HOLDINGS OPINIONS AND REVIEWS

BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

SOUTH WEST PACIFIC AREA (A)
PACIFIC (P)

VOLUME 4 B.R. (A-P)

CM P 204-CM P 1368

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Holdings Opinions and Reviews

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Branch Office of The Judge Advocate General

SOUTH WEST PACIFIC AREA (A)
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Volume 4 B.R. (A-P)

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

Board of Review
CM P-204

17 August 1945.

UNITED STATES v. Private First Class GERVASE D. BIRSTER (33837003), Company A, 383rd Infantry.	Trial by G.C.M., convened at APO 96, 15 July 1945. Dishonorable discharge, total forfeitures, confinement for forty years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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

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

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

CHARGE: Violation of the 75th Article of War.

Specification 1: In that Private First Class Gervase D. Birster, Company A, 383rd Infantry, having received a lawful order from First Sergeant John J. Summers, Company A, 383rd Infantry, a noncommissioned officer who was then in the execution of his office, to report to the forward echelon of his company which was then engaged with the enemy, did at or near APO 96, on or about 29 May 1945, misbehave himself before the enemy by willfully disobeying the same.

Specification 2: In that Private First Class Gervase D. Birster, Company A, 383rd Infantry, did, while he was before the enemy, at APO 96, without proper leave, absent himself from his organization which was then engaged with the enemy, from on or about 29 May 1945 to on or about 23 June 1945, intending thereby to avoid hazardous duty and shirk important service.

The accused pleaded not guilty to, but was found guilty of, the specifications and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for forty years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 29 May 1945 Company A, 383rd Infantry was in combat with the Japanese forces (R. 15) in the vicinity of "Charlie Hill" on Okinawa Island and so continued until it was withdrawn to a defensive position on 20 June 1945 (R. 7). About 11:00 o'clock on the morning of 29 May accused, who had been in the hospital, reported to the rear echelon of the company for duty (R. 6). The first sergeant ordered him to report to the front lines telling him the company was at "Charlie Hill" and stating that as transportation was limited he would have to make his way as best he could. The sergeant testified that at that time accused seemed "pretty nervous" and told him that he "didn't think he could take any more of it" (R. 6). Accused sat around for a minute or two, walked out (R. 6), and was seen no more (R. 12) until he reported back to the company on 23 June 1945 in the vicinity of Iwa where it had been drawn back on 20 June for a rest but was still in a defensive position.

Major Austin T. Thorson, the investigating officer, testified that after he had thoroughly explained to the accused his rights, the latter stated to him that on 23 April he had shot himself between the toes and had gone to the hospital and reported back to the rear echelon of his company on 29 May; that when the first sergeant ordered him to report to the company he had told the sergeant "that he couldn't go up forward that he couldn't stand that shelling, that he was afraid he would blow his top" (R. 18-19). He then foraged around the rear echelon for about a week, stayed away from the men of his company, ate with different organizations, and started from the rear echelon up to the field train, expecting the company to come out of the line in three or four days, but did not report to his company until 23 June (R. 19).

4. The defense called Captain Hugh D. Young who testified that he was the commanding officer of Company A on 9 April 1945 and that at that time it was in combat on Kakazu Ridge. The strength of the company that evening was only twenty-two or twenty-three men, over sixty-five casualties having been sustained that day (R. 21). He stated that accused had a "self-inflicted" wound (R. 22) that day, but that a subsequent investigation showed that it was not due to his willful misconduct but was "received in line of duty" (R. 24). In that action the accused was awarded the Bronze Star Medal for killing four of the enemy, and volunteered to remain at his position covering the withdrawal of his unit, the citation ending with the statement: "The courage and self sacrificing devotion to duty displayed by Private First Class Birster reflect great credit upon himself and the military service." (Def. Ex. A).

Major Eugene J. Alexander, MC, the division psychiatrist, testified that he examined the accused the day before the trial and that in his opinion accused's condition would have been such on 29 May 1945 that it was a "possibility" that had his company commander or a medical officer not trained in psychiatry seen him he would have been placed in a sick status (R. 27). He further testified that it was his opinion that on 29 May accused was sane, could distinguish between right and wrong and could adhere to the right (R. 29-30).

The accused elected to remain silent.

5. The accused is charged in two specifications with misbehavior before the enemy, in the first by refusing to go from the rear to the forward echelon of his company which was then engaged in combat with the enemy, and in the second by absenting himself without leave to avoid hazardous duty and shirk important service. The testimony is uncontradicted that on 29 May 1945 accused received an order from the first sergeant to go to the front lines and that shortly thereafter he left the area, did not then rejoin his company, and remained away until 23 June. There was also testimony that at that time accused stated that he did not think he "could take any more of it", that he "couldn't stand that shelling" and that he was afraid he would "blow his top".

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

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

Winthrop states that "misbehavior before the enemy" may consist in -

> "Such acts by any officer or soldier, as - refusing or failing to advance with the command when ordered forward to meet the enemy; going to the rear or leaving the command when engaged with the enemy, or expecting to be engaged, or when under fire; hiding or seeking shelter when properly required to be exposed to fire; feigning sickness, or wounds, or making himself drunk, in order to evade taking part in a present or impending engagement or other active service against the enemy; refusing to do duty or to perform some particular service when before the enemy." (Winthrop, 1920 Reprint, p. 623).

A soldier is "before the enemy" within the provisions of Article of War 75 not only when he is in direct contact with the enemy but also when he is part of a tactical operation which will, in the normal course of events, lead to immediate uninterrupted contact with the enemy (CM 128019 (1919); Dig. Op. JAG, 1912-40, sec. 433(2); CM A-2109, Rice). It follows that there is substantial evidence in the record that the accused at the time of the alleged offense was "before the enemy" and that his conduct in refusing to go forward and in absenting himself was misbehavior before the enemy in violation of Article of War 75.

6. The question of accused's sanity at the time the alleged offenses were committed was raised at the trial. The division psychiatrist, a defense witness, testified that it was a "possibility" that accused would have been placed in a sick status had he been seen by his company commander on 29 May 1945 but was of the opinion that at that time accused was sane, could distinguish between right and wrong and could adhere to the right. The court, by its findings, determined that accused was sane at the time of the alleged offenses. The Board of Review finds nothing in the record upon which such findings should be disturbed.

It was also brought out in the testimony for the prosecution that the wound for which accused was sent to the hospital was "self-inflicted" and he so stated to Major Thorson. The error, if any, in the admission of such testimony was subsequently cured by a stipulation that the wound was received in line of duty and was not due to accused's willful misconduct.

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

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

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 4 September, 1945.

To: Commanding General, 96th Infantry Division, APO 96.

1. In the case of Private First Class Gervase D. Birster (33537003), Company A, 383rd Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. The accused was convicted of willfully disobeying the lawful order of a non-commissioned officer and of absenting himself without leave from about 29 May 1945 to 23 June 1945 to avoid hazardous duty. His sentence includes a term of confinement of 40 years. In comparison with the sentences ordered executed in similar cases this term is grossly excessive, and it is requested that so much thereof as exceeds 10 years be remitted.

Upon release from a hospital where he had undergone treatment for an accidental gunshot wound of a foot the accused reported to his first sergeant at the rear echelon of the company. The first sergeant instructed him to make his way as best he could and report to the company commander at the forward echelon which on that day was engaged with the enemy; two days later as a part of its battalion the company withdrew and became a regimental reserve unit. At the time of the commission of these offenses the accused was under 20 years of age and had been in the military service less than a year and a half, but during that time had participated in active combat and been awarded the bronze star medal for heroic service on Okinawa Island on 9 April 1945, only seven weeks prior to the date he absented himself without leave. When reporting to his first sergeant the latter noticed that the accused "seemed pretty nervous and he told me he did not think he could take any more of it".

The gravamen of the two offenses of which the accused stands convicted is that of absence without leave from his company while the company was engaged for two days against the enemy and in reserve for possible further use against the enemy. It is for this conduct that he is properly deserving of punishment. The offense while a serious one, is not accompanied by aggravating circumstances; on the other hand mitigating factors were present. The accused's record refutes that he is a coward and there is evidence that at the time of the commission of his offense he was suffering from a very definite mental, if not physical disability. For these reasons and the further reason that the average sentence ordered executed in this theater for all offenses against Article of War 75 is 10 years and 2 months in keeping with War Department policy as locally administered the appropriate sentence in this case, as indicated above, should not be in excess of 10 years. It is also suggested in keeping with long established practice in this theater that the execution of the dishonorable discharge of this prisoner be suspended and that he be retained in local confinement.

(Contd. 4 September 1945)

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-204).

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

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

Board of Review
CM P-243

7 August 1945

UNITED STATES v. First Lieutenant CHARLES W. HUSTON, JR. (0650533), Air Corps, Headquarters V Air Force Service Command.	Trial by G.C.M., convened at Headquarters Fifth Air Force, APO 710, 7 May 1945. Dismissal, total forfeitures.

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

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

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

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

Specification: In that First Lieutenant Charles W. Huston, Junior, V Air Force Service Command, did, at APO 710, on or about 21 March 1945, knowingly and willfully apply to his own use and benefit a ¼ ton 4 x 4 Willys Command and Reconnaissance truck, of the value of about $930.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that First Lieutenant Charles W. Huston, Junior, V Air Force Service Command, did, at APO 710, on or about 22 March 1945, in an affidavit, make under oath a statement, part of which was in substance as follows: "I drove the Major to the XI Corps, unloaded his things and returned to Major Jones' house," which statement was known by the said Lieutenant Huston to be untrue.

Specification 2: In that First Lieutenant Charles W. Huston, Junior, V Air Force Service Command, did, at APO 710, on or about 22 March 1945, cause Private (then Technical Sergeant) Murry J. Lang, V Air Force Service Command, to make a false affidavit in connection with an investigation being conducted concerning misconduct of said Lieutenant Huston.

Specification 3: In that First Lieutenant Charles W. Huston, Junior, V Air Force Service Command, having received a lawful order from Lieutenant Colonel Harry W. Atkinson, Officer in Charge, V Air Force Service Command, Advance Echelon, not to go to Manila without express authority, the said Lieutenant Colonel Atkinson being in the execution of his office, did, at APO 710, on or about 21 March 1945, fail to obey the same.

Specification 4: In that First Lieutenant Charles W. Huston, Junior, V Air Force Service Command, did, at APO 74, on or about 21 March 1945, drink intoxicating liquor with Private (then Technical Sergeant) Murry J. Lang, an enlisted man.

The accused pleaded guilty to, and was found guilty of, the specifications and the charges, and was sentenced to dismissal and total forfeitures. The reviewing authority approved the sentence and the confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. On 20 March 1945 accused requested transportation for the following day to carry some equipment to the quarters of Major Jones, VC, which were one mile north of the town of Dau, P.I.. Permission was granted, a jeep furnished, and accused, accompanied by Technical Sergeant Murry J. Lang, left the area and proceeded to the quarters of Major Jones where they unloaded the baggage. While there, accused was requested by another major to take him to Manila, and with Technical Sergeant Lang accompanying him he drove to Manila although he had previously been given a direct order by Lieutenant Colonel Harry W. Atkinson not to go to Manila without express authority. They then went to the home of a Filipino where they attended a birthday party, and then proceeded to their quarters at Clark Field, arriving at 0330 hours.

On 22 March, First Lieutenant John G. Starr interviewed accused concerning his activities on the previous day. After fully explaining his rights to him, accused made an affidavit in which he related his activities on the 21st of March, stating that upon arriving at Major Jones' quarters with Technical Sergeant Lang, "we had a few beers and chatted a while * * * We ate the ice cream and drank some more beer." A major requested that he drive him (the major) from Major Jones' quarters to XI Corps, which was

30 miles on the road towards Manila. He complied with the major's request and then returned to Major Jones' quarters and from there to his own, arriving about 0330 hours, 22 March 1945 (Pros. Exs. 2 and 2A).

Later that afternoon accused again appeared at Lieutenant Starr's quarters and stated to him that the statement he had previously given was false. He made another affidavit in which he stated that after having gone to Major Jones' quarters, he and Technical Sergeant Lang and a major went to Manila. He further stated that he had previously explained to Technical Sergeant Lang that he intended to make a false statement as to his activities on 21 March and had requested Lang to substantiate his alibi. Technical Sergeant Lang made an affidavit in accordance with the request of the accused and subsequently repudiated this first affidavit, stating that it was untrue.

4. The accused elected to remain silent but called as a witness Captain Thomas M. Farrell, statistical officer, who testified that he had known accused since September 1944, he (accused) having worked for him as his assistant. He stated that accused was a competent officer, well acquainted with statistical work (R. 9), loyal to his organization, quite conscientious and "stands far above the same officer of his own rank" (R. 10). Another officer testified that he had worked with the accused on statistical work and that his work was "commendable * * * I have found he pitches right in and he really does his best and puts everything he has into a job" (R. 11).

All of the accused's five ratings were "excellent" (Def. Ex. A).

5. When the record of trial was received by the reviewing authority it was returned to the court with the request that it reconsider the sentence imposed to determine whether a sentence less than dismissal would be appropriate. The reviewing authority gave as his reasons for returning the record the consistent ratings of "excellent" which the accused had received; accused's concern as to the conduct of certain officers at the home of a Filipino civilian; his youth and inexperience; the statements of his leadership ability and his conscientious attention to duty. The court reconvened but adhered to its former sentence. Prior to the record having been returned for reconsideration, three members of the court signed a recommendation for clemency asking for suspension or remission of that portion of the sentence providing for dismissal. The allied papers reveal that General George C. Kenney, Commanding General, Far East Air Forces, recommended that the sentence of dismissal be commuted to a reprimand and appropriate pay forfeiture.

6. The offense of misapplication of government property of which the accused was found guilty is a violation of Article of War 94 which covers those cases where a person subject to military law makes a wrongful and unauthorized use of government property devoted to the military service (III Bull. JAG 237).

It is undisputed that accused made a false official statement and also caused an enlisted man to do the same. Such offenses may be charged as violations of Article of War 96 (CM A-2100, Harpole; CM 230829, Mayers, 18 B.R. 65, 92).

The accused admitted that he was ordered not to go to Manila without express permission. Nevertheless, in direct violation of the order he went, and, on two separate occasions, drank intoxicating liquor with an enlisted man.

His pleas of guilty and the evidence support the court's findings of guilty of all of the offenses as charged.

Dismissal and total forfeitures are authorized for the offenses of which the accused was found guilty.

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

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

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 8 August 1945.
To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of First Lieutenant Charles W. Huston, Jr., 0-650533, Headquarters V Air Force Service Command, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:
(CM P-243).

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

(Sentence ordered executed. GCMO 15, USAFP, 15 Aug 1945.)

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

13 August 1945

Board of Review
CM P-270

UNITED STATES v. Private First Class J. D. BRAGGS (38323742), 629th Ordnance Company (Ammunition).	Trial by G.C.M., convened at APO 70, 26 June 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class J.D. Braggs, 629th Ordnance Ammunition Company, did at APO 70, on or about 28 April 1945, with malice aforethought willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Catalino De Guzman, a Filipino civilian, a human being by shooting him with a pistol.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On the night of 28 April 1945 a "social dance" was held at the home of a Filipino named Catalino DeGuzman "especially for white GIs and some civilians" (R. 5, 22-23, 26-27). There was a space for dancing enclosed within a fence at the side of the house (R. 5). About 2300 hours (R. 5) Technician Fourth Grade Rufus E. Taylor, who was in attendance at the dance, saw accused, the only "colored boy" present (R. 9), standing outside of the enclosure and asked him to leave "to avoid trouble." The accused replied "I'll go" and started to walk away, but after he had taken about three steps, turned around, drew a .45 caliber pistol, cocked it and said, "I am going to break up this Goddam dance" (R. 18-19).

When Technician Third Grade David L. Chamblin saw accused with "a gun" (R. 5) in the center of a circle of Filipinos he approached the group, asked what the trouble was and requested accused to leave. Chamblin, who had drunk a "beer bottle" full of "nipa" from 2000 to 2300 hours but was not drunk, called the accused a "Goddam nigger," said to him, "Nigger, go take a rest" and threatened to strike him (R. 7, 9-12, 16). Accused put his pistol away but pulled it out again when Chamblin took a step toward him. He told Chamblin to stay where he was and not move. Mr. DeGuzman and Tec 4 Gibson took hold of Chamblin and "sort of pulled him back." Accused said, "I will go now," took several steps backwards, turned around and walked away a few steps, turned around, worked the slide of his pistol and leveled and fired it in the general direction of Chamblin (R. 6, 11, 14, 23). Accused disappeared around the corner of the house and one more shot was heard (R. 14). When the first shot was fired accused was about twenty-six feet from Chamblin. DeGuzman, who was standing nearby, fell to the ground and "started hollering and shouting" (R. 14). The bullet entered his left side and he died as a result of the wound on 30 April 1945 (R. 6, 24, 27).

On 29 April Robert Velarde, a special agent of the Criminal Investigation Division, questioned accused regarding the incident of the night before. He asked accused "the location of the gun" and accused told him where to find it. Following the directions given by the accused, Velarde found a .45 caliber pistol wrapped in brown cloth or a handkerchief in the tent where accused was quartered and under a cot adjacent to his cot. The pistol was covered with sand. There were seven cartridges in the magazine (R. 28-31).

On 30 April 1945 Velarde and another "Agent" took accused to the bedside of Mr. DeGuzman in the hospital where he was a patient and asked him if he knew the accused. DeGuzman replied to the effect that the accused was the man who shot him. The questioning was conducted partly in English and partly in "Pangasinan" through an interpreter. While it was "going on," but at what stage the record does not show, the accused stepped up to DeGuzman and said, "I am Braggs * * * I am your friend - I shot you?" DeGuzman answered (through the interpreter), "Yes, you were trying to shoot the American, but you shot me" (R. 27-28).

On 29 May 1945, after his rights under the 24th Article of War had been explained in language not entirely correct, but in substantial accord with the law (R. 31-32), accused made a written statement, the material parts of which are as follows:

At 1800 hours on 28 April 1945 accused and some other members of his company went in a weapons carrier to a town about half an hour's drive from their camp. Before starting out accused borrowed a pistol from another soldier "just to have a gun" with him. He checked it "to make sure" that there were "bullets" in the magazine. The men separated upon reaching their destination. After accused visited a girl and stayed at her house until 2230 hours, he went to the DeGuzman residence as he was aware that a dance was being held "next door." "These people" knew him. Mrs. DeGuzman asked him to come up on the rear porch where he talked with her about twenty-five minutes and drank a glass of nipa which she gave him.

A girl who lived next door told accused that it was a private affair, but when some Filipinos asked him to go over and look at the dance he started to do so. After he had gone about 100 feet a small white soldier asked him to leave. Accused said that he would go and started walking back "towards DeGuzmans." When he was near the DeGuzman house two big white soldiers came up and one of them said to him, "Get the God damned hell out of here." He replied, "OK. I'm leaving now" but the white soldiers continued to advance upon him. When he saw that they "weren't going to stop" he pulled out the pistol and "racked it back." He "must have squeezed the trigger" too tightly because the pistol went off when he released the slide. He held the gun at his "midriff." He did not see Mr. DeGuzman at all. After the pistol discharged he ran away, "hitchhiked" a ride back to camp, buried the pistol in the sand under his bed and went to sleep (Ex. 4).

4. For the defense, Private First Class Percy L. Royster testified that he went to the dance at Mr. DeGuzman's place on the night of 28 April but "stopped outside of the wire fence." After he had been there ten or fifteen minutes "some fellows came around" and one of them told him that the dance was not for "niggers" but strictly for white soldiers, and that if he did not leave they would "throw" him out. Royster said that he would go but suggested that it would be better to say "negro." The other man thereupon "retracted the statement." Royster then went away. Accused was not at the dance while he was there (R. 33).

The accused elected to remain silent (R. 35).

5. Murder is the killing of a human being with malice aforethought and without legal justification or excuse. Malice does not necessarily involve hatred or personal ill will toward the person killed or an actual intent to take his life, but may mean that preceding or co-existing

with the act by which death is caused, the accused intended to cause the death of, or grievous bodily harm to, any person, whether or not such person is the one actually killed (MCM, 1928, par. 148a).

In the present case the undisputed evidence shows that the accused, without legal excuse or justification, fired a .45 caliber pistol at Tec 3 David L. Chamblin from a distance of about twenty-six feet but missed his aim and the bullet struck and killed a bystander, Catalino DeGuzman. That accused intended to kill or inflict grievous bodily harm upon Chamblin may reasonably be inferred from the fact that immediately prior to the shooting there had been an altercation between them in which Chamblin had called accused a "Goddam nigger" and had threatened to strike him and from the manner of the use by accused of a weapon likely to cause death or serious bodily injury (CM P-105, Nichols, (26 July 1945)). Under the applicable principals stated above the evidence is amply sufficient to sustain the findings of guilty of murder.

6. The prosecution offered a "CERTIFICATE" signed by a Medical Corps officer which recited that the death of Catalino DeGuzman was due to a wound (described in detail) caused by a .45 caliber bullet (Ex. 5). There was no objection by the defense but nevertheless the admission in evidence of the certificate was erroneous. It was not a public record or government document (MCM, 1928, par. 116a), and it does not appear that it was the duty of the Medical Corps officer who signed it to know and record the facts therein stated (MCM, 1928, par. 117a), nor was it shown to be a "writing or record" made in the regular course of a business or calling within the meaning of 28 U.S.C. 695 (Hoffman v. Palmer, 129 Fed. 2nd, 976). However, a witness testified that DeGuzman died as a result of the wound inflicted upon him (R. 27), and the fact of his death was not in any manner questioned or disputed. The error did not, therefore, injuriously affect any substantial right of the accused.

The same may also be said of the statements elicited from DeGuzman in the hospital in the presence of accused to the effect that accused was the person who had shot him. Manifestly the statement was not a part of the res gestae, no foundation had been laid for its introduction as a dying declaration, and it could not be inferred that accused by his silence tacitly admitted its truth since he was in custody and under no duty to deny it (Bull. JAG, September 1944, p. 378). However, since it is established beyond all question of a doubt by evidence properly in the record that accused fired the fatal shot, the improper admission of DeGuzman's hospital statements may not be said to have injuriously affected the substantial rights of the accused (A.W. 37; Bull. JAG, October 1944, p. 417).

7. A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-2404 of the Code of the District of Columbia.

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

Samuel N. Drover, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

Francis V. Robinson, Judge Advocate.
Major, J.A.G.D.

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

13 August 1945

Board of Review
CM P-279

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 72, 7 July 1945. Dishonor-
Warrant Officer Junior Grade	)	able discharge, total forfeitures
ADOLPH C. NEIDHART (W-2127692),	)	and confinement at hard labor for
Base Port Command, Headquarters	)	two years. United States Dis-
Base K, APO 72.	)	ciplinary Barracks, Fort Leaven-
	)	worth, Kansas.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
Judge Advocates.

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

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

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

Specification: In that Warrant Officer (JG) Adolph C. Neidhart, Headquarters, Base K, United States Army Services of Supply, APO 72, did, without proper leave absent himself from his organization at APO 72, from on or about 28 March 1945 to on or about 3 April 1945.

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

Specification: In that Warrant Officer (jg) Adolph C. Neidhart, Headquarters Base K, United States Army Services of Supply, APO 72, did, at APO 72, from on or about 27 March 1945, to on or about 3 April 1945, through neglect lose currency in excess of the amount of Fifty Dollars ($50.00), property of the United States furnished and intended for the military service thereof.

The accused pleaded not guilty to, but was found guilty of, the specifications and the charges, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for two years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On 31 December 1944 the accused, a junior grade warrant officer, was appointed a class A agent, which appointment empowered him to pay out monies of the United States as agent of the disbursing officer, Base K (Ex. 2).

On 27 March 1945 Captain Gordon D. Osborn, Finance Dfficer, Base K, entrusted the accused with $6,833.33 to pay salaries to the crew of the FS 204 (R. 8, 13). The accused paid all the men whose names appear upon the payroll voucher of the FS 204 except Roland T. Schmetzer, who was on shore leave (R. 8, Ex. 1). The amount due him was $399.48. While waiting for Schmetzer to return to the ship, the accused started to drink whiskey, although he knew that liquor had the effect of putting him "in a stupor" (Ex. 3). When the one unpaid man did not show up, the accused returned to shore in a launch with the $399.48 in his possession.

In his sworn pretrial statement (voluntarily made (R. 10)), the accused said that he remembered nothing from the time the launch landed until the afternoon of 2 April 1945, at which time he came to and discovered that the money was missing (Ex. 3). Accused did not have proper leave to be absent (R. 9).

The accused's superior officer, First Lieutenant Harold F. Thomas, testified the accused had not been seen at the finance office or at his quarters from 1300 hours 27 March 1945 when he picked up the payroll for the FS 204 until 3 April 1945, when he (Thomas) saw him in a restaurant across Padre Zamora Street, APO 72 (R. 7). Shortly thereafter the accused entered the finance office and handed Lieutenant Thomas the payroll records indicating that all the crew members of the FS 204 had been paid except Schmetzer (R. 8). Nothing was said about the unpaid man's $399.48. Accused was placed in arrest (R. 7, 8).

On 5 April 1945, Captain Osborn sent for the accused and requested him to account. The accused was short $544.00 on an earlier voucher (Ex. 4, R. 15) and $399.48 on the FS 204 voucher, making a total shortage of $943.48 (R. 15). Accused told Captain Osborn that he was unable to make payment at that time but that he would get the cash in the United States and clear his account, which he did, in full, on 2 May 1945 (R. 15).

4. The evidence for the defense:

The accused elected to remain silent (R. 17).

Captain Ralph Sargent testified that he had never heard the accused's reputation for truth and veracity questioned (R. 17), and that accused performed his work in a satisfactory manner. First Lieutenant Stephen M. Crawford testified that accused's general reputation for truth and veracity within the command was satisfactory (R. 18).

5. The evidence shows that the accused absented himself without leave from 28 March 1945 to 3 April 1945 in violation of Article of War 61.

Insofar as the second charge and specification are concerned, the proof shows that the sum of $6,833.33, property of the United States, was entrusted to the accused on 27 March 1945 for the specific purpose of paying the crew members of the FS 204, and that in fulfillment of that purpose all but the sum of $399.48 had been paid out. With the government's money ($399.48) in his possession and with knowledge that liquor had the effect of putting him in a "stupor" and causing him to lose control of his activities, accused started drinking excessively. Five days later, after "waking up sporadically" and finding himself "shaking like a leaf" and "trying to cure" himself "with more liquor," he discovered that the money was gone (Ex. 3).

Army Regulation 35-320, 5 February 1945, requires a class A agent to "make the necessary returns to the accountable disbursing officer within 24 hours after completion of the particular payments for which designated" and requires that all money in his possession be "properly protected."

The losing of government funds or property, which one is duty bound to protect, brought about by excessive drinking on the part of the custodian thereof constitutes a neglect in dereliction of duty denounced by Articles of War 83 and 84 (MCM, 1928, pars. 143, 144b; App. 4, p. 247). It may also be a disorder or neglect to the prejudice of good order and military discipline in violation of Article of War 96. In this case the accused's conduct (losing government funds because of drinking to a point of stupor) constituted a careless and wanton disregard of the property rights of the United States. Such conduct on the part of persons subject to military law is punishable under Article of War 96 (MCM, 1928, par. 152a; Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, pp. 722-730).

The repayment of the money lost through neglect, is not a defense. An "offense is not obliterated by restitution, either actual or intended" (CM 239984, Hoyt, 25 B.R. 301, 305). The offense in the Hoyt case was embezzlement but the principal is the same.

Evidence of the fact that the accused failed to account for the sum of $544.00 entrusted to him on or about 8 March 1945 was

introduced upon the prosecution's direct case (R. 12, Ex. 4). The defense counsel failed to object (R. 12, 13). The propriety of the introduction of such evidence, which was wholly unrelated to any issue in the case, may nevertheless be passed upon by the Board of Review (Bull. JAG, February 1943, p. 60).

It is elementary that testimony relating to other offenses or to the previous bad character of the accused is inadmissible (MCM, 1928, par. 112b; People v. Molineux, 61 N.E. (N.Y.) 286; People v. Zachowitz, 172 N.E. 466, 254 (N.Y.) 192). In the Molineux case at page 294 the court said:

> "The general rule is that when a man is put upon trial for one offense he is to be convicted, if at all, by evidence which shows that he is guilty of that offense alone, and that, under ordinary circumstances, proof of his guilt of one or a score of other offenses in his lifetime is wholly excluded."

The rule is the same in military law. The Manual for Courts-Martial, 1928, paragraph 112b, reads:

> "A fundamental rule is that the prosecution may not evidence the doing of the act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and any reference in the evidence to former specific offenses or other acts of misconduct, whether he has or has not ever been tried and convicted of their commission."

Though it was improper to introduce testimony relating to the failure on the part of the accused to account for or return the $544.00 which was entrusted to him on 8 March 1945, the error may nevertheless be regarded as harmless (A.W. 37), since other evidence in the record is "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (Bull. JAG, October 1944, p. 417; see also CM POA 313, Greenlee).

The maximum confinement which may be imposed under Charge II and its specification is one year (CM 218876, Wyrich, 12 B.R. 157, 162-163). However, since there is no limitation on the length of confinement which may be imposed for absence without leave (Charge I and its specification) the punishment herein decreed is legally authorized.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

Joseph S. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement
Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 18 August 1945.

To: Commanding General, Philippine Base Section, APO 358.

1. In the case of Warrant Officer (JG) Adolph C. Neidhart, W-2127692, Base Port Command, Hq. Base K, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence. To the extent that the holding concludes the record of trial to be legally sufficient to support the sentence the holding is approved. The offense of losing government property should have been alleged as a violation of Article of War 83; this irregularity, however, is of no legal significance. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. The accused was absent without leave for about 5 days and convicted of negligently losing money, which the evidence reveals was in the amount of $399.48. For these two offenses he has received the approved sentence of dishonorable discharge, total forfeitures and confinement at hard labor for 2 years. The sentence is considered excessive and violative of War Department policy. The maximum allowable term of confinement for the offense of negligently losing government property is one year; it necessarily follows that the remainder of the two year term of confinement is for the offense of absence without leave for 5 days. Neither of these two offenses is a grave one. The absence without leave was incidental to the accused becoming so drunk that he went into a stupor and remained in that condition during the major period of his absence. The War Department policy respecting the offense of absence without leave is expressed in the following quotation from its letter (AG 250.4(16 May 45) OB-S-USW-M) dated 18 May 1945:

"(1) No charge for absence without leave alone should be referred to a general court-martial unless the offense is

(Contd. 18 August 1945)

> aggravated either by the circumstances of the offense, the previous record or conduct of the accused, or approaches desertion in character. In such cases the punishment should be measured by the seriousness of the offense and the portion thereof relating to confinement at hard labor should not exceed five years."

The offense of losing $399.48 is also not a serious one. This small amount was readily restored to the government and the government suffered only infinitesimal damage because of the temporary loss of the use of that amount.

In view of the foregoing, if it is considered necessary to dishonorably discharge this warrant officer from the service, it is recommended that a substantial part, if not all, of the term of confinement be remitted.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-279).

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

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

28 October 1945

Board of Reyiew
CM P-357

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 358, 30 March 1945. Sen-
Privates First Class JOHNNIE	)	tence as to each: Dishonorable
RYALS (34564437) and ARTHUR	)	Discharge, total forfeitures
TAYLOR (34740035), both of	)	and confinement at hard labor
Headquarters and Service	)	for life. United States
Company, 870th Engineer	)	Penitentiary, McNeil Island,
Aviation Battalion, APO 70.	)	Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Johnnie Ryals and Private First Class Arthur Taylor, both of Headquarters and Service Company, 870th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Clark Field Sector, on or about 10 March 1945, forcibly and feloniously, against her will, have carnal knowledge of Virginia Navarro.

Each accused pleaded not guilty to, but was found guilty of, the Specification and the Charge. Each was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. On the morning of 10 March 1945 Privates First Class Arthur Taylor and Johnnie Ryals (accused), both members of Headquarters and Service Company, 870th Engineer Aviation Battalion, approached Virginia Navarro, her father, and Marcelino Mallari, who were planting camotes (R 8, 16). Both accused were armed with Garand rifles (R 17). The accused asked Virginia, who was fifteen years of age and who understood no English (R 8), if she would do some laundry for them. Learning from Marcelino what they wanted, Virginia hesitated, but upon the assurance of the former that he would help her, she left the camote field with the accused and Marcelino in order to fetch the dirty clothes (R 8, 15-20). After proceeding a few meters, the accused remarked that they would have to be on their guard because there were Japanese in the vicinity (R 9). Taylor and Marcelino stopped, Taylor saying that they were going to guard against the Japs (R 9). Virginia and Ryals went on a distance of thirty-five feet by themselves (R 9, 13), while Taylor warned Marcelino that if he followed the pair he would be harmed (R 9, 13, 14, 17). Ryals put his rifle down, placed his hand over Virginia's mouth, and slapped her. He forced her to the ground, straddling her body with his own. Frightened, Virginia did not resist (R 9, 10). Ryals raised her dress and proceeded to have sexual intercourse with her, penetrating her body with his private parts (R 11). The act consummated, the pair returned to Taylor and Marcelino, and the latter, learning that Taylor intended to lay with Virginia next, started to leave with her, but one or both accused fired into the air and forced them to return (R 11, 13, 17, 18). And in the presence of Marcelino, accused Taylor forced Virginia to the ground and had intercourse with her (R 11, 17). Virginia testified that she did not consent, but that she was frightened and could not prevent him because of his size (R 11). Ryals followed Taylor and had intercourse with Virginia a second time, while Taylor led Marcelino a short distance away (R 12, 19). Out of sight of Ryals, Marcelino overpowered Taylor, secured his rifle, and ran to the XI Corps Command Post (R 19). As soon as Ryals had left her, Virginia found her father and later in the day was taken to the 36th Evacuation Hospital for examination (R 13, 14).

At the XI Corps Command Post Marcelino reported the affair and turned in the rifle he had taken from Taylor, which was found to contain one cartridge in the chamber and five in the clip. There is some evidence indicating that this rifle had been issued to Ryals (R 23, 24-26, 28-30), although this is not clearly established. On the same day Taylor was found asleep on a railroad embankment and Ryals was apprehended and brought to the Provost Marshal's office by the battalion adjutant (R 24, 26, 28). At the Provost Marshal's office it was noted that Taylor was drunk (R 30).

Virginia was examined by a medical officer at the 36th Evacuation Hospital on the same day. The officer testified that he found evidence of recent lacerations of the hymenal ring which would indicate little or no prior sexual experience and that examination of a vaginal smear pointed

to the presence of spermatazoa in the vaginal vault from which fact vaginal penetration could be assumed (R 6-7).

Marcelino testified that Taylor was somewhat drunk and quite weak; Virginia stated that she could not tell whether he was under the influence of liquor although she admitted having said he was intoxicated in a pretrial statement made to the defense counsel (R 14, 18).

4. Both accused elected to testify under oath. Ryals stated that he left camp at 0830 on 10 March and met Taylor at 0930. Both of them approached Virginia, her father, and Marcelino while they were working in the fields, and Ryals asked for "pom-pom." Virginia said nothing and when she stooped over to pick up some potatoes she permitted him to rub across her leg. He invited her to do his laundry, and she left with him, Marcelino and Taylor following some distance away. Passing some bushes, he caught her by the arm and finding that she did not resist or say anything, had sexual intercourse with her (R 34). Taylor testified that he had drunk one bottle of wine before meeting Ryals and that after he met him they both started on a second bottle. His testimony as to the first meeting between Virginia and Ryals was substantially the same as the testimony of the latter. After Ryals had intercourse with Virginia, Taylor beckoned to her and she followed him and consented to have intercourse with him. After that he walked away, lay down, and, troubled by the heat and the wine he had drunk, lost consciousness, knowing nothing of what transpired thereafter until awakening in the Provost Marshal's office (R 35-39).

5. Both accused admitted, and the evidence otherwise establishes, that on 10 March 1945 they had sexual intercourse with Virginia Navarro, a fifteen-year old Filipino female. The only evidentiary question for the consideration of the Board of Review is whether the record contains substantial evidence that such acts were accomplished by force and against the victim's will (par 148b, MCM). The accused maintained that the acts were done with her consent and that no force was used in their accomplishment. Contrary to this evidence is the direct testimony of the girl, and the testimony of other prosecution witnesses which largely corroborates hers, which justify a finding that she did not consent. This evidence is to the effect that accused Ryals, who first had intercourse with her, took her to a secluded spot, placed his hand over her mouth, slapped her, forced her to the ground, and had intercourse with her, and that she did not resist because she was frightened. She and Ryals then returned to the place where the other accused and Marcelino were. She and Marcelino then started to depart, at which time one or both accused fired into the air, and both pointed their rifles at the two Filipinos. Each accused in turn then ravished the victim.

The court had this conflicting evidence before it and, as weigher of the facts, chose to believe the prosecution's witnesses. The record contains substantial evidence to support the findings of guilty.

6. By 1st indorsement, Headquarters Luzon Base Section, APO 358, 22 March 1945, the charges herein were referred for trial to Captain Emmett D. Whipple, JAGD, trial judge advocate of the general court-martial appointed by paragraph 1, Special Orders No. 28, Headquarters Luzon Base Section, APO 358, 18 March 1945.

The order (paragraph 1, Special Orders No. 28, 18 March 1945) appointing the court details Lieutenant Colonel Paul G. Smith, QMC, as a member thereof. Two changes, not material to the present discussion, were thereafter made in the personnel of the court, one by Special Orders No. 31, 21 March 1945, and the other by Special Orders No. 33, 23 March 1945.

Paragraph 30 of Special Orders No. 37, Headquarters Luzon Base Section, APO 358, 27 March 1945, reads as follows:

> 30. So much of Par 1, SO 28, this hq, 18 Mar 45 as pertains to Lt Col PAUL G SMITH, 0397291, QMC, is revoked. (Apmt of Gen Court-Martial).

Although the distribution list requires that Colonel Smith be furnished a copy, it would appear from the papers attached to the record of trial (Staff Judge Advocate's review) that no copy was furnished him, nor was a copy furnished to the trial judge advocate or any other person on the general court appointed by paragraph 1, Special Orders No. 28, 18 March 1945. To ascertain more definitely whether Colonel Smith or any other member of the court had knowledge of the fact that prior to the conclusion of the trial Lieutenant Colonel Smith's appointment to the court had been revoked, on 24 August 1945 this Branch Office of The Judge Advocate General returned the record of trial to the appointing authority with a request that such information be obtained and incorporated in the record. Certificates by Lieutenant Colonel Smith, two other members of the court, and the trial judge advocate and defense counsel, to the effect that they had no such knowledge were attached to the record. Five other members of the court reconvened and each certified in open court that he had no such knowledge. The record was then returned to the Branch Office of The Judge Advocate General on 25 September 1945. Certificates from the other three members of the court are not available.

On 30 March 1945 the court met and after formally hearing the evidence convicted and sentenced both accused to life imprisonment. Lieutenant Colonel Smith was sworn as a member of the court and took part in all the proceedings. In some manner undisclosed by the record, a copy of Special Orders No. 37, 27 March 1945, paragraph 30 of which revoked Lieutenant Colonel Smith's earlier appointment to the court, was brought to light in early April 1945.

Paragraph 12a, AR 310-50, 1 December 1944, reads as follows:

> . . . A War Department order which is special or individual in its operation becomes effective when it has been delivered, actually or constructively, to the persons concerned, through the usual military channels.

That this is the rule applicable to special orders detailing officers as members of courts-martial is shown by the following digest of CM 143603 (Dig Ops JAG, 1912-40, sec 368(1)):

> A special order relieved the trial judge advocate and two members detailed to a general court by a previous order and, in their stead, detailed a new trial judge advocate and two new members. By indorsement dated the following day accused's case was referred to the new trial judge advocate for trial. Before the order modifying the detail came to the knowledge of the officers concerned, accused was arraigned by the original trial judge advocate before the court composed of officers originally detailed, one of the members relieved by the modifying order being present. After accused had pleaded the court adjourned without taking any evidence. At the next session the new trial judge advocate and the two new members were present and sworn, the right of challenge having been extended as to the two new members, the proceedings at the first session were read, and the trial proceeded without the original trial judge advocate or either of the two members who had been relieved. . Held, That the court was legally constituted, the modifying order not being effective to relieve the two members and the original trial judge advocate until they were advised of it. (Emphasis supplied)

Since Lieutenant Colonel Smith had not received notice that he had been relieved as a member of the court, and it is apparent that the other members of the court had not received such notice, the court was legally constituted.

7. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 278 of the Criminal Code of the United States (18 USC 457) and section 52, Code of the District of Columbia.

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

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

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

1st Ind

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

Board of Review
CM P-358

27 August 1945.

UNITED STATES v. Private JAMES C. THOMAS (34616798), Company A, 828th Engineer Aviation Battalion.	)	Trial by G.C.M., convened at Headquarters Base X, USASOS, APO 75, 28 May 1945. Death.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James C. Thomas, Company "A", 828th Engineer Aviation Battalion did, at APO 74, on or about 31 March 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class James A. Clarke, 1130 Military Police Company, a human being by shooting him with a carbine, thereby inflicting wounds which caused his death on 14 April 1945.

The accused pleaded not guilty to, but, all members of the court concurring, was found guilty of, the specification and the charge and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and the confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on the evening of 30 March 1945 Private James C. Thomas (the accused) and several other colored soldiers were in the town of Angeles, P.I., drinking native wine. They returned to their camp bringing some wine with them which they consumed (R. 13). Private Robert R. Cline then stated that if he could get into town he would buy more and accused asked Private Duffy Ryans to take them to Angeles in a truck. The three of them got in the truck and drove to the town of Angeles, arriving at about midnight. They drove down an alley where they were stopped by the Military Police who questioned them as to their presence there at that hour as a curfew was in force (R. 7). They replied that they were there to buy some wine and were then ordered to leave or be "written up". They agreed to leave and after having driven a short distance accused and Private Cline jumped off the truck (R. 7), having told Private Ryans to pick them up at the railroad crossing. The Military Police saw them leave the truck and pursued them but were unable to overtake them (R. 7). Accused and Cline got the wine and proceeded to the railroad crossing where they met Ryans (R. 14). As they were getting in the truck Privates First Class James A. Clarke and Bill B. Prohoroff of the Military Police approached them, the former stating "We will place these two men under arrest and let the driver go on". The other Military Policeman then advanced toward accused, who was armed with a .30 calibre carbine, and told him to give him his gun. Accused replied "I won't give you my gun", stepped back a few steps and fired about five shots, one of which hit deceased in the abdomen (R. 8, 14, 22) resulting in his death on 14 April 1945 (R. 27; Pros. Ex. A). Private Cline jumped on the truck, leaving accused, and with Ryans driving they returned to their camp (R. 14). Neither Ryans nor Cline were armed at any time during the night in question (R. 11, 13, 22).

The accused elected to remain silent but called several witnesses whose cumulative testimony reveals that he was drinking native wine in the morning, afternoon and night preceding the killing (R. 30, 32, 33, 34). Such witnesses, however, would express no opinion as to whether he was drunk during that time (R. 30, 32). One witness testified that about 3:00 o'clock P.M. accused "got high" (R. 33); he "staggered a little bit" and he showed it "By the eyes and the way <u>they</u> walked" (R. 34). Private Cline, a witness for the prosecution, also testified that he had been drinking wine with accused on the afternoon and night preceding the killing. Upon being asked if accused appeared to be intoxicated he replied "I couldn't tell that, sir" (R. 17). The Military Policeman Prohoroff, the other eyewitness to the killing, was not questioned as to accused's sobriety.

4. There is no dispute in the testimony as to the manner in which deceased was killed. Having previously been ordered to leave the town of Angeles for having violated curfew regulations the accused and his companions disregarded the order and completed the mission for which they had come. When later apprehended by the Military Police in the lawful discharge of their duties accused's carbine was demanded of him. There is no evidence of any untoward acts on the part of the Military Police or of any provocation given accused. In defiance of the lawful order to surrender his gun he stepped back a few steps and fired the lethal weapon five times, killing Private Clarke. The only excuse

the defense interposed for the homicide was that accused had been drinking wine the preceding day and night. None of the witnesses testified that he was drunk on the night in question. He was able to jump from a truck, secure some wine and meet his companions at a designated place to be taken back to his company. The court, by its findings, concluded that accused was not so intoxicated as to be unable to entertain a specific intent and that the homicide was committed with malice aforethought.

> "'Malice * * * is used in a technical sense, including not only anger, hatred, andrevenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.'" (CM 224951, Thompson, 14 B.R. 219, 225).

> "Malice is presumed from the use of a deadly weapon." (MCM, 1928, par. 112a).

Accused's malice was demonstrated by his willful and deliberate use of a deadly weapon which resulted in the death of deceased. The facts furnish substantial evidence from which the court could determine that the accused killed deceased willfully, deliberately, with malice aforethought and with premeditation and support the court's findings of guilty of murder as charged (MCM, 1928, par. 148a).

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

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

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

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

Judson A. Clements, Judge Advocate.
Major, J.A.G.D.

(32)

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75
28 August 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Private James C. Thomas (34616798), Company A, 828th Engineer Aviation Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-358).

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

(Sentence ordered executed. GCMO 19, USAFP, 5 Sept 1945.)

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

19 August 1945

Board of Review
CM P-369

UNITED STATES v. Corporal SAM McFARLAND (33193923), 578th Ordnance Ammunition Company.	Trial by G.C.M., convened at APO 24, 17 July 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Sam McFarland, 578th Ordnance Ammunition Company, did, at APO 159, on or about 9 May 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Harry Jackson, 578th Ordnance Ammunition Company, a human being by shooting him with a carbine.

The accused pleaded not guilty to the specification and the charge. He was found guilty of the specification except the words "with malice aforethought," "deliberately" and "with premeditation," and not guilty of the charge but guilty of a violation of the 93rd Article of War. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On 9 May 1945 the accused along with Privates Bennie Williams and DC Washington, all members of the 578th Ordnance Ammunition Company, went to a native Filipino home about three miles from Camp Pikit, APO 24, and drank some "tuba," a native liquor (R. 14). After about twenty minutes they went to another Filipino house but had nothing to eat or drink (R. 15). They remained there about twenty minutes also and then proceeded to a third Filipino house where they met Sergeant Harry Jackson and Pfc. John C. Carter, also members of the 578th Ordnance Ammunition Company (R. 15, 27). The accused, Sergeant Jackson and Pfc. Carter went inside (R. 16, 28). In the house were a Filipino lady and her niece (R. 28). The three soldiers sat on the floor, drank "tuba" and talked (R. 28-29).

During the course of the conversation Carter said, "When men start drinking and have been away from women a long time they get wild" (R. 29). Jackson took offense at the statement and started cursing (R. 29). Carter told Jackson that there was no reason to get angry, that he did not mean anything offensive. The Filipino lady said "she didn't want any trouble - told them to go outside." The three men then left the house (R. 17). Accused then told Jackson that he was wrong and that "Nobody meant any harm" (R. 29). Jackson thereupon grabbed the accused with his left hand and hit him with his right (R. 29). The accused fell down and when he got up said to Jackson, "You hit me." Accused made no effort to strike back. "He was spitting blood - his eyes were red, and he was crying" (R. 21, 31). He got his carbine and started back to camp with his companion, Private Bennie Williams (R. 17, 29).

Jackson, after striking the accused, went over to Carter and asked him if he "wanted to take it up." Carter replied, "I'm not looking for trouble. Nobody did anything to you. Your temper is only going to get you in bad one of these days" (R. 29). Jackson calmed down and he and Carter went to the back of the house and "began eating pig" (R. 29).

In the meantime the accused and Bennie Williams were on their way back to camp. They walked along the road for about fifteen minutes when accused discovered that he had the wrong carbine (R. 18). They thereupon returned and accused picked up his own carbine and left the one taken by mistake (R. 29). The Filipino lady asked accused to have some pig (R. 29). Accused said he did not want any and started back to camp (R. 19). Jackson then announced to Carter and DC Washington, who were eating with him, that he was "going to get Sam [the accused] to come back and eat some pig" (R. 29). As Jackson approached him the accused said, "Don't come any closer" (R. 23). Jackson continued to advance toward him, whereupon the accused raised his carbine, changed it to his right hand and fired (R. 24). The distance between the two

men at that time has been estimated between eight and twenty-four feet (R. 33) Seven bullets entered Jackson's body (R. 12), one of which penetrated the heart causing his death (R. 11-13). Six bullets passed through the body and one lodged in the skull (R. 12).

After the shooting accused slung his carbine on his shoulder and returned to camp (R. 19). He approached his commanding officer, First Lieutenant Robert C. Carson, who was sitting in a jeep, and said, "Lt. I have shot Sgt. Harry Jackson and here is my carbine" (R. 5). Accused at that time was nervous and upset but not intoxicated (R. 10). His lips were swollen and one of his eyes was closed (R. 9).

4. The evidence for the defense:

First Lieutenant Robert C. Carson testified that the accused had had his arm broken (R. 36) and had also been hospitalized at Mindoro about a month before for an ankle injury (R. 37); that the accused's character was excellent and that he got along well with everybody in the organization (R. 36). Accused "never gave anybody any trouble whatsoever" (R. 54). The deceased on the other hand was feared by all the men in the company for his ability as a fighter. "As a matter of fact he could lick any man in our company" (R. 54). The men "feared him [Jackson] in that he didn't take anything from anybody and if anybody said anything he was just likely to go up and sock him" (R. 55).

Technical Sergeant Homer King testified to substantially the same thing. He said the deceased had a reputation "for turbulence and violence"; that "He [Jackson] created fear among the men in the organization. The majority of the men feared him and he sensed it." Sergeant King said that the accused, McFarland, on the other hand, was a "very submissive, peaceful man. He never went around trying to create disturbances;on the other hand he did everything that he could to avoid it. There were several occasions that he demonstrated that. He was the type of person that preferred peace" (R. 50-51).

The accused testified that while they were sitting in the Filipino house drinking, some of the boys sang and others talked; that at one point Jackson went out of the house whereupon Carter said to the Filipino lady, "Don't pay the boys no mind. The boys sometimes get to drinking and saying things." Jackson came back in and said, "I hear you mother-fuckers making your wise cracks. You wait until a man gets behind your back, then you talk about him," to which Carter said, "No Jackson, nobody meant any harm to you or anyone else." Jackson started cursing Carter when accused said, "No, Jackson, you shouldn't get mad. Nobody meant any harm" (R. 39). The cursing continued. Accused then said, "Jackson, you should not curse that boy like that. He is a Private and you are a

Sergeant, and you should know better." Jackson replied by calling accused a "rotten rat." The Filipino lady then got up and said "she didn't want any trouble in the house - to go on outside." They went outside and when accused said to Jackson, "nobody meant you any harm" Jackson struck him in the face causing him to fall to the ground (R. 40). Accused made no effort to strike back. He got up, picked up what later turned out to be the wrong carbine, and started back to the camp along with Private Bennie Williams (R. 41).

After walking about fifteen minutes he discovered he had taken the wrong carbine and returned to the Filipino house to get the right one. When he got there the others were eating pig. They asked him to have some (R. 41). Accused said "No, thank you" (R. 42). His reasons for not having any were that his mouth was sore and that in any event he wanted to get away from Jackson as quickly as possible (R. 42). He then picked up his own carbine and after checking the serial number slung it on his shoulder and started back to camp. Jackson came after him (R. 42). Accused's exact language as to what then occurred is as follows: "He told me, 'Sam, you think you're bad because you got your rifle.' I said, 'No, Jackson, I'm not going to do anything with this rifle. I'm going to camp.' He made another step toward me and when he did, he said, 'Sam, you're bad - you're a bad son-of-a-bitch. I'm going to kill you.' When he said that, I turned around. * * * He was still advancing toward me. I said, 'No Jackson, don't come any further.' * * * I was just standing there looking at him. I saw him coming and knew that my life was in danger. I knew he would kill me. At that time I knew if I turned to run I would be in just as bad a fix as if I had been standing there. * * * I knew that Jackson was the type of man when he started to do something like that there was no end until he finished. * * * I had no intention of shooting him. I felt it in my heart. I told him not to come any further and thought he would see the rifle and would not come. * * * He had a mad look in his eyes. * * * I was afraid if I tried to run away he would catch me. * * * I had a fractured ankle and it hurt me to run. * * * I knew if he would catch me he would take advantage of me because of my arm. I have no way of defending myself" (R. 42-45). When Jackson continued advancing, accused shot and killed him.

5. The accused was charged with murder but the court found him guilty of the lesser included offense of voluntary manslaughter. It was the contention of the defense that the homicide was committed by the accused in necessary self-defense and was, therefore, legally excusable.

> "Vim vi repellere licet is a cardinal doctrine of the Roman law; and by the English common law, as accepted throughout the United States, this principle has been asserted with equal emphasis. I have a right to resist the application of force to myself or to those under my immediate charge, by force proportioned to the attack" (Vol. 1, Wharton's Crim. Law, 12th Ed., sec. 613).

> "In case of personal conflict, it must appear, in order to establish excusable homicide in self-defense, in some jurisdictions, that the party

> killing had retreated, either as far as he could, by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault would permit him" (Wharton's Crim. Law, supra. sec. 616).

Difficulty is encountered not only in determining whether the retreat was sufficient but also whether the danger was of such a nature as to place the accused in fear of bodily harm. Fear of a coward that great bodily harm was about to be inflicted upon him will not justify a homicide in self-defense (State v. Allen, 35 So. (La.) 495), nor will an unwarranted fear of bodily harm justify a homicide in self-defense (Vol. 1, Wharton's Crim. Law, 12th Ed., secs. 620-626). Some cases hold that it is the defendant's honest belief as to the extent of the danger that controls (Thomas v. State, 16 So. (Ala.) 4). Other jurisdictions hold that the danger must be such as would place a "reasonable man" in fear (Allen v. United States, 164 U.S. 492).

In military law the rule is stated in the Manual for Courts-Martial, 1928, paragraph 148a as follows:

> "To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To availhimself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty * * * ."

In CM 235044, Winters, Jr., 21 B.R. 265, 271, the following is stated:

> "But before one may take the life of his assailant, he must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm, and he must also reasonably believe that it is necessary to kill to avert the danger (Acers v. U.S., 164 U.S. 388; Davis v. Peo., 88 Ill. 350; State v. Thompson, 9 Iowa 188, Wesley v. State, 37 Miss. 327; Smith v. State, 25 Fla. 517, 6 So. 482). Furthermore, he must retreat if by so doing he may lessen the danger (16 Harv. Law Rev. 567; 12 Iowa Law Rev. 171; 18 A.L.R. 1279). As one court expressed it:

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

And as said by another court:

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

Whether upon all the facts and circumstances in this case there was a showing that the accused made adequate retreat and had reasonable cause to fear bodily harm to himself presents a question of fact which the court determined adversely to him. The fact that the court found the accused guilty of the lesser offense of manslaughter in violation of Article of War 93 is not inconsistant with its finding that the accused did not act in self-defense. A finding that accused acted in self-defense would necessarily result in an acquittal. By convicting the accused of manslaughter the court necessarily found that the accused "intentionally" killed Sergeant Jackson; that the killing was not in self-defense (either because of inadequate retreat or because there was no reasonable basis for fearing bodily harm); and that the killing was without premeditation and without malice aforethought (See MCM, 1928, pars. 148a and 149a).

> "The law recognizes the fact that a man may be provoked to such an extent that in the heat of sudden passion, caused by the provocation, and not from malice, he may strike a blow before he has had time to control himself, and therefore does not in such a case punish him as severely as if he were guilty of a deliberate homicide.
>
> "In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark.)" (MCM, 1928, par. 149a).

It is the function of the court to decide disputed questions of fact and if the evidence supports the court's conclusion the Board of Review is without power to interfere therewith (CM 231636, Curtis, 18 B.R. 261; CM 234711, Sandlin, 21 B.R. 131, 137; CM 152797 cited in MCM, 1928, p. 216). In this case the evidence adequately supports the court's finding of guilt.

6. The maximum confinement authorized upon conviction of voluntary manslaughter in violation of Article of War 93 is ten years (MCM, 1928, par. 104c). Confinement in a penitentiary is authorized by Article of War 42 for the offense of manslaughter, recognized as an offense of a civil nature and punishable by penitentiary confinement by section 22-2405 of the Code of the District of Columbia.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

Joseph V. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 23 August 1945.

To: Commanding General, 24th Infantry Division, APO 24.

1. In the case of Corporal Sam (NMI) McFarland, 33193923, 578th Ordnance Ammunition Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Before final action is taken it is recommended that consideration be given the term of confinement to be ordered executed with the view to its reduction. The court-martial obviously concluded that the deceased was killed by the accused in the heat of passion caused by adequate provocation. The record of trial contains evidence upon which the court-martial could have acquitted the accused without such action being properly deemed a miscarriage of justice. Under the circumstances of this case it is believed that the term of confinement should not exceed 5 years, under the applicable rule contained in the War Department letter (AG 250.47(1-2-41)E) dated 22 January 1941. The record does not reveal any aggravating factor for application against the accused and does reveal mitigating factors. In accord with the War Department policy just cited and giving effect to the mitigating factors a term of confinement less than 5 years would appear to be appropriate.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-369).

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

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

Board of Review
CM P-383

30 August 1945.

UNITED STATES v. Private WILLIAM A. KYLE (34367758), Company A, 1879th Engineer Aviation Battalion.	Trial by G.C.M., convened at APO 442, 28 July 1945. Dishonorable discharge, total forfeitures, confinement for life. The United States Penitentiary, McNeil Island, Washington.

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

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

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

CHARGE: Violation of the 92d Article of War.

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

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

Specification 1: In that Private William A. Kyle, Company "A", 1879th Engineer Aviation Battalion, did without proper leave, absent himself from his station at Base "M" Stockade, A.P.O. 70, from about 16 February 1945 to about 13 April 1945.

Specification 2: In that Private William A. Kyle, Company "A", 1879th Engineer Aviation Battalion, did without proper leave, absent himself from his station at Sixth Army Stockade, A.P.O. 442, from about 29 April 1945 to about 12 June 1945.

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

Specification 1: In that Private William A. Kyle, Company "A", 1879th Engineer Aviation Battalion, having been duly placed in confinement in Base "M" Stockade, A.P.O. 70, on or about 3 February 1945, did at A.P.O. 70, on or about 16 February 1945, escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that Private William A. Kyle, Company "A", 1879th Engineer Aviation Battalion, having been duly placed in confinement in Sixth Army Stockade, A.P.O. 442, on or about 13 April 1945, did at A.P.O. 442 on or about 29 April 1945, escape from said confinement before he was set at liberty by proper authority.

The accused pleaded not guilty to Charge I and its specification, guilty to the Additional Charges and their specifications and was found guilty as charged and sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution with reference to Charge I and its specification reveals that on 23 January 1945 Nieves Caguioa and her younger sister Marcellina were living with their parents and brothers in the Barrio Paitan, San Carlos, P.I. (R. 16). The 1879th Engineer Aviation Battalion was encamped nearby. Nieves was an unmarried girl 18 years of age, 4 feet 7 inches in height, and weighed 82 pounds (R. 15). About 10:00 o'clock on the night in question Private William A. Kyle (the accused) and three other soldiers, came to the house of the victim, and he and Private First Class Thomas A. Bateman entered the house. Bateman remained there and accused left but returned later with two other soldiers, Privates Robert C. Naylor and Wilton M. Poole (R. 132, 133). Accused and Poole were armed (R. 117). About midnight the accused asked Nieves and her sister to take a walk but they declined stating that their parents would not allow them to go (R. 19, 116). Accused cocked his gun and pointed it at Nieves, her father and mother, stating that if the girls did not come with him he would shoot them (R. 20, 116). Accused and Naylor then "pulled" Nieves and Marcellina downstairs (R. 21, 117). At that time her mother and father were crying and Nieves and her sister were both "Crying and trembling" (R. 21). After walking about 50 feet they came to the house of a relative and Nieves called out in their dialect, "Brother, brother, you come with us to take a walk because they are forcing us". She and her sister then went in the house and accused called to her to "come downstairs" (R. 25, 85). Upon her refusal to comply accused entered the house, cocked his gun and said, "Come with me", and "pulled" her from the house (R. 26,86, 120). Her cousin (R. 49), Marcelo Castro, came from the house with the victim "holding him" (R. 27) and all of

them walked down the road toward a bamboo grove, which was about 300 yards from her house. On the way they passed the home of their aunt and Nieves called out in her dialect, "Aunt, aunt, help us because they are forcing us to take a walk" (R. 28, 120). Marcellino, after walking a short distance, returned with her aunt to the house and the accused, Nieves and Marcelo (R. 30), who were ahead of the others, continued walking down the road with accused behind them, his gun "in contact" with their bodies (R. 30, 88, 122). In about five minutes they reached a bamboo grove where accused pointed his gun at Marcelo and said "You lie down. If you don't lay I am going to shoot" (R. 31). Marcelo lay down and accused kicked him and said, "If you move, I shoot you" (R.38). He then ordered Nieves to lie down and pointed his gun at her. Upon her refusal to comply, he put his gun down, grabbed her by the arms, pushed her down and committed an act of sexual intercourse upon her (R. 33, 36, 91). After the accused had completed the act he called Naylor (R. 38, 99) who cam e to where Nieves was sitting on the ground and, forcing her to lie down, he (Naylor) completed an act of sexual intercourse upon her while accused stood guard over Marcelo (R. 40). When Naylor had completed the act, accused again got on top of her and committed a second act of sexual intercourse (R.42). Nieves testified that before the first act was consummated she refused to lie down and the accused pointed his gun at her; that he "forced me to sit down"; that she resisted "but he got hold of my arms and he was too strong" (R. 33); "I was trying to roll upside down", but "I could not move". She attempted to shout but accused held her mouth saying, "If you shout, I will kill you" (R. 34). During the second act by the accused she "forced him, push him" and told him not to do it again because she was "too weak" (R. 41, 42) and was bleeding (R. 41, 46, 109). The three and Nieves then returned to her house. On the way accused said to her, "Don't tell what I have done to you", and "Don't show the blood on your dress", adding, "If you report, I will kill you" (R. 46). When they arrived at her house they stayed a short time and then "went home". She then reported to her mother and father what had happened to her (R. 47). On the following afternoon she was taken to an Army hospital and examined by a doctor (R. 78) who stated that in his opinion there had been a recent forceful entry of the vagina which had not been previously entered, that there were two fresh lacerations of the hymen, and a bloody discharge which did not appear to be normal (R. 80).

Nieves, her sister Marcellina and their mother and father specifically denied having ever been in the camp area of the accused prior to the night in question (R. 111, 122, 177, 180).

The defense called Private Wilton M. Poole who testified that on the day in question he met the victim and her sister in camp where they were getting laundry. That night he, accused and Naylor went to the home of the victim. Accused and Naylor went in, and he (Poole) remained outside (R. 133). In about 30 minutes accused and Naylor came out accompanied by the victim, her sister Marcellina and Castro (R. 134, 160). Naylor was not armed (R. 151) but accused was and had his gun at "sling arms". All were walking "alongside" of each other. Upon arriving at Castro's house

they did not stop but when they reached the home of the victim's aunt, Nieves called to her to go with them (R. 135). At that time Marcellina was crying and Naylor told her aunt to take her back to the house (R. 150). Kyle, Nieves and Marcelo, who were in advance of the rest of the party, walked across a rice field to a bamboo grove. Kyle still had his gun on his shoulder and Poole did not notice "anything unusual in the manner in which they were proceeding" (R. 135). Poole and Naylor walked to within about 8 feet of where Kyle and Nieves were (R. 137). Naylor asked Kyle "if it was pretty good stuff", Kyle replying in the affirmative. Naylor then asked Nieves "could he have some" and "She lay down on the ground". Nieves offered no resistance when Naylor got on her (R. 137), was not crying, and made no effort to get away (R. 139, 149, 161). When Naylor had finished the act Poole observed Kyle get "on her again" (R. 139). At that time Marcelo was lying on the ground and at no time did Poole observe any violence or force used against either of them. When Kyle had completed the act all of them returned to the victim's house, arriving at about 0100 hours (R. 156) having been gone from the house approximately two hours (R. 157). They then returned to their camp.

Private First Class Thomas A. Bateman testified that on the day in question he saw the victim, her mother, father, aunt, cousin and sister in camp when they were returning some laundry (R. 163, 165). He accompanied accused to their home that night, arriving about 2200 hours where all except Marcellina drank about 2 quarts of nipa wine. He became "a little bit sick" and went into a room and went to sleep (R. 166). Upon awakening next morning he saw the victim's brother but no report or comment of anything having happened the previous night was made by the brother (R. 167).

The testimony of Private Robert C. Naylor was, by stipulation, read in evidence. He stated in substance that on the night in question he was at the home of the victim with the accused and someone said it was an American custom for a boy to take his girl for a walk in the moonlight. The accused asked the victim and her sister to go for a walk with them but theirparents said it was too late. The parents finally consented "if a boy went along". He then related practically the same events as did Private Poole as to what transpired after they left the victim's home, admitting that he had intercourse with Nieves but stating that it was with her consent, and that after he had completed the act he saw Kyle also have intercourse with her. The victim then said that she must return home and asked them to accompany her as her parents might think she was "fooling around with some Filipino boys". They all returned to her home and talked with her parents for about half an hour and then returned to camp. At no time did he see the victim crying, she made no effort to avoid him, did not struggle while he and accused were having intercourse with her, nor did he see accused at any time that night point a gun or threaten anyone (Def. Ex. A).

The accused elected to be sworn and testified that a few days before the night in question he met the victim, her mother, father, sister, brother and some cousins going from tent to tent in his company asking "if they had any laundry"(R. 183). Upon their invitation he visited their home prior

to 23 January 1945 and upon leaving was invited to return (R. 184). On the night of the incident he again visited their home and talked until about midnight when he, Nieves, her sister, Naylor, Poole and Castro took a walk, Nieves and her sister leaving willingly but taking along their cousin Castro as a chaperon. After they left her aunt's house, he, Castro and Nieves proceeded to the bamboo grove, the others remaining at the aunt's house. Upon arriving at the grove he and Nieves sat down and he asked her if she liked "pom-pom" (sexual intercourse). He suggested that Marcelo, who was lying on the ground a few feet away, leave but Nieves spoke to him in her dialect and said it would be all right for him to stay (R. 190). She "didn't say anything. She laughed". He then had intercourse with her during which she did not cry or offer any resistance; she was "more or less bashful". He stated that after Private Naylor appeared on the scene and completed an act of intercourse, he again asked the victim if he could have intercourse with her and completed a second act. She offered no resistance and gave no indication that she was in pain. He further stated that at no time did he threaten or point his gun at Marcelo, Nieves, or anyone else that night (R. 192, 193). They returned to Nieves' house and on the way she said to him, "don't say anything about it", the accused replying that he would not. They remained at Nieves' home for about 15 or 30 minutes and then returned to their camp (R. 194).

4. In addition to accused's plea of guilty to the additional charges and their specifications the prosecution introduced evidence showing that the accused escaped from confinement on 16 February 1945 and remained absent without leave until 13 April 1945. He again escaped from confinement from 29 April 1945 and remained absent without leave until 12 June 1945.

5. The accused admitted, and the evidence establishes, that on the night of 23 January 1945 he twice had sexual intercourse with Nieves Caguioa, an 18 year old Filipino girl. The only question for the consideration of the Board of Review is whether the record contains substantial evidence that such acts were accomplished by force and against the girl's will (MCM, 1928, par. 148b). The accused contended that the acts were with the girl's consent and that no force was used in their accomplishment. In opposition to this evidence is the direct testimony of the girl, largely corroborated by that of her cousin Marcelo and the surrounding circumstances, from which the conclusion is inescapable that she did not consent. She stated that she was forced to leave her house at the point of a gun and by threats of death and physical force, taken to the bamboo grove and there twice ravished by the accused and once by his companion, whom he called to the scene. The court had before it these conflicting statements and, as weighers of the facts, chose to believe the victim, and found accused guilty as charged. The record contains substantial evidence to sustain the findings.

The evidence is undisputed and the accused admitted that he escaped from confinement and was absent without leave as is alleged in the

additional charges and their specifications. The findings of guilty of these offenses were fully supported by the evidence.

A sentence of imprisonment for life is authorized upon conviction of a violation of the 92nd Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement by section 278 of the Criminal Code of the United States (18 U.S.C. 457) and section 52, Code of the District of Columbia.

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

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

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

8 September 1945

Board of Review
CM P-404

UNITED STATES v. Captain JACK R. PEARCE (0-888557), Finance Department, 184th Finance Disbursing Section.	Trial by G.C.M., convened at APO 358, 19 July 1945. Forfeiture of seventy-five dollars per month for six months.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

George L. Robinson, Judge Advocate.
Major, J.A.G.D.

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

8 September 1945

CM P-404

MEMORANDUM for General Burt.

Subject: Record of trial in the case of Captain Jack R. Pearce (0-888557), 184th Finance Disbursing Section, APO 75.

1. Upon a plea of not guilty, the accused was found guilty of the Specification and Charge which are as follows:

CHARGE: Violation of the 96th Article of War.

Specification: In that Captain Jack R. Pearce, FD, 184th Finance Disbursing Section, having received a lawful order from the commanding officer, Base G, USASOS, to report to the nearest leave control station immediately upon delivery of certain funds to the proper authority at Base 7, USASOS, APO 927, as directed by Letter Order IGXP 777, Headquarters, Base G, USASOS, 28 November 1944, the said commanding officer being in the execution of his office, did, at APO 927, on or about 6 December 1944, fail to obey the same.

He was sentenced to forfeit $75.00 of his pay per month for six months. The reviewing authority approved the sentence and ordered its execution. As noted in the holding of the Board of Review, the record of trial was examined in the Branch Office of The Judge Advocate General, found legally insufficient to support the findings and sentence, and transmitted to the Board of Review for examination under the provisions of Article of War 50½.

2. The only question involved is whether or not the evidence is sufficient to sustain the findings of guilty. If it is, the sentence is legal.

3. The evidence shows that on 28 November 1944 the accused, Captain Jack R. Pearce, Finance Department, was the finance officer at Base G, APO 565 (R. 13, 14, 18). On that day the headquarters of

the base issued to him Letter Orders IGXP 777, the material portions of which are as follows:

"SUBJECT: Orders.

"TO : See Distribution.

- E X T R A C T -

"1. Following named Off & EM pl temp dy at destinations indicated for purpose guarding shipments of money. WP by first available mil or commercial acft (AR 55-120). Immediately upon receipt of orders will report Fin O this Hq for further instructions. * * * :

"174th Finance Disbursing Section

"Capt JACK R. PEARCE 0888557 FD to APO 927

XX XX XX XX

"2. Off & EM concerned atzd per diem & mon alws prescribed by pertinent Executive Orders & WD directives * * * .

"3. Immediately upon delivery of funds to proper authority, mon alws prescribed above is terminated and subject pers will report nearest Leave Control Sta for lv (fur) of 30 days under provisions of Cir 90 USAFFE 44. Upon completion lv (fur) return proper sta by method prescribed in lv (fur) orders" (R. 6, 7).

About 3 December 1944 the accused arrived at the Finance Office, Base 7 to deliver funds pursuant to the foregoing orders. He reported to the leave control station, Base 7, for thirty-day's leave on or about 27 December (R. 6, Ex. A).

On 24 February 1945 Major Sverre Roang of the Inspector General's Department, in the course of an official investigation, interviewed the accused. After the 24th Article of War had been read to him the accused said that he had turned over the funds in accordance with his letter orders set out above about 6 December 1944; that the minimum time required to turn them over was one day and the maximum time one week. He also admitted that he had not reported to the leave control center for his thirty-day's leave until about 27 December (R. 7-9).

The defense, by stipulation, submitted evidence that on 23 June 1945 Lieutenant Colonel Arles H. Miller, as Chief Finance Officer "AFWESPAC" dispatched a radiogram to the commanding general of the Australian Base Section in Sidney requesting confirmation as to whether or not accused was on duty "ONE SEVEN SEVEN FINANCE DISBURSING SECTION" preparing Netherlands East Indies currency for shipment from 3 December to 26 December 1944 (R. 11, Def. Ex. 1). In reply Colonel Miller received a radiogram, dated 25 June 1945, a paraphrased copy of which reads as follows:

> "REURAD S 43849 GSF OFFICER PERSONNEL ON DUTY AT TIME IN QUESTER NO LONGER AT THIS BASE. ALL RECORDS INDICATE SUBJECT OFFICER DURING SPECIFIED TIME ON DUTY" (R. 11, Def. Ex. 2).

It was stipulated that if Colonel Miller were present in court as a witness he would testify that he had known the accused for the past three years, during which time his character, efficiency and loyalty had been "above reproach" (R. 11-12, Def. Ex. 3).

The accused testified that he was the officer named in Letter Orders IGXP 777 and that such orders were issued to him (R. 13). On cross examination he said that between 6 and 27 December 1944, he was on duty at the Finance Office, Base 7, verifying "shipments of Netherlands East Indies currency and coins" (R. 13). He also said that his records as to "several shipments of funds" sent to him at Base G did not "check" with the record of the Finance Office, Base 7. By checking the records at that office he succeeded in reconciling the discrepancies in the accounts (R. 14). He admitted that his duties after 6 December "had nothing to do with turning over the money" as directed under his letter orders (R. 18).

On examination by the court the accused gave the following further explanation of his conduct subsequent to 6 December:

> "My official duties were in connection with the first paragraph of that special orders. It says I am to report to myself for further instructions and, my being the Finance Officer at that particular time, I felt that it was my duty to go into the status of these shipments of Netherlands East Indies currency and coins" (R. 17).

4. It is established by the undisputed evidence that by letter orders, Headquarters Base G, dated 28 November 1944, the accused was directed to proceed by first available air transportation to APO 927 "for purpose guarding shipments of money" (par. 1). He was further ordered to report to the nearest leave station for thirty-day's

leave, immediately upon delivery of the funds to the proper authority (par. 3). In accordance with such orders he arrived at Base 7 (apparently APO 927) on 3 December and there turned over the funds to the finance officer on 6 December. Accused did not, however, report to the leave control station for thirty-day's leave until about 27 December. Since he did not report to the leave station immediately after delivery of the funds he is guilty of failing to obey the orders in violation of the 96th Article of War, unless the record shows some legal excuse for his failure to obey.

The accused testified that he was the finance officer at Base G; that during the period from 6 December to 27 December he was on duty at the Base 7 Finance Office to which he had delivered the funds; that his duties consisted of verifying shipments of Netherlands East Indies currency made during that period to Base G and reconciling his accounts with the Base 7 Finance Office with reference to shipments of funds previously made. It was the contention of the defense, in effect, that since paragraph 1 of the orders directed accused to report to the Finance Officer, Base G (himself) for further instructions, he acted within the discretion thereby vested in him and was within his rights when he performed the duties relative to shipments of Netherlands East Indies currency before reporting to the leave station.

Paragraph 1, which was issued not only to accused but to others as well, directs them "upon receipt of orders" to "report Fin O this Hq for further instructions" (underscoring supplied). It is significant that the persons affected were not directed to report to the finance officer for further orders. The use of both the words "orders" and "instructions" in the same sentence indicates that they were employed advisedly in accordance with their usual, ordinary meanings. An order is a formal oral or written command issued by a person or headquarters (Dictionary of United States Army Terms, TM 20-205, p. 191). To instruct means to impart knowledge or information to another (Webster's New International Dictionary, 2nd Ed., p. 1288). Clearly, therefore, the meaning of that portion of the letter orders under discussion was that the men who were to guard the shipments of money were to obtain from the finance officer detailed instructions, that is to say, information and guidance as to the manner in which the orders should be executed. It did not authorize modification or cancellation of the orders in whole or in part nor authorize the giving of instructions after execution of the order.

Doubtless the author of the orders did not intend that accused should report to himself for instructions but taking that provision literally as written it could not reasonably be construed as vesting in the accused the power to vary the terms of the orders in any material particular or to issue to himself instructions contrary to or inconsistent with their plain terms either upon the receipt of the orders or after execution thereof. Accused admitted in his testimony

that the duties which he performed between 6 December and 27 December had no connection whatsoever with the guarding of shipments of money or the delivery of funds as ordered. Without asking for clarification or modification of the orders, accused took it upon himself to disregard the clear and simple directions contained in paragraph 3 (to report immediately for leave) in order that he might perform other and wholly unrelated duties.

After discussing the dignity of a formal military order and the gravity of the obligation which it imposes, Winthrop, in his work on Military Law and Precedents, 1920 Reprint, at page 572 says:

> "The obligation to obey [an order] is one to be fulfilled without hesitation, with alacrity, and to the full; nothing short of a physical impossibility ordinarily excusing a complete performance. While a certain discretion in the execution of an order may sometimes be permitted to officers high in rank or command, or officers charged with expert or peculiarly responsible duties, the inferior cannot, as a general rule, be permitted to raise a question as to the propriety, expediency, or feasibility of a command given him, or to vary in any degree from its terms."

In the present case the evidence does not show any legal excuse for the failure of accused to obey the orders.

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

Samuel M. Irwin, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Irene E. Robinson, Judge Advocate.
Major, J.A.G.D.

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

26 August 1945

Board of Review
CM P-408

UNITED STATES v. Captain HARVEY L. GLASCOCK (0-117977), Transportation Corps, Base Port Command, Base G.	Trial by G.C.M., convened at APO 565, 11 June 1945. Dismissal and total forfeitures.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
Judge Advocates.

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

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

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

Specification 1: In that Captain Harvey L. Glascock, 362nd Harbor Craft Company, for the purpose of obtaining the issuance of 10 watches, property of the United States, of a value of over $50.00, from the Base G Ordnance Property Officer, an officer of the United States duly authorized to issue said property, did, at APO 565, on or about 14 February 1945, wrongfully forge the name "Charles A.Zepp" upon a property issue slip in the following words and figures:

PROPERTY ISSUE SLIP.

TO: Supply Officer	Type of Issue				Voucher
ORDNANCE PROPERTY OFFICER: Base "G" APO 565		Replacement	Debit Memo Receipt	Credit Memo Receipt	No.
FOR: (Organization Unit) 376th Harbor Craft Co. Base "G" APO 565	Initial xx				Issue Slip No. 6-0-376

HCC-45

STOCK NO. NOMENCLATURE	Unit	Auth or Max Level	On Hand	Due in	Quan Desired	Act
Authority T/O & E 55-500 dated 17 Aug 1943						
	w/3	chgs	365	E.M. #39	Officers	
Basis: Watches to be used for navigation purposes aboard organizational floating craft: 60 and 105 ft. "FS":						
Watch, pocket or wrist, jewel	ea	10	0	0	10	
////////////////Last Item//						
SHOW BASIS OF ISSUE						

Issuance or acceptance of quantities shown in "Action" column is authorized. Items marked "Ext" will be ordered. Inquiries must refer to

No._____
Date:

_____19_____

For the Commanding Officer:
Date:

21 Feb 1945 s/ Charles A.Zepp
t/ CHARLES A.ZEPP,1st Lt TC

Quantities shown in action column have been rec'd
Date:
_____19_____
Authorized Representative

W.D. A.G.O. Form No. 446

Specification 2: In that Captain Harvey L. Glascock, 362nd Harbor Craft Company, for the purpose of obtaining the issuance of two pistols and three holsters, property of the United States, of a value of more than $50.00, from the Base G Ordnance Property Officer, an officer of the United States duly authorized to issue said property, did, at APO 565, on or about 14 February 1945, wrongfully order First Lieutenant Konstantine G. Sotiras, Warrant Officer (j.g.) George E.Marcuse and Warrant Officer (j.g.) Lucius A.Banks to use a property issue slip in the following words and figures:

P R O P E R T Y I S S U E S L I P

TO: Supply Officer	Type of Issue				Voucher
ORDNANCE PROPERTY OFFICER: Base G, APO 565		Replacement	Debit Memo Receipt	Credit Memo Receipt	No.
FOR: (Organization Unit)	Initial				Issue Slip
46th T.C. Composite Bn.	x				No. 46 TC-124

STOCK NO. NOMENCLATURE	Unit	Auth or Max Level	On Hand	Due in	Quan Desired	Act
Pistol, automatic, cal.45: M-1911	ea	3	1	0	2	2

Holster, side, pistol, automatic	ea	3	0	0	3	3	49-H-1

////////////////nothing follows//

Authority: T/O & E 55-500

Basis: Initial issue T/E equip.

(ink) (ink) PMS

SHOW BASIS OF ISSUE

Issuance or acceptance of quantities shown in "Action" column is authorized. Items marked "Ext" will be ordered. Inquiries must refer to	For the Commanding Officer: Date: 14 Feb 1945 s/ Robert G. Green t/ ROBERT G. GREEN, Maj TC
No.	
Date:	
	Quantities shown in action column have been rec'd Date:
19	19 s/James T. Suggs WO (JG) Authorized Representative

W.D. A.G.O. Form No. 446

which said property issue slip was then well known to the said Captain Harvey L. Glascock to be an illegal and fraudulent writing.

Specification 3: In that Captain Harvey L. Glascock, 362nd Harbor Craft Company, did, at APO 565, on or about 15 February 1945, acting in his capacity as Commanding Officer, wrongfully retain in his organization, the 362nd Harbor Craft Company, unauthorized government property, to wit: one 3/4 ton 4x4 truck, of the value of about $1900.00; one signal chest of the value of about $55.00; two tree-climbing sets, of the value of about $25.00; six field telephones, of the value of about $180.00; one switchboard, of the value of about $150.00; seven miles of wire, of the value of about $225.00; one tripod, of the value of about $35.00; two pike poles, of the value of about $5.00; one case of batteries, of the value of about $50.00; one case of friction tape, of the value of about $50.00; one rocket launcher, of the value of about $40.00; six rounds of ammunition for the rocket launcher, of the value of about $30.00; of a total value of about $2745.00, all property of the United States, the said Captain Harvey L. Glascock, then well knowing the said property to have been procured without proper authorization.

CHARGE II: (Finding of not guilty.)

Specification: (Finding of not guilty.)

The accused pleaded not guilty to all charges and specifications, but was found guilty of Specifications 1, 2 and 3 of Charge I and Charge I. He was found not guilty of Charge II and its Specification. He was sentenced to dismissal, total forfeitures and confinement at hard labor for two years. The reviewing authority approved only so much of the findings of guilty of Specification 3 of Charge I as involved a finding that accused did at the time and place alleged and in the manner alleged, wrongfully retain in his organization, the 362nd Harbor Craft Company, unauthorized government property, to wit: one 3/4 ton 4 x 4 truck of a value of about $1,828.00, four field telephones of a value of about $131.60, and some wire of some value, of a total value of about $1,959.60, all property of the United States. The reviewing authority also approved the sentence. The confirming authority confirmed the sentence but remitted the confinement imposed and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

The accused, Captain Harvey L. Glascock, was the commanding officer of the 362nd Harbor Craft Company which, during the month of February 1945, was stationed at Lancaster Pool, APO 565. In the same organization were Warrant Officer George E. Marcuse and First Lieutenant Konstantine G. Sotiras (R. 7, 14, 26-27). On the morning of 14 February 1945 the accused handed Warrant Officer Marcuse a requisition for two pistols and three holsters (Ex. B). The requisition was made out to a fictitious organization, the "46th T.C. Composite Bn" and the name Robert G. Green, Major, T.C. signed thereto was in the accused's handwriting (Ex. B, R. 8-9, 11, 15). Warrant Officer Marcuse told the accused that he "would have nothing to do with it" (R. 8). The accused then requested Lieutenant Sotiras to have the requisition filled but he also refused (R. 8, 14). Accused thereupon directed Lieutenant Sotiras to take the requisition out to Warrant Officer Banks and "have him fill it." Lieutenant Sotiras complied with the order (R. 8, 14). Warrant Officer Banks, upon receipt of the requisition, proceeded to Hollandia and drew the property (R. 8, 14).

On or about 20 February 1945 accused stated to Warrant Officer Marcuse that he "had a requisition for watches at Ordnance" and that he wanted Warrant Officer Marcuse to take care of it for him (R. 9). He signed a requisition for four watches in his own name and made it out to his own organization, the 362nd Harbor Craft Company (R. 9). That night the accused requested Warrant Officer Marcuse to return the requisition for the four watches, saying "I will have one of the other officers take care of it." The requisition was returned (R. 10).

On the morning of 21 February 1945 the accused told Warrant Officer Marcuse that "there was a requisition on his desk for watches, to pick it up and get it filled" (R. 11). Warrant Officer Marcuse picked it up and later discovered that it was not the same as the requisition

for watches he returned the night before. This one called for ten watches and was not signed in the name of the accused (Ex. C). Marcuse did not have it filled. He talked to the accused about it and a few days later was transferred out of the company (R. 11).

The requisition for the ten watches was made out in the name of the 376th Harbor Craft Company, an organization which was not then stationed at APO 565 (R. 18). It was signed "Charles A. Zepp," First Lieutenant, T.C. (Ex. C). The signature "Charles A. Zepp" was compared with the admittedly genuine signature of the accused appearing on his pretrial statements (Exs. E, F and G), and a handwriting expert testified that the same person signed both names (R. 44). The requisition for the ten watches was never filled (R. 12-13).

Lieutenant Colonel Russell D. Turrill, Adjutant General's Department, Headquarters Base G, APO 565, testified that neither a Major Robert G. Green, T.C. nor a First Lieutenant Charles A. Zepp, T.C. had ever been stationed at Base G, APO 565 (R. 18).

Private Robert L. Ash of the 362nd Harbor Craft Company stated that prior to leaving the company area on 14 February 1945, the accused said that he "wanted some men with sticky fingers" (R. 19); that he and Privates Dacy and Harris accompanied the accused on the way to Base G; that en route the accused pointed to trucks on the road which he said "we could use." One was a three-quarter ton truck (R. 19). Upon arrival at Base G the accused told the three enlisted men "to get out and scout around." They went to Dock No. 9 where a three-quarter ton weapons carrier loaded with Signal Corps and other supplies was parked (R. 19, 23). They drove the truck off (R. 19).

The testimony of Pfc. William H. Dacy was substantially the same as the foregoing testimony of Private Ash (R. 23-26).

When the accused learned what his enlisted men had done he said he hoped they could get the truck back "without being caught by the M.P.'s" (R. 19, 21). Several times thereafter he said, "I hope they don't get caught" (R. 19). The equipment which was loaded on the truck was removed (R. 19-20). It consisted of telephone wire, telephones, tools, a switchboard, a bazooka, ammunition packs, rockets, etc., some of which together with the truck itself was used by the company (R. 29, 31, Ex. A). The 3/4 ton truck was not listed in the company property records (R. 22, 31). On orders of the accused it was repainted and the numbers changed (R. 34).

Corporal Ralph J. Price testified that the accused had made statements at company formations to the effect that "the only way we could get property here was to beg, borrow or steal it" (R. 32). He said he was the company electrician and installed in the company area the electrical equipment and telephones taken from the truck (R. 32).

After the truck had been in use by accused's company for about two weeks, he, one day, gave instructions to remove it from the island where the 362nd Harbor Craft Company was stationed and leave it on the mainland (R. 34).

Pfc. James G. Childers testified that he drove the weapons carrier to the mainland and was also the one who repainted it at the direction of the accused. Before taking it to the mainland, the car was again repainted and the original numbers replaced (R. 35). The value of the truck was stated to be $1,828.00 (R. 36); the telephones $32.90 each and the wire $31.68 per mile (R. 37).

Four unsworn pretrial statements of the accused were admitted in evidence (Exs. D, E, F and G). The accused stated in substance that it was he who made out the fictitious requisition for the two .45 caliber automatic pistols and the three holsters (R. 38, Ex. D), and that he signed the name Major Robert G. Green, T. C. thereto, although he knew no such person. He said that he never had the pistols in his possession but that men in his company used them for practice firing. He also said that it was never his intention to use the pistols for personal gain (R. 39, Ex. D).

Accused further admitted, in his pretrial statements, that he made out the fictitious requisition for the ten watches and signed the name Charles A. Zepp, First Lieutenant, T. C. The 376th Harbor Craft Company, for which the watches were ordered, did actually exist, but the accused did not know where it was located (Ex. D). He said that it was not his intention to have the requisition filled and that it was on his desk for three days before it was removed by Warrant Officer Marcuse (R. 39, Ex. D).

Respecting the "stolen truck" and equipment, accused said that when he learned about it while over at Base G, he told the enlisted men they had better get it out of there but that when he returned to the company area the truck was there and the men were taking off the supplies (R. 40, Ex. F). He said he knew that four of the telephones and some wire taken off the truck were being used in the company area; that he did not know what other equipment was in the truck; that none of the "stolen property" was ever in his possession; that he intended to return the telephones when they got others from the Signal Corps; that at the time the truck "was stolen" the company had no means of transportation (R. 41, Ex. F); that he at no time told any of his men that the way to get property was to steal it (R. 40, Ex. D); and that several days after he first saw the truck in the company area he directed Private Childers to take it to the mainland and hide it because he expected that Warrant Officer Marcuse, who had been transferred, would make trouble (Ex. G). He said he also directed Private Sheward to take the bazooka and switchboard out of the company area, and continued, "I accept full responsibility for all property which was stolen or destroyed. Many times the officers and myself have gotten together and came to the agreement all this stealing must cease and while I was in the hospital Lt. Sidlo called the

company together and told all the men the same thing. That was the same day the stolen jeep came in with Mr. Marcuse, Sgt. Dodkowitz and Pvt. Dacy. I personally have told many men about stealing and informed them it must cease immediately. I accept full responsibility for all .45 cal. pistols which were drawn from Ordnance on a fictitious requisition" (Ex. G).

4. The evidence for the defense:

Written statements by Lieutenant Colonel Oscar W. Traber, T. C. and Major Eugene J. O'Connell, T.C. attesting the accused's good character were introduced in evidence (Def. Exs. 1 and 2). Lieutenant Colonel Traber said that the accused was an outstanding instructor; that he did an excellent job in training his company; that he "conducted himself as an Army Officer and served intelligently and with loyalty and to the best of his ability" (R. 51). Major O'Connell said he "found him to be of the highest character and to possess the leadership necessary to command a company" (R. 51).

Privates James G. Childers and Robert L. Ash both testified that the accused did not at any time direct or order them to steal property (R. 53).

Lieutenant Thomas A. Kennedy, Jr., testified that he was with the accused on the morning of 14 February 1945 when the truck was stolen; that the accused gave no instructions to enlisted men to steal the property and that he at no time heard the accused say that the way to get materials was "to beg, borrow or steal" (R. 53-53).

The accused elected to testify under oath only "in reference to the Specification of Charge II" and elected to remain silent with respect to all other aspects of the case (R. 55). Accused's testimony was that he did not instruct or order his men to steal the truck or the equipment or any other property (R. 56); that when Dacy, after stealing the truck, said to him, "Here is a truck," he (accused) said, "You better take it back" (R. 56).

5. The evidence amply sustains the findings of guilty of Specifications 1 and 2 of Charge I (Wrongfully forging the name "Charles A. Zepp" on a property issue slip for the purpose of obtaining ten watches, property of the United States and wrongfully ordering First Lieutenant Sotiras and Warrant Officer Marcuse to use a fictitious "property issue slip" for the purpose of obtaining two pistols and three holsters, property of the United States.). Specification 3, as modified by the reviewing authority, that the accused wrongfully retained in his organization a three-quarter ton 4 x 4 truck of the value of $1,828.00, four field telephones of the value of $131.60 and some wire of some value, all of a total value of $1959.60, all property of the United States, is also amply supported by the evidence.

To order a subordinate to do an unlawful act, in this case to obtain government property on a fictitious and forged requisition slip, is a wrong to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service in violation of Article of War 96. The act of forging a fictitious name on a requisition slip for the purpose of obtaining government property is also a wrong in violation of the same article. Retaining and using government property with knowledge that such property was wrongfully obtained and not intended for use by the organization into whose possession it has come is likewise a wrong within the purview of Article of War 96 (Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, pp. 722-733). It is not material that the accused may have acted without motive of personal gain and in the manner which, in his opinion, was for the best interests of his company. "The most laudable motive is no defense where the act committed is a crime in contemplation of law" (22 C.J.S. sec. 31; see also Simmons v. State, 197 N.W. (Neb.) 398; State v. Logan, 126 S.W. 2nd (Mo.) 256).

6. The first indorsement to the charge sheet shows that this case was "Referred for trial to First Lieutenant ROSCOE J. AILOR, OD, Trial Judge Advocate of the general court-martial appointed by paragraph 3, Special Orders No. 103, Headquarters NEW GUINEA BASE SECTION, USASOS, APO 503, 30 April, 1945." The court which tried the case was appointed by Major General Sturdevant by paragraph 1, Special Orders Number 123, New Guinea Base Section, 31 May 1945, and there is no order in the record transferring the cases from the court which was appointed by paragraph 3, Special Orders Number 103, 30 April 1945 to the new court. Since, however, the officer who appointed both courts and acted as reviewing authority was one and the same person the court which tried the case had jurisdiction to hear and determine the issues even though the case was never formally assigned to it (CM 232790, Brandon, 19 B.R. 193, 207-209).

7. Testimony was permitted to be introduced in evidence respecting a requisition slip for four watches which accused gave to Warrant Officer Marcuse on 13 February 1945. The accused's conduct in this connection was not the subject matter of any charge against him and the testimony relating thereto, to which due and timely objection was taken by defense counsel, tended to establish the commission of another offense wholly unrelated to the offenses for which the accused was then on trial.

It is elementary that testimony relating to offenses other than those for which an accused is then being tried is, with certain exceptions, inadmissible (People v. Molineux, 61 N.E. (N.Y.) 286; People v. Zachowitz, 172 N.E. (N.Y.) 466; MCM, 1928, par. 112b). Evidence of other offenses is admissible only to prove motive, intent, absence of mistake or accidents, identity of the person charged where they are issues in a given case, or a common scheme embracing the commission of two or more crimes so closely related that proof of one tends to establish the other (People v. Molineux, supra). In this case the

request by the accused made to Warrant Officer Marcuse on 13 February 1945 to obtain four watches upon a requisition signed by the accused does not fall within any of the exceptions above enumerated, nor does it tend to establish that on 14 February the accused forged the name "Charles A. Zepp" to a requisition for ten watches for which offense he was then on trial. The error nevertheless may be regarded as harmless (A.W. 37) since other evidence in the record is "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (Bull. JAG, October 1944, p. 417; CM POA 313, Greenlee).

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

Samuel W. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

James A. Robinson, Judge Advocate.
Major, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 28 August 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Captain Harvey L. Glascock (O-117977), Transportation Corps, Base Port Command, Base G, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-408).

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

(Sentence ordereed executed. GCMO 18, USAFP, 3 Sept 1945.)

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

Board of Review
CM P-417

26 September 1945.

UNITED STATES v. First Lieutenants JOHN G. EGAN (01316499) and EDWIN J. LALONDE (01297904), both of Company L, 184th Infantry.	)	Trial by G.C.M., convened at APO 7, 27 June 1945. As to each accused: Dismissal.

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

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

2. Each accused was tried in a common trial upon the following charge and specification:

Lieutenant LaLonde:

CHARGE: Violation of the 64th Article of War.

Specification: In that First Lieutenant Edwin J. LaLonde, Company "L", 184th Infantry, being in command of Company L, 184th Infantry, which was then occupying a forward position against the enemy, and having received a lawful command from Major James K. Bullock, his superior officer, to hold the position at all costs, did, at APO #7, c/o Postmaster, San Francisco, California, on or about 2 May 1945, willfully disobey the same.

Lieutenant Egan:

Upon an identical specification save as to the name of the accused.

Each accused pleaded not guilty to, but was found guilty of, the specification and the charge and was sentenced to dismissal. The reviewing authority approved the sentences and the confirming authority confirmed them and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on 2 May 1945 L Company of the 3rd Battalion, 184th Infantry, secured from the enemy a terrain feature known as Gaja Ridge on the Island of Okinawa (R. 7). The Company Commander was killed in the action and Lieutenant Edwin J. LaLonde, the Battalion Assistant S-3, then at the Battalion CP, was ordered to assume command of the company. He arrived at Gaja Ridge at approximately 1145 hours, assumed command, and Lieutenant John G. Egan was designated as his executive officer (R. 7-8).

Lieutenant Colonel James K. Bullock (then Major), the Battalion Commander, testified that at about 1700 hours Lieutenant Egan reported by radio that the company was receiving a great deal of fire and asked for permission to withdraw. Permission was refused. A half hour later another radio message arrived "elaborating on" the casualties Company L had received and the amount of enemy fire, reporting the loss of their only artillery observer, and again asking for permission to withdraw. The Battalion Commander ordered the position to be held "at all cost". After receiving another radio message from the company, the Battalion Commander conferred with the Regimental Commander about the situation and again informed Company L that the position was to be held at all cost. At about 1900 hours Lieutenant LaLonde spoke to the Battalion Commander on the radio, stated that he could not hold the position and desired permission to "pull out". Upon being told that the position would not be abandoned the Lieutenant answered that "he had considered the situation and had talked to his officers about it, and that he could not hold the position" and that "come dark he was going to pull out" (R. 8, 13, 15, 19, 20). The Battalion Commander then asked him if he fully understood the order that he was to hold the position. Lieutenant LaLonde said that he did and that he understood "the consequences" (R. 8). The Major then told the Lieutenant that he was relieved of his command and to put Lieutenant Egan on the phone (R. 8, 13, 19, 21). Major Bullock thereupon told Lieutenant Egan that he was to take command of the company and that the position would be held at all cost. He testified that Lieutenant Egan responded "no sir, I refuse to take command as I do not believe this position can be held * * *" (R. 8). Major Bullock telephoned regimental headquarters and while doing so heard over the radio that Company L had already started to move out one rifle and one heavy machine gun platoon. The next morning Lieutenant Egan reported to the Major that he had brought the entire company, together with its wounded and supplies, back to the assembly area in the perimeter of Company K, where the company was digging in (R. 9). At that time Lieutenant Egan denied having said over the radio the previous evening that he refused to take command of the company but stated that he did actually take command and brought the company back (R. 9).

On cross-examination Major Bullock admitted that it became dark that night later than 2000 hours; "it was thirty minutes after the time Lt LaLonde was relieved of his command" that the message was received that Company L was moving back (R.12, 16).

The unit journal of the 3rd Battalion, 184th Infantry, for 2 May 1945, the entries of which Major Bullock testified were correct (R. 15), was introduced in evidence (Ex. C). It revealed the increasing enemy pressure to which the company had been subjected and that Company L was withdrawn by Lieutenant Egan about thirty minutes after he was placed in command.

Lieutenant Colonel Daniel C. Maybury, a defense witness, testified that he was in command of the 1st Battalion on 2 May 1945 and that L Company was then located about 400 or 500 yards to the left of his battalion and about 400 to 500 yards in advance with no supporting troops in its immediate vicinity (R. 27). A Company of the 1st Battalion advanced to the town of Kibara, about opposite L Company, but withdrew at 1510 hours (R. 27).

Both Lieutenants LaLonde and Egan testified at length with reference to the tactical situation confronting Company L on 2 May. Their testimony is substantially the same and to the following effect: The area covered by Company L on 2 May was very small, about 35 yards in depth and 75 yards in width. I and K Companies were to come up on their flanks (R. 34). Because they were receiving mortar fire they endeavored to spread the company out across the ridge, but machine gun fire was received from both the right and left flanks and the men were not able to dig in (R.30, 35). A patrol was sent forward but was forced to return. During the afternoon they noticed increasing enemy activity to their left and to the forward slope of the ridge. Their artillery observer was killed and they started to get heavy machine gun and mortar fire (R. 31, 35). From their positions the enemy "could see every bit of ground" occupied by the company (R. 31). Mortars kept firing at them. The mortar men advised that there were only 15 rounds of 60mm ammunition left (R.31). They were also low on 81mm mortar ammunition (R. 37). Accused LaLonde endeavored to determine why Company A did not "come up on our right flank" as had been expected but he received no answer. About 1600 hours enemy troops moved to within about 200 yards of them on the forward slope of the ridge. He told Lieutenant Egan to ask permission to withdraw, but permission was refused. He again told Lieutenant Egan to try to give Major Bullock "a picture of what was happening" and again to ask permission to withdraw to the position of the previous night but again received the reply to "hold at all cost" (R. 32, 36). They saw a supply train start out for them in two groups. Of the first group only two men got up to them (R. 32, 37, 40) and none of the second reached them. Supplies were requested but they were told the route of supply had been cut off (R. 37).

Lieutenant LaLonde admitted that he understood the order to remain at all costs and that he said "* * * I am going to pull out at dark" (R. 33).

He was then relieved and did not thereafter command the company although he withdrew with it. He stated, "* * * I wasn't scared of what they could do during the day. We sat there all day taking knee mortar fire, and everything they threw at us, but at night I could see what they could do to us. I wish you could appreciate the picture. That company out there about 800 yards in front of any troops, with both flanks definitely exposed. I wasn't backing away from a fight * * * The decision I made wasn't an easy one to make. I knew what would happen, I never thought I would be facing this, but I knew what to expect. I would have liked to have said, 'OK men, this is it, we are going to sweat it out here all night'. Then I would have been doing my job, but I felt it my job to pull that company out of there, and if I had the same thing to do I would do it over again" (R. 33).

Lieutenant Egan admitted that he was placed in command of the company with the order to "hold at all cost". He testified that he then said "I cannot hold this position, I am pulling out" (R. 36). He further testified that he took command of the company, "waited around for about a half hour until it got dark" and then withdrew (R. 36, 38).

Other witnesses (First Lieutenants Lewis E. Jewell, Eugene K. Quillan, T/Sgt. Lee J. Wyatt) also testified that the ammunition supply was low (R. 40, 43, 44). First Lieutenant Daniel P. Jones in charge of a heavy machine gun section of L Company testified that there "wasn't one good place" for his section on the ridge and "We were told the order to hold the hill, and then we were asked our opinion as to whether we could hold or not. The opinion that we could not hold was unanimous" (R. 44).

Major Bullock on cross-examination testified that he had known Lieutenant LaLonde for more than 2½ years and would characterize him as an excellent officer (R. 10). Lieutenant Colonel William P. Walker, a defense witness, stated that Lieutenant LaLonde served under him on Kwajalein and Leyte and "his work was better than excellent * * * [he] has superb judgement * ** " (R. 46). Captains James B. Hewett and Robert L. Pelloux, defense witnesses, testified that they knew Lieutenant Egan. The former stated "He was very recipient to orders and carried them out very well, and worked very conscientiously" (R. 21). The latter said that he was an excellent officer. At no time did he refuse an order or let him down (R. 28). At the time of the Leyte campaign, although very ill, because of a shortage of officers he refused to be evacuated.

4. Lieutenants LaLonde and Egan were found guilty of willfully disobeying the order of Colonel (then Major) Bullock, their superior officer, to hold the position then occupied by Company L, which company each accused in turn commanded. The evidence clearly establishes that Lieutenant Egan disobeyed the order. The Board of Review is of the opinion, however, that the evidence does not sustain the findings with reference to accused Lieutenant LaLonde.

Upon telling the major that he would withdraw the company after dark regardless of the order to remain, Lieutenant LaLonde was relieved from command. Some thirty minutes later Lieutenant Egan, then in command of the company, began the withdrawal. The order to remain was negative in character, that is, it required for its obedience no act on the part of accused save the maintenance of the status quo. Disobedience was dependent upon setting in motion the withdrawal of the company. Up to the time of his removal from command Lieutenant LaLonde had merely expressed an intent to disobey the order in the future, had done nothing to carry that intent into fruition, and, having been removed from command by his superior officer, was placed in a position whereby he could not disobey the order had he continued to desire to do so.

The 64th Article of War proscribes a disobedience "of a positive and deliberate character" (Winthrop, 1920 Reprint, p. 573); "the refusal or resistance of commands instantly and presently given, and directed to be obeyed with promptitude * * * [whereby] some immediate act, necessary to be done, might be impeded or defeated" (Davis, Mil. Law, p. 383). The statement by a person subject to military law that he refuses to obey a lawful order of a superior officer, although evidencing a "willful" intent, of itself does not constitute a "willful disobedience" in violation of Article of War 64. To constitute the offense there must be effected some noncompliance with the order, or, as stated in CM 256598, Williams, III Bull. JAG 340, 36 B.R. 307, "a completed act of disobedience". Thus it has been repeatedly held that an expressed refusal to obey an order to be performed in the future is not punishable as a violation of this article (CM 233906, Jenkins, 20 B.R. 205; CM 256598, Williams, supra; CM A-2262, Davis), although carrying out such an intention may be (MCM, 1928, par. 134b). The settled principle of law last cited is applicable to the circumstances in the instant case. There were two aspects to the major's order. The first required the lieutenant to hold the position. The lieutenant clearly intended so to do for the time being. In its other aspect the order was one in futuro, continuing effective until modified or rescinded by the Battalion Commander. Had accused LaLonde remained in command until nightfall and then withdrawn he would have been guilty as charged. But his expressed intent to violate it in the future did not constitute a "willful disobedience" of the order eo instanti.

The conclusion here expressed does not mean that the junior officer did not commit an offense. Lieutenant LaLonde's direct and defiant declaration that he would (in the future) disobey the order of his superior officer was a disorder to the prejudice of good order and military discipline and violative of Article of War 96. However, an accused may not legally be convicted of an offense not alleged in the specification unless such offense is necessarily included in the one charged (MCM, 1928, par. 78c; CM 191809, Price, 1 B.R. 301; CM 218667, Johns, 12 B.R. 133). An offense is an included one if it contains one or more but not all of the elements

of the greater offense. The lesser offense is disclosed by subtracting one or more appropriate essential elements from the greater offense without adding any new element. In the present case the accused LaLonde is not directly charged with making a defiant declaration of his intention to disobey an order in the future and the making of such a declaration is not a lesser included offense of willful disobedience (CM 256598, Williams, 36 B.R. 307; CM P-344, Grills, 16 August 1945). As to accused LaLonde, therefore, the record of trial is not legally sufficient to support the findings of guilty of the offense of willful disobedience or of any lesser offense necessarily included therein.

5. With reference to the other accused, Lieutenant Egan, the Board of Review has considered the effort of the defense to exculpate his actions by showing that under the circumstances existing on 2 May the position of the company was untenable. The order of Major Bullock was ostensibly a legal one; under the facts shown by the record it was not so repugnant to military necessity or the usage of the service as to itself have constituted a criminal military offense (Davis, Mil. Law, p. 381 & notes); it admitted of no discretion by the junior officer and he could not under the circumstances and facts revealed here, with impunity, question its propriety or expediency even though it may have appeared to be arbitrary and unwise and fraught with evident danger to himself and the men of his command (Winthrop, 1920 Reprint, p. 572). The reasons impelling the actions of accused Egan properly were for the consideration of the court-martial and the reviewing and confirming authorities in determining the appropriate punishment but furnish no legal defense to the offense of which he legally was guilty.

6. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the findings and sentence with reference to accused Lieutenant LaLonde and legally sufficient to support the findings and sentence with reference to accused Lieutenant Egan.

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

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

Samuel M. Drewry, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 3 October 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the cases of First Lieutenant John G. Egan (O-1316499) and First Lieutenant Edwin J. LaLonde (O-1297904), both of the 184th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally insufficient to support the findings and sentences with respect to Lieutenant LaLonde and legally sufficient to support the findings and the sentence with reference to Lieutenant Egan. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence in the case of Lieutenant Egan. In the case of Lieutenant LaLonde the findings and sentence should be vacated.

2. Before final action is taken in the case of Lieutenant Egan it is suggested that investigation might reveal that the order given him to hold the company's position was illegal, or, if not in fact illegal, based upon culpably bad judgment. The record of trial and its accompanying papers do not sufficiently elucidate the tactical situation and the tactical plan pertaining to the higher units of which Lieutenant Egan's company was a part, to enable such determination to be made. If, as is evidenced by the testimony, an effort to hold the company position would have resulted in the annihilation of the company, or caused it either to lose or to hold the position with substantial loss of personnel to no military purpose, then it properly may be said that the order to hold was illegal and one which Lieutenant Egan was not required to obey. Under such a circumstance the decision to withdraw was a meritorious and praiseworthy one resulting in the saving of numerous lives and the avoidance of other casualities. Incidentally, if the order to hold was illegal, the authority who gave it is liable to appropriate disciplinary action. In connection with the order to hold, attention is invited to the fact that the evidence of record reveals that other lieutenants belonging to the company, with knowledge of the order to hold and despite such order, obeyed Lieutenant Egan's order to withdraw; if Lieutenant Egan's order to withdraw was in fact illegal these other lieutenants were also guilty of willfull violations of the order to hold. It is pertinent to observe that the record of trial reveals that the plan of operation of this company included a plan of withdrawal, should such action become necessary; it is therefore apparent that the tactical situation was not such that withdrawal of the company from its position was not previously considered as out of the question. So far as the record of trial is concerned it is also pertinent to observe that the withdrawal of this company apparently had no appreciable effect upon the general military operations nor did any serious consequences flow from it, because the situation was reoccupied the next day without any difficulty. In the event it is determined that the order to hold was in fact legal it is suggested that the needs of this case do not require the <u>execution</u> of the sentence of dismissal of Lieutenant Egan and in such event it is recommended that the sentence be approved but its execution suspended.

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3. When copies of the published orders in these cases are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published orders, as follows:

(CM P-417).

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

(As to accused Egan sentence remitted. GCMO 35, USAFP, 26 Oct 1945.)
((As to accused Lalonde sentence disapproved. GCMO 36, USAFP, 26 Oct 1945.)

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

Board of Review
CM P-432

31 August 1945.

UNITED STATES v. First Lieutenant HARRY L. CRISSEY (0-753498), AC, 544th Base Headquarters and Air Base Squadron.	)))))))	Trial by G.C.M., convened at APO 959, 5 July 1945. Dismissal, total forfeitures, confinement for two years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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

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

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that First Lieutenant Harry L. Crissey, Air Corps, 544th Base Headquarters and Air Base Squadron, then 396th Bombardment Squadron (M), 41st Bombardment Group (M), did, at the Halekai Officers' Club, Honolulu, T. H., on or about 1 June 1945, feloniously take, steal and carry away about $80.00, lawful money of the United States, property of Major John G. Goelker, 122nd Battalion, 13th Replacement Depot; about $160.00, lawful money of the United States, property of Lieutenant Quinlan Johnson, 396th Bombardment Squadron, 41st Bombardment Group; and about $14.00, lawful money of the United States, one diamond ring, 3/4 carat with a plain, graduated gold setting of the value of about $350.00, one wristwatch, "Slam," Swiss movement, black dial, of the value of about $40.00, one Ronson cigarette lighter, black, of the value of about $4.00, property of First Lieutenant Edward A. Logel, Chemical Office, Headquarters, Central Pacific Base Command; all of the total value of about $648.00.

The accused pleaded not guilty to, but was found guilty of, the charge and of the specification except that the values of the ring and lighter were reduced to $200.00 and $2.50, respectively, and the total value of the property stolen was reduced to $496.50. He was sentenced to dismissal, total forfeitures, and confinement at hard labor for two years. The reviewing authority approved the sentence and the confirming authority confirmed it, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on 1 June 1945 Major John G. Goekler, First Lieutenant Edward A. Logel and Lieutenant Quinlan M. Johnson went to the Halekai Officers' Club at Waikiki Beach, Honolulu, T. H. to go swimming. Each rented an individual locker with separate padlocks and keys, placed his clothes and valuables therein, locked it, and went swimming. Upon returning and unlocking their lockers Major Goekler and Lieutenant Johnson found that about eighty and one hundred and sixty dollars, respectively, had been extracted from their wallets (R. 6, 7; Pros. Ex. 1). Lieutenant Logel upon opening his locker found that there was missing fourteen dollars in cash, a diamond ring valued at $200.00, a wrist watch valued at $40.00, and a cigarette lighter valued at $2.50 (all values stipulated) (R. 10, 11, 12).

The larceny was reported to Lieutenant Robert A. Batdorff, CMP, who interviewed the accused on 3 June 1945. He noticed accused at that time was wearing a diamond ring similar to the one reported to have been stolen. He requested permission of accused to search his quarters but permission was refused. He then requested and received authority from the base commander to search accused's quarters and found a cigarette lighter and wrist watch subsequently proven to be those stolen from Lieutenant Logel.

After having been fully advised of his rights (R. 24) on 5 June 1945 accused gave Lieutenant Batdorff a statement in which he admitted that on the morning in question, while the locker room attendant was absent, he secured the keys to the lockers of Major Goekler and Lieutenants Logel and Johnson and took from their lockers about $275.00 in cash, a diamond ring, a wrist watch and a cigarette lighter. He left immediately thereafter and put $150.00 of the money in war bonds and expended $14.00 for a new watch band and $24.00 for having the diamond ring reset. He further stated he was not badly in need of the money, that at that time he was under an emotional stress due to matters beyond his control, and that "I must have been insane * * * I believe this action was caused by momentarily insanity" (Pros. Ex. 7).

Subsequently a "ladyfriend" of accused turned over to Lieutenant Batdorff $94.00 with which he reimbursed Major Goekler and Lieutenant Logel for their losses (R. 26). Accused also reimbursed Lieutenant Johnson the $160.00 which he had taken from his locker (Def. Ex. D).

The accused elected to take the stand and testified that the statement he had given Lieutenant Batdorff was substantially correct. When asked why he committed the larceny he replied "I am not sure; I really don't have any explanation at all. I was emotionally upset at that time" (R. 38). He stated that he was emotionally upset at the time of the offense because for a year he had been brought before his commanding officers to explain letters sent by his divorced wife through channels demanding money for the support of their child. At the time of the larceny he had no need of money, having two checking and a savings account and approximately $1,000.00 face value of war bonds. He also possessed a wrist watch and a cigarette lighter (R. 40).

The defense, by stipulation, introduced the statements of several officers who stated that accused was a capable pilot, well liked, did not drink, and had no bad habits (Def. Exs. A, B, & C).

4. The evidence is clear, and the accused admits, that at the time and place alleged he stole from the lockers of three of his brother officers cash and personal property of the value of $496.50. His only excuse was that he was "emotionally upset" and he "must have been insane". He admitted that he did not need the money, that he possessed a wrist watch and a cigarette lighter, and yet he perpetrated the theft in a bold and deliberate manner and his subsequent actions show no evidence of an unbalanced mind. The evidence is so clear of accused's guilt as not to warrant a more detailed discussion. The court properly concluded that accused was guilty.

As the sentence imposed is permissible whether the larcenies were alleged as one or several offenses, the accused was not prejudiced by the form of the specification herein, and an academic discussion thereof is deemed unnecessary.

Dismissal and confinement are authorized for conviction of a violation of Article of War 93.

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

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

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

Samuel M. Drury, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

(74)

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 1 September, 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of First Lieutenant Harry L. Crissey (0-753498), AC, 544th Base Headquarters and Air Base Squadron, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-432).

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

(Sentence ordered executed. GCMO 20, USAFP, 6 Sept 1945.)

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

30 August 1945

Board of Review
CM P-442

UNITED STATES v. Private HENRY J. DOBBELAERE (6933081), Company G, 172nd Infantry.	Trial by G.C.M., convened at APO 43, 20 July 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. Federal Reformatory, El Reno, Oklahoma.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

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

Specification: In that Private Henry J. Dobbelaere, Company G, 172nd Infantry, APO #43, c/o Postmaster, San Francisco, California, did at APO #43, c/o Postmaster, San Francisco, California, on or about 10 March 1945 desert the service of the United States by absenting himself without proper leave from his organization with intent to avoid hazardous duty, to wit: combat duty as an Infantryman in offensive operations against the enemy, and did remain absent in desertion until he was apprehended at APO 75, c/o Postmaster, San Francisco, California, on or about 17 June 1945.

CHARGE II: (Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification 1: In that Private Henry J. Dobbelaere, Company G, 172nd Infantry, APO #43, c/o Postmaster, San Francisco, California, with intent to defraud at APO 75, c/o Postmaster, San Francisco, California, did on or about 16 June 1945, unlawfully pretend to one Rufino Halili that he was an intelligence officer of the United States Army, acting in an official capacity, well knowing that said pretenses were false and by means thereof did fraudulently and feloniously extort from the said Rufino Halili the sum of one thousand pesos in lawful currency of the Commonwealth of the Philippines of value $500.00 and one Colt revolver caliber 32 of the value about $22.75.

Specification 2: In that Private Henry J. Dobbelaere, Company G, 172nd Infantry, APO #43, c/o Postmaster, San Francisco, California, did on or about 16 June 1945 wrongfully impersonate an officer of the United States Army by wearing the uniform of a First Lieutenant of the United States Army.

Specification 3: In that Private Henry J. Dobbelaere, Company G, 172nd Infantry, APO #43, c/o Postmaster, San Francisco, California, with intent to defraud at APO #75, c/o Postmaster, San Francisco, California, did on or about 2 June 1945 unlawfully pretend to one Feliciano Conwi that he was an intelligence officer of the United States Army, acting in an official capacity, well knowing that said pretenses were false and by means thereof did fraudulently and feloniously extort from the said Feliciano Conwi the sum of two thousand pesos in lawful currency of the Commonwealth of the Philippines of value $1000.00.

The accused pleaded to the Specification of Charge I, by appropriate exceptions and substitutions, not guilty of desertion but guilty of absence without leave. He pleaded not guilty to Charge I but guilty of a violation of the 61st Article of War and not guilty to Charges II and III and their respective specifications. He was found not guilty of Charge II and its Specification and guilty of Charge III and the specifications thereunder. As to the Specification of Charge I he was found not guilty of desertion but guilty of absence without leave by the same exceptions and substitutions set forth in his plea, and of Charge I not guilty but guilty of a violation of the 61st Article of War. He was sentenced to dishonorable discharge, total forfeitures and confinement

at hard labor for thirty years. The court considered one previous conviction by special court-martial. The reviewing authority approved only so much of the findings of guilty of Specification 1 of Charge III as involves a finding of guilty of extorting one thousand (₱1,000) pesos of the value alleged and one Colt revolver, caliber .32, of some substantial value not in excess of twenty ($20.00) dollars, at the time and placed alleged; approved the sentence; reduced the period of confinement to ten years; designated the Federal Reformatory, El Reno, Oklahoma, as the place of confinement; and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

Prior to 0600 hours on 11 March 1945 the accused, who was a member of Company G, 172nd Infantry, absented himself without leave and remained absent from his organization until he was apprehended by the military police at the Club Morocco, Manila, on 17 June 1945 (R. 6-9, 16, Exs. 1 and 2). At the time of his arrest he was wearing the insignia of a first lieutenant (R. 16, Ex. 5). On or about 10 March 1945 the accused's organization had been briefed on the tactical situation and contemplated mission. The men had been warned by the company officers respecting leaving the company area and the consequences of desertion in war time (R. 6, 9). The accused was present at these talks (R. 6, 8).

On 1 June 1945, during the period accused was absent without leave, he donned the uniform of a second lieutenant and, accompanied by "Lieutenant Caniza," went to the premises at 649 Galicia Street, Manila. There he talked to a Miss Connie Montinola (R. 10). Accused introduced himself as "Lieutenant Tennant"; said that he was from G-2, GHQ and that he wanted to see Miss Montinola's brother-in-law, one Feliciano Conwi (R. 10-11). He said in substance that Mr. Conwi was a Japanese collaborator and that he wanted to take him to headquarters for investigation (R. 11). Miss Montinola offered to help him and the three of them proceeded to San Juan. They were unsuccessful in their search (R. 11).

Feliciano Conwi testified that he first saw the accused at St. Anthony's Hospital on 2 June 1945. Accused introduced himself as Lieutenant Tennant of G-2 and said he was arresting Conwi because he "was a Japanese collaborator" (R. 12). Accused put Conwi in arrest, took him out to an automobile and said he was going to "Bilibid." Instead of going to the prison the car proceeded to the Liberty Hotel in Manila. The accused had a room there and both of them went to that room (R. 12). Accused locked the door and told Conwi he would find himself in "hot water" if an unfavorable report was turned in and that he (Conwi) "could be sentenced to six to nine years imprisonment" (R. 12-13).

Conwi, continuing his testimony, said, "He told me that I am a pro-Jap and held parties in my house three times a week and I have two cars in my possession right now and it depends on him what reports he gives to his Captain and he says he can settle the matter with the Captain whatever his report is. * * * He asked what I wanted, money or my good reputation. He said, 'You have a good reputation and money doesn't count.' I asked what he meant. He said, 'Give me 5,000 pesos and I will fix everything.' * * * I said, 'I am not a collaborator.' He said I would be sentenced to twenty years. * * * He was insisting on the money but I said I was hard up. * * * He said, 'You can get money from some of your friends. I know you have two cars and own your house'" (R. 13). Conwi obtained a loan of 2,000 pesos from a friend and turned it over to the accused (R. 13-14). The next time he saw the accused was in the courtroom (R. 12, 14).

On 16 June 1945 the accused, again dressed in an officer's uniform and accompanied by "Another officer," called at the home of one Rufine Halili (R. 14-15). Accused told Mr. Halili that he was investigating him on three counts: first, Japanese collaboration; second, illegal possession of firearms; and third, possession of G.I. goods and looted goods. Halili protested his innocence; said that he had been one of the Philippine guerrilla fighters and did have a revolver. Accused said, "Having a revolver is sufficient to condemn you to three to five years imprisonment and five to ten thousand peso fine" (R. 14-15). Halili told the accused that he had a license to possess the revolver to which the accused replied, "This case is very serious because you are not cooperating with the United States Government * * * " (R. 15). Halili's wife injected the comments to the effect that they had the revolver in good faith, that they had five children but were willing to surrender the revolver if its possession was illegal. At the direction of accused his companion "officer" and Halili's wife left the room. Accused then said to Halili, "You are going to lose your reputation and now come across with 3000 pesos because my report will be submitted tonight. If I put in my report that you are guilty you are guilty. Your assistant mayor and other big shots are in Bilibid prison" (R. 15). Halili then gave the accused 1,000 pesos and a diamond ring. The accused was to keep the ring as security until Halili could get 2,000 pesos more and deliver it the next day (R. 15). It was agreed that they would meet at the Club Morocco in Manila at 1600 hours on 17 June 1945 (R. 16). Accused left, taking with him the 1,000 pesos, the diamond ring and the revolver (R. 15-16). Halili reported the matter to the Provost Marshal's office and at the appointed time and place he, accompanied by a government agent, met the accused. Accused was taken into custody (R. 16).

Agents from the Criminal Investigation Department after they had "explained" the 24th Article of War to the accused, obtained from

him two unsworn statements in which he admitted substantially all the facts respecting his obtaining money under threats and false pretenses from Conwi and Halili, his impersonating an officer and his absence without leave. He denied any intention to desert (R. 16-20, Exs. 4 and 5).

4. The evidence for the defense:

The accused elected to take the stand (R. 21), but testified respecting the desertion charge only. He said that his organization came out of a combat area in the mountains on 3 March 1945 and camped in the vicinity of Nichols Field near Pasig (R. 22); that he was "under the impression they were in a rest camp" (R. 22); that about 1100 hours on 4 March he and a companion, Private Bob Free, went to Manila just to see the place; that they bought some whiskey and got drunk; that they walked around Rizal Avenue until the eleven o'clock curfew, when they started back to camp; that they caught a ride but that his buddy (Bob Free) thought they were on the wrong road so they got off and started walking, ending up in Manila about three o'clock in the morning (R. 22). Under cross examination he admitted that all the men were told by the company commander "they could not leave camp" (R. 23), and that he nevertheless left without permission (R. 24). Accused admitted also that he was absent approximately three and one-half months and that he made no effort to turn in to any military organization in the interim (R. 24).

5. The evidence amply sustains the finding that the accused was absent without leave from 11 March 1945 to 17 June 1945 (Spec., Chg. I), during part of which time accused impersonated an officer in the Army of the United States (Spec. 2, Chg. III). Impersonating an officer is an offense punishable under Article of War 96 (MCM, 1928, par. 152a). In Specifications 1 and 3 of Charge III it is alleged that the accused did, by unlawfully pretending that he was an intelligence officer of the United States Army acting in an official capacity, fraudulently and feloniously extort from the respective individuals named in such specifications, certain currency and property. Extortion is the wrongful taking or obtaining of another's property by threats or other conduct of a character likely to produce fear in the mind of a reasonable man and it is not material that the person against whom the extortion is exercised is guilty of the act threatened to be exposed or of the offense charged (35 C.J.S. 296; CM P-44, Roush, et al, July 1945; Commonwealth v. Buckley, 148 Mass. 27; Daniels v. United States, 17 Fed. 2d 339).

Blackmail is "equivalent to, and synonymous with, 'extortion,'— the exaction of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not infrequently it is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies, or the crimes of the victim. Edsall v. Brooks,

3 Rob. (N.Y.) 284, 17 Abb. Prac. 221; Life Ass'n v. Boogher, 3 Mo. App. 173; Hess v. Sparks, 44 Kan. 465, 24 P. 979, 21 Am. St. Rep. 300; People v. Thompson, 97 N. Y. 313; Utterback v. State, 153 Ind. 545, 55 N. E. 420; Mitchell v. Sharon (C. C.) 51 F. 424; In re Mills, 104 Wash. 278, 176 P. 556, 562" (Black's Law Dictionary, 3d Ed., p. 225).

In military law both blackmail and extortion are offenses punishable under the 96th Article of War (CM P-44, Roush, supra; Winthrop's Military Law and Precedents, 1920 Reprint, pp. 720-732). Difficulty is often encountered in determining whether a particular offense is blackmail or extortion and while in most instances the question is academic, here the accused's conduct must be placed in one category or the other because confinement in a federal reformatory was imposed, and confinement in an institution of the penitentiary type is not authorized except as provided in Article of War 42. The federal extortion statute (18 U.S.C.A. 171) does not authorize confinement in a penitentiary for more than one year, whereas a blackmail statute (Section 22-2305, District of Columbia Code) authorizes confinement in a penitentiary for a period in excess of one year. Under Article of War 42, with certain exceptions not here applicable, no person may be sentencedto confinement in a penitentiary unless the offense of which he was found guilty is punishable by penitentiary confinement for more than one year by a United States statute of general application within continental United States (except Section 289 of the United States Penal Code—also not applicable here) or by the Law of the District of Columbia (A.W. 42; MCM, 1928, par. 90a).

At common law extortion is a form of malfeasance or misfeasance in office (Miller's Crim. Law, Hornbook Series (1934) sec. 162; 35 C.J.S.298). The offense implies a wrongful act being committed by a public officer de jure or de facto (Kirby v. State, 57 N. J. Law 320; 31 Atl. 213). For example, it is extortion for a constable to obtain money for discharging a void search warrant (Hanley v. State, 125 (Wis.) 396; 104 N.W. 57). It is also extortion for a public official to demand money as a condition to allow a just claim against a public corporation (In re Shepard, 161 (Cal.) 171, 118 Pac. 513).

The United States Criminal Code, Section 85 (18 U.S.C.A. 171) limits extortion to offenses committed by de facto or de jure federal officers or agents acting under color of their office (United States v.Kelly, 86 Fed. (2d) 613; United States v. Schlierholz, 133 Fed. 333, 335; United States v. Germaine, 99 U. S. 508; United States v. Waitz, 28 Fed. Cases 386; United States v. Reisley, 35 Fed. Supp. 102; 35 C.J.S. 302; 22 Am. Jur. 235). Blackmail, on the other hand, may be committed by any individual (22 Am. Jur. 238). " * * * a person is guilty of blackmail who either verbally or by any letter or writing * * * demands of any person, with menaces of personal injury, any chattel, money, or other valuable security, or who accuses or threatens

to accuse, * * * any person of any crime punishable by law, or of any immoral conduct, which, if true, would tend to degrade and disgrace such person, or in any way to subject him to ridicule or contempt of society; * * * or with any intent to compel the person threatened to do any act against his will". (Underscoring supplied) (22 Am. Jur. 239. See also State v. Hammond, 80 Ind. 80; Commonwealth v. Buckley, 148 (Mass.) 27; 18 N.E. 577).

In the light of the above principles the offense which the accused committed constitutes blackmail as the term is legally and generally understood (35 C.J.S. 296). Confinement in a penitentiary (reformatory) is authorized by Article of War 42 for the offense of blackmail, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-2305 of the Code of the District of Columbia.

The maximum confinement which may be imposed for blackmail is five years (MCM, 1928, par. 104c; Dig. Op. JAG, 1912-1940, par. 402 (14); District of Columbia Code, Sec. 22-2305). The other offenses of which the accused was found guilty authorize the additional confinement imposed (MCM, 1928, par. 104c). The offense of blackmail alone carries with it penitentiary confinement. In this case, however, the entire ten year period of confinement may be served in an institution of penitentiary character under Article of War 42 which provides that " * * * upon conviction of two or more acts or omissions, any one of which is punishable under these articles by confinement in a penitentiary, the entire sentence of confinement may be executed in a penitentiary."

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson A. Clements, Judge Advocate.
Major, J.A.G.D.

Jonas V. Robinson, Judge Advocate.
Major, J.A.G.D.

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

1 September 1945

Board of Review
CM P-455

UNITED STATES v. Corporal ARNETT WITHERSPOON, JR. (34793498), Company A, 810th Engineer Aviation Battalion.	Trial by G.C.M., convened at APO 70, 8 June 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Corporal Arnett Witherspoon, Jr., Company "A", 810th Engineer Aviation Battalion, did, at APO 70, on or about 13 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Percy E. Cobb, Company "A", 810th Engineer Aviation Battalion, a human being by shooting him with a carbine.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge and was sentenced to be shot to death with musketry. Pursuant to Article of War 40 and the Manual for Courts-Martial, 1928, paragraph 83, the reviewing authority reconvened the court to "consider vacating their previous sentence and adjudging a

sentence of life imprisonment." The accused was resentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On 13 May 1945 Corporal Arnett Witherspoon, the accused, and Private Percy E. Cobb, the deceased, were both members of Company A, 810th Engineer Aviation Battalion (R. 6-7). On the morning of that day the accused was assigned the duty of collecting ammunition and firearms throughout the company area (R. 28). In the course of his duties he came into a tent which was occupied by Sergeant Malcolm Lett and others (R. 28). A carbine belonging to Newman Johnson, one of the other occupants, was hanging on the center pole (R. 28-29). Accused picked up some ammunition, took a carbine clip off the table, took Johnson's carbine, saying "the gun isn't supposed to be in the tent," and left (R. 28-30). About 15 or 20 minutes later Sergeant Lett heard some shots being fired in another tent (R. 30).

About 1100 hours and within a short time after accused left Sergeant Lett's tent he entered a pyramidal tent occupied by Private Percy E. Cobb (R. 6). Present in that tent were Private Edward Dillon, who was lying down on his bunk (R. 6), Private Percy E. Cobb, who was sitting on a chair, two girls and an old lady (R. 8). Accused proceeded to look for ammunition. Cobb said to him that he would never find all the ammunition there was around the company. The accused replied that he had orders to pick up all ammunition. Cobb then said, "You ain't got no orders to look in my locker." Accused admitted that that was so (R. 7, 12). There were no harsh words or argument of any kind between accused and Cobb (R. 10, 13). Accused put all the ammunition he could find in a barracks bag that he was carrying. He then backed off toward a corner of the tent; put a bullet in the chamber of the carbine he had taken from Sergeant Lett's tent; told Cobb "to get the 45"; "told the girl to move" and before Cobb could say anything started firing (R. 12, 13). Cobb got up from the chair, took several steps forward and fell to the floor dead (R. 12-14).

Three or four shots were fired, two entering the head and one entering the body in the vicinity of the heart (R. 12-14). Accused "walked out of the tent" and went toward the orderly room (R. 14). In addition to killing Cobb, accused injured one of the girls. She was struck by a bullet (R. 15) and was taken to the "medics" by Pfc. Carlton Baker, who came running out of an adjoining tent (R. 25). Baker said he saw accused leaving Cobb's tent with the ammunition bag and the carbine over his shoulder (R. 20).

First Lieutenant Clifford D. Stock, the company commander, was in the orderly room when he heard the shots (R. 32). Proceeding to the scene he met the accused (R. 32). He took the carbine away from him and sent for a doctor and the officer of the day (R. 32-33). The accused did not appear drunk or intoxicated, he "seemed very controlled," and was obedient to Lieutenant Stock's orders (R. 33-34). Lieutenant Stock testified that he gave an order that morning to Sergeant Monroe to have all ammunition and rifles in the company area picked up and that the accused was Sergeant Monroe's assistant (R. 36). When Lieutenant Stock questioned him as to what happened accused said, "Cobb threatened me long enough" (R. 35).

The officer of the day made an examination of the tent and Cobb's belongings and was unable to find a .45 caliber pistol, although he did find a holster (R. 39). He found some live .38 caliber ammunition in Cobb's barracks bag and four empty carbine shells (R. 39-40, 42).

On the afternoon of the same day, the accused, having been advised of his rights, made a voluntary statement to Major Herbert C. Zilly, the investigating officer (R. 42-43), the substance of which is as follows:

Accused first saw Cobb on the morning of 13 May 1945 at the ball field. When he asked for the return of a fifty-peso loan, Cobb "got his Army .45 and said he didn't owe me any money." Accused did not argue the point but told his superior, the weapons sergeant, with whom he lived, about the incident (R. 12-13). It was at that time that the weapons sergeant (Sergeant Monroe) told accused to pick up all the ammunition in the company area that he could find. Accused got a barracks bag and started on his duties. Continuing, accused said, "Before I got to Cobb's tent I picked up a Carbine in Sgt. Lett's tent. * * * I picked up a Carbine magazine of ammunition off the table and placed it in the gun. From there I kept working from tent to tent until I got to Cobb's tent. I came in, and he had some Filipino women, some girls and women sitting around and lying on the beds. * * * I went around and looked for ammunition and picked up some M-1 ammunition from the beds. On the last bed I found some Carbine ammunition. I picked it up and Cobb told me not to take it, that it was his. I told him I had to take all ammunition and that he wasn't supposed to have a Carbine or Carbine ammunition. He said, 'You can get all the ammunition here, but you can tell Blake [the company commander who was succeeded by Lieutenant Stock] you can't go in my locker.' I told him I didn't want to look in his locker that 'I'll take all that's in sight.' * * * He said, 'You can go. You got it all,' But I saw some more ammunition and went to get it from under the bed. Then I started out of the tent. He said something and got up from the chair and started toward me. * * * He was cursing when he got up out of the chair.

He was very close up on me and I backed up along side the tent. I injected a cartridge in the gun because it didn't have any in it and when he kept coming I shot. I think I fired 3 shots. * * * Right after the last shot was fired he fell forward on his face. * * * I gave the gun to a Lieutenant - I don't remember which one - on the way to the orderly room. * * * Cobb gambles and when he loses he borrows money. I needed money to send home" (Ex. 4).

4. The evidence for the defense:

Sergeant Willie P. Monroe, the weapons sergeant, testified that about 1000 hours on 13 May the accused told him that "Cobb had drawn a gun on him and attempted to kill him. * * * I told him to forget it and I gave him an order to go pick up some ammunition in the company" (R. 45). This witness said that he knew of his own knowledge that Cobb had a .45 caliber automatic (R. 45); that he reported the matter to the company commander and the company commander told him to pick up all the guns; that he asked Cobb for the pistol but that it was not turned in (R. 47).

The accused testified substantially in accordance with his pretrial statement (R. 47-56). He said that when he asked Cobb about repaying the twenty-five dollar loan Cobb "runs his hand in a pocket and starts to take it out. He says 'Hell, I ain't going to pay you.' --he answers me and he put a pistol in my face" (R. 48). Accused reported the matter to Sergeant Monroe "so that he could tell the officers and the officers can take it back, take the gun from him" (R. 48). The facts relating to accused's gathering up of the ammunition; his obtaining of the carbine in Sergeant Lett's tent; his entry into Cobb's tent and his firing at Cobb are all in substantial accord with the prosecution's case and accused's pretrial statement. Accused asserted that Cobb was drunk; that he (accused) acted in self-defense and that he was in fear of his life "Because he [Cobb] threatened me that morning, just before the incident" (R. 49). He insisted that Cobb moved toward him "cussing" and that he (accused) moved back before firing the first shot (R. 50). "He came toward me as though he wanted to take the gun I had" (R. 51). " * * * I backed alongside the tent and I shot again. He then wheeled and fell. * * * I remember shooting three times" (R. 54).

5. There is ample evidence in the record upon which the court could find that the accused with malice aforethought and premeditation wrongfully killed Private Percy E. Cobb (MCM, 1928, par. 148a; CM P-456, Hawkins, 28 August 1945; CM P-100, Roberts, 19 July 1945; CM POA 346, Hill; CM P-270, Braggs, 13 August 1945).

The court was not duty bound to find that the accused acted in self-defense. In CM P-369, McFarland, 19 August 1945, the Board of Review said:

"Difficulty is encountered not only in determining whether the retreat was sufficient but also whether the danger was of such a nature as to place the accused in fear of bodily harm. Fear of a coward that great bodily harm was about to be inflicted upon him will not justify a homicide in self-defense (State v. Allen, 35 So. (La.) 495), nor will an unwarranted fear of bodily harm justify a homicide in self-defense (Vol. 1, Wharton's Crim. Law, 12th Ed., secs. 620-626). Some cases hold that it is the defendant's honest belief as to the extent of the danger that controls (Thomas v. State, 16 So. (Ala.) 4). Other jurisdictions hold that the danger must be such as would place a 'reasonable man' in fear (Allen v. United States, 164 U.S. 492).

"In military law the rule is stated in the Manual for Courts-Martial, 1928, paragraph 148a as follows:

> "'To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty * * * .'

"In CM 235044, Winters, Jr., 21 B.R. 265, 271, the following is stated:

> "'But before one may take the life of his assailant, he must reasonably believe that his life is in danger or that he is in danger of suffering great bodily harm, and he must also reasonably believe that it is necessary to kill to avert the danger (Acers v. U.S., 164 U.S. 388; Davis v. Peo., 88 Ill. 350; State v. Thompson, 9 Iowa 188, Wesley v. State, 37 Miss. 327; Smith v. State, 25 Fla. 517, 6 So. 482). Furthermore, he must retreat if by so doing he may lessen the danger (16 Harv. Law Rev. 567; 12 Iowa Law Rev. 171; 18 A.L.R. 1279). As one court expressed it:

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

"And as said by another court:

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

"Whether upon all the facts and circumstances in this case there was a showing that the accused made adequate retreat and had reasonable cause to fear bodily harm to himself presents a question of fact which the court determined adversely to him."

There are no errors injuriously affecting the substantial rights of the accused. A controverted issue of fact was presented which the court, within its province, decided in favor of the prosecution.

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452; 455).

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

Samuel M. Drew, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Joseph S. Robinson, Judge Advocate.
Major, J.A.G.D.

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

28 August 1945

Board of Review
CM P-456

UNITED STATES v. Private First Class PETER F. HAWKINS (18023260), 92d Quartermaster Railhead Company.	Trial by G.C.M., convened at APO 70, 13 July 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, DRUMMOND and ROBINSON
Judge Advocates.

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

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

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

Specification: In that Private First Class Peter F. Hawkins, 92d Quartermaster Railhead Company, did, at APO 70, on or about 25 April, 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Harold Marion, 4188th Quartermaster Service Company, a human being by shooting him with a carbine.

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

Specification 1: In that Private First Class Peter F. Hawkins, 92d Quartermaster Railhead Company, did, at APO 70, on or about 25 April, 1945, with intent to commit a felony, viz, murder, commit an assault upon Private Wash Harris, 4188th Quartermaster Service Company, by willfully and feloniously shooting the said Private Wash Harris in the right thigh with a carbine.

Specification 2: In that Private First Class Peter F. Hawkins, 92d Quartermaster Railhead Company, did, at APO 70, on or about 25 April, 1945, with intent to commit a felony, viz, murder, commit an assault upon Corporal William H. Austin, 92d Quartermaster Railhead Company, by willfully and feloniously shooting the said Corporal William H. Austin in the left leg with a carbine.

Specification 3: In that Private First Class Peter F. Hawkins, 92d Quartermaster Railhead Company, did, at APO 70, on or about 25 April, 1945, with intent to commit a felony, viz, murder, commit an assault upon Private First Class James W. Washington, 4188th Quartermaster Service Company, by willfully and feloniously shooting the said Private First Class James W. Washington in the left foot with a carbine.

Specification 4: In that Private First Class Peter F. Hawkins, 92d Quartermaster Railhead Company, did, at APO 70, on or about 25 April, 1945 with intent to commit a felony, viz, murder, commit an assault upon Private First Class Joseph Samuels, 4188th Quartermaster Service Company, by willfully and feloniously shooting said Private First Class Joseph Samuels in the right foot with a carbine.

The accused pleaded not guilty to, but was found guilty of, all specifications and charges, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The court considered one previous conviction by summary court-martial. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 25 April 1945 about 1205 hours, the accused, a member of the 92nd Quartermaster Railhead Company, was at the officers' mess hall in the company area talking to Captain Wright, his company commander. He had been drinking nipa, his eyes were red, his tongue was thick and he was "a bit unsteady on his feet" (R. 7, 9, 16, 17). He was "intoxicated" but not "drunk," in the opinion of First Sergeant Josef Woodson, who observed him at that time, "because I [Woodson] define drunkenness as one who is out * * * " (R. 9). Sergeant Woodson told the accused to go to bed and take a rest, whereupon accused went to his tent (R. 7).

Accused was next seen about 1230 hours in his tent with Corporal William H. Austin, and several other enlisted men of his company (R. 10, 15, Ex. C). He and Corporal Austin talked about some cookies, there was some further conversation between them, and "one word led to the other." Accused "got up and put his hand on the carbine" and Austin told him "to turn it loose." Accused refused to do so whereupon Austin "snatched the rifle." In the ensuing struggle the accused

was pushed or fell to the floor; Austin was "on top" and took the carbine away from him. They shook hands and accused told Austin that "everything was over * * * " and that they were still friends (R. 10, 15-16). Accused then left the tent (R. 10, 12).

Shortly thereafter Sergeant Woodson, who was on his way to the orderly room, saw accused approaching "with two rifles." His eyes were very red and he had grass in his hair. Woodson asked him what the "trouble" was, and the accused "burst into tears" and said, "I'm tired of these GI corporals fucking with me." When Woodson asked him to give up the rifles, accused placed one of them on the ground and said, "You can have this one but I'll keep the other." Sergeant Lois Jackson and Private Norman Harris came up behind the accused and took the rifle away from him (R. 7, 11, 18). Accused was then taken to his tent by Sergeant Jackson at the direction of Sergeant Woodson (R. 7).

A short time later accused, who was then in the tent area with a rifle in his hands, asked, "Where is Austin?" Sergeant Woodson, who had approached to within fifty feet of the accused, told him to put the rifle down. Accused put the weapon to his shoulder, "manipulated the bolt," said "You better get out of the way," and started firing in the direction of Austin, who ran toward a nearby road which extended through the company area (R. 7-8, 19). When Austin reached the road he fell in front of an approaching truck, making it necessary for the driver to stop the vehicle (R. 19, 24). A bullet struck Austin in the left leg (R. 24, Ex. B). The truck, which was loaded with soldiers, was on its way from the subsistence dump where the men worked to their organization "chow." The firing continued after the truck had stopped and the following occupants sustained bullet wounds: Private Wash Harris, in the right thigh; Private First Class James W. Washington, in the left foot; Private First Class Joseph Samuels, in the right foot; and Private Harold W. Marion, in the sacral region involving the peritoneal cavity. Private Marion died on 26 April 1945 as a result of the wound (R. 21-22, 24, Ex. B).

Second Lieutenant Joseph E. Alexander testified that he saw the accused immediately after the shooting. Accused had been crying and his mouth was bleeding slightly. Although the "smell" indicated that he had been drinking and his voice was not very "clear or distinct" the accused was not drunk in the opinion of Lieutenant Alexander (R. 25-26).

On 30 April 1945, after he had been informed of his rights under the 24th Article of War and had been told that "anything he said could be used for or against him," accused made a voluntary statement (Ex. C) substantially as follows:

About 1230 hours on 25 April accused entered his tent where some other soldiers were talking and a few minutes later Corporal Austin accused him of stealing some cookies from Austin's duffle bag. Accused denied taking them and started to show that he did not have them in his own duffle bag, but when his back was turned he received a blow on his right shoulder which knocked him onto the bed. He looked up and saw Corporal Austin standing over him with a carbine in his hand. Accused said "That's all right, Austin, you've got me now." Without making any reply Austin put the carbine down and left the tent. Prior to the "argument" accused had consumed two-thirds of a twelve ounce bottle of "GI Alcohol" and native "Nepa" wine mixed together. He was, therefore, "rather hazy as to the exact details" of the incident.

After Austin left, accused picked up two carbines which were under his cot and started to go to the orderly room when he met Sergeant Woodson, who told him to give them up. Accused gave him one of the carbines but was not "certain" whether or not he gave up the other. On the way back to his tent accused saw Corporal Austin. He did not recall whether he first went to his tent but remembered having a carbine in his hands. He "wanted to shoot him [Austin] in the legs so as to cripple him" because Austin had humiliated accused in the presence of his friends. When he was about thirty feet from Austin accused said, "There he is" and Austin started to run to the roadway. Accused fired twice at his legs and, thinking that he had missed, fired two more shots, whereupon Austin fell to the ground just as a truck stopped in front of him. Accused did not "recall firing anymore shots but someone came up from behind" him and "grabbed the carbine * * * " (Ex. C).

4. The defense offered no evidence. The accused elected to remain silent (R. 28).

5. It is established by the undisputed evidence that following an altercation with Corporal William H. Austin in the course of which Austin threw accused to the ground and took a carbine away from him, the accused again armed himself with a carbine, sought out Austin and fired several shots at him as he fled to a road running through the company area. One of the bullets wounded Austin in the leg. Others struck and wounded four occupants of a truck which happened to be on the road at that time. One of them, Private Harold Marion, died next day as a result of the wound thus inflicted.

Accused is charged with the murder of Private Marion (Spec., Chg. I). Murder is the killing of a human being with malice aforethought and without legal excuse or justification. Malice does not necessarily involve hatred or personal ill will toward the person killed nor an actual intent to take his life, but may mean that preceding or

coexisting with the act by which death is caused the accused entertained an intention to cause the death of, or grievous bodily harm to, any person, whether or not such person is the one actually killed (MCM, 1928, par. 148a).

In the present case accused fired at Corporal Austin without legal excuse or justification. If he had killed Austin the requisite malice would have been established since he intentionally fired several times with a weapon likely to cause death or serious bodily harm at a man with whom he had had a recent altercation (MCM, 1928, par. 112a; 1 Wharton's Crim. Law, 12th Ed., par. 519). The fact that he missed his aim and killed a person other than the one he intended to kill does not excuse him or reduce the degree of the homicide (CM P-105 Nichols (26 July 1945)).

In the specifications of Charge II it is alleged that accused assaulted with intent to murder Corporal Austin (Spec. 2) and each of three other soldiers who were riding in the passing truck (Specs. 1, 3 and 4). It reasonably may be inferred from the attendant circumstances including the character of the weapon used and the manner of its use that in firing the shots from his carbine it was the purpose and intention of accused to unlawfully kill Corporal Austin (CM P-100 Roberts (19 July 1945)). When, as to some of the shots, he missed his aim and wounded the three soldiers in the truck, his intent to murder Austin was transferred to them (CM 248102, Roberts, 31 B.R. 121; Bull. JAG, July 1944, p. 286). He was, therefore, properly found guilty of assault with intent to murder each of the persons injured by the bullets.

6. Accused had been drinking intoxicating liquor prior to the commission of the offenses charged and one witness testified that he was intoxicated. Another witness who had an opportunity to observe him soon after the shooting testified that accused was not drunk. Voluntary drunkenness 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 circumstances of this case, including accused's repeated rearming of himself after being twice disarmed, his ability to recognize Corporal Austin and the first sergeant, and, despite his assertions to the contrary, his clear recollection at the time of making his pretrial statement, of incidents leading up to and accompanying his assault upon Austin, indicate that accused was capable of forming an intent to murder and of entertaining malice aforethought (See CM 238771, Lineberger, 24 B.R. 345; CM 241176, Petty, 26 B.R. 213).

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

in a penitentiary is authorized by Article of War 42 either for the offense of murder or for the offense of assault with intent to murder, each of which is recognized as an offense of a civil nature and punishable by penitentiary confinement, murder by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454) and assault with intent to murder by Section 22-501 of the Code of the District of Columbia.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

Joseph Robinson, Judge Advocate.
Major, J.A.G.D.

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

Board of Review
CM P-457

5 September 1945

UNITED STATES v. Private OZELL LOUIS (38308688), 2nd Platoon, Company A, 429th Signal Heavy Construction Battalion.	)	Trial by G.C.M., convened at APO 719-1, 9 July 1945. Death.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Ozell Louis, 2d Platoon, Company "A", 429th Signal Heavy Construction Battalion, did, at APO 705, on or about 9 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Lanardo Edradan, a human being, by shooting him with a carbine.

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

Specification 1: In that Private Ozell Louis, 2d Platoon, Company A, 429th Signal Heavy Construction Battalion did, at APO 705, on or about 9 April 1945, with intent to commit murder, commit an assault upon Antero Paredes, by willfully and feloniously shooting the said Antero Paredes in the neck with a carbine.

Specification 2: In that Private Ozell Louis, 2d Platoon, Company A, 429th Signal Heavy Construction Battalion did, at APO 705, on or about 9 April 1945, with intent to commit rape, commit an assault upon Teodora Badinas, by willfully and feloniously, and against her will, grappling with her and attempting to undress her by tearing her clothing.

The accused pleaded not guilty to, but, all members of the court concurring, was found guilty of, the specifications and the charges, and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence and the confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence shows that on the morning of 9 April 1945 Lanardo Edradan (the deceased), his wife Teodora, and Antero Paredes were at the Barrio of Canigaran where they had gone to purchase some fish (R. 20). Having completed the purpose for which they had come they started for their home at Malemec which was about 3 kilometers away (R. 19). After having walked about 1 kilometer they were joined by a negro, Ozell Louis (the accused), armed with a rifle and wearing fatigues, no shoes and a helmet (R. 9, 20), who asked them for a match, stating that he would go with them for a short walk and would then return to his base. They proceeded along the beach and as they approached some water the negro gave Paredes his gun, rolled up his pants and took the rifle back. After they had walked about 50 meters they approached a "mangrove" and the negro, walking a "little behind", fired a shot hitting Paredes in the back of the neck, the bullet coming out at his jaw (R. 20, 21). He immediately fired another shot hitting Edradan (R. 10) in the side, the bullet entering his right lateral chest piercing both lungs and the thoracic aorta and emerging from the left side of the body causing his death instantly (R. 29; Pros. Ex. E). The accused then grabbed Teodora by her wrists, dragged her to the mangrove trees which were about 10 meters away (R. 10), hit her on the side of the face, and, after having pulled her further into the woods, attempted to remove her clothes, "unbuttoned his trousers" (R. 68) and tried to "put her down" (R. 11, 22). At that time she struggled (R. 17, 69), screamed, and called for help (R. 12, 22). He turned her loose but when she fled tried to follow her (R. 12). She then returned to the home of her father at Canigaran and reported the incident. At that time her father noticed that her dress was torn on the "sides and the front" (R. 67).

About 1000 hours on the morning in question Master Sergeant Theodore DeWise and Sergeant Berry were called to the Barrio of Canigaran and questioned Teodora, the wife of the deceased. She led them to the scene of the crime (R. 37) where they found the body of the deceased and showed them the direction her assailant had taken. They followed her directions and found a carbine, serial number 2094765 (R. 45) leaning against the roots of a tree (R. 38). The carbine was subsequently turned over to First Lieutenant

Joseph Hickey of the Military Police and was found to have been issued to Private Powell Blair of accused's unit (R. 59) and lost by him when he embarked at Sansapor (R. 58, 60). When examined it had 13 rounds of ammunition in the clip which held 15 rounds when full (R. 48, 49).

Private First Class Calvin H. Ward, the mail orderly of the 1943rd Quartermaster Truck Company, and Private First Class Frank Roland Lewis and Corporal James Powell were returning from the post office in a "jeep" at about 10:00 o'clock. As they got out on the main road they picked up the accused (R. 31, 33, 35). He was wearing a fatigue hat and a pair of wet fatigue trousers which were rolled up almost to his knees. He did not have on any shoes (R. 31, 34). Upon being asked "where he had been" accused replied "fishing". At that time he had no fishing tackle or gun with him. Accused did not seem "upset or nervous" and talked in a normal manner (R. 33, 35, 36). They dropped him off at the 6th Service Group Headquarters (R. 34).

About 9:00 o'clock on the morning in question Captain William H. Shaw, the company commander, went to the motor pool and saw accused's truck on the "deadline" but did not see accused. He inquired of accused's whereabouts and had the motor sergeant look for him but he could not be found. When accused returned to the area about 10:30 the motor sergeant had him report to the Captain who inquired of him where he had been (R. 51). Accused told the Captain that he had been in the area of the 42nd Bomb Group to get some Philippine invasion money from some Filipino. "Who the Filipino was he didn't seem to know" (R. 51). He subsequently stated to Major Leslie F. Diekvoss, the investigating officer, that on the morning in question he went to the tent next door and without permission picked up a gun which he subsequently returned (R. 76) and

> "* * * left the camp area without permission; came to an area north of the Fighter Command and here he sat down and waited for a Filipino. This Filipino was going to give him some Japanese invasion money. The Filipino didn't show up so Louis stated he walked out into the water to catch minnows. After that he came through the Fighter Command area, walked up to the main road where he was picked up by three colored boys" (R. 75).

A rifle inspection of accused's unit was held at 1:00 that same day. The inspection revealed four rifles missing, three of which had been previously reported as having been lost. The rifle of accused, serial number 51505 (R. 56) was missing.(R. 52, 58). Upon being questioned about its loss accused stated that he had left it in "the vehicle in the motor pool" and that "it had been taken out of it" (R. 52). It

developed that accused had sold it to a Filipino in the "Early part of April" (R. 72) and that the Filipino had had it continuously in his possession until it was confiscated on 10 May 1945 (R. 73).

Captain Shaw was requested by the Provost Marshal to have a line up about 12 April 1945 and was advised that a Filipino woman would be brought to see if she could identify any of the men. Captain Shaw picked about 20 men whom he knew to have been working in the vicinity of the village on the day in question and "also any KP's or men working in the area that might possibly have slipped out of the area at that time" (R. 52). He had the men file into the orderly room one at a time, face the Filipino woman (the wife of deceased), turn to the side and pass out. When the accused, who was about the eighth man, came in the woman identified him by shaking "her head up and down" (R. 71). At that time accused "didn't seem excited or disturbed" (R. 53). That same day the accused was taken to the 14th Portable Hospital and confronted by Paredes who was in an ambulance on a stretcher but he (Paredes) could not, at that time, identify him as the man who had shot him (R. 54). However, about 3 July 1945 six negro prisoners in the stockade were brought before Paredes and in the presence of the trial judge advocate, the accused's counsel, and others he identified the accused as the man who had shot him (R. 65).

The accused elected to be sworn and testified that on the morning of 9 April 1945 -

> " * * *
>
> I went to a formation. Then I went back to my tent, went in my tent, and I went and got a rifle out of from underneath Jimmie Powell's bed and then I went on to the beach. I walked down the beach to a well, then I stopped. I went to get some Japanese invasion money from a Filipino. I went to get some Japanese invasion money from a Filipino so I sat down by a coconut tree and I waited for awhile and I walked down into the water and waded around in the water. I saw some little fish and I was trying to grab some of them. Then I came out of the water, walked back to where I left my rifle by the side of a tree and took my rifle and walked back towards the road. There were three boys of the 1943rd Truck Company picked me up. Then I went back to my camp.
>
> * * *" (R. 78).

He then returned the rifle to Jimmie Powell, his tent mate, went to the motor pool and reported to Captain Shaw and related, in substance, the conversation as stated by the Captain, supra. He denied that he was wearing a helmet and said that he was not barefooted but had on moccasins, did not sell his gun and had not seen Teodora or Paredes that morning (R. 89, 95). On cross-examination he insisted that he had a gun when picked up by the

mail orderly (R. 89) and admitted that he did not know whether the person he was to get the invasion money from would be there as he had seen him about a month before and "he told me if I would come down there sometime he would get the Japanese money for me" (R. 82). He gave as his reason for taking his gun with him that he intended to shoot a monkey and "would keep him alive if he lived" (R. 91) and further claimed not to have fired his gun that day.

Private Walter Fontane, a tent mate of the accused, testified that before "one rifle inspection" accused stated to him that he (accused) had "lost his gun on the job" (R. 100).

4. The accused is charged with murder, assault with intent to murder, and assault with intent to commit rape. The evidence for the prosecution shows that accused, armed with a loaded carbine, joined the deceased, his wife and Antero Paredes, stating that he would walk a short distance with them and then return to base. Upon approaching a wooded area he suddenly and without warning shot both men from the rear and then forced deceased's wife into the woods, attempted to remove her clothes and "put her down" and unbuttoned his trousers. From such actions the court could conclude that the assault upon her was with intent to rape. His unlawful and unwarranted shooting of her two male companions immediately followed by his attempt to rape the unprotected woman is clear evidence of his intent to commit murder when he fired the shots, and there is no other reasonable inference to be drawn from his acts. His denial of having seen any of the three of them on the day in question was not accepted by the court. There is substantial evidence to sustain the findings of the court.

5. The places where the offenses occurred and where accused said he was that morning were identified principally by reference to a map which was before the court but which was not made a part of the record of trial.

> "* * *A record of trial by general court-martial should 'set forth a complete history of the proceedings had in open court' (MCM, 1928, par. 85b) so that the reviewing authority and others required to review the record may have before them all of the evidence considered by the court in reaching its conclusion. Places, distances, or direction referred to by witnesses, should be described by apt words or by references to exhibits introduced in evidence and attached to the record. CM A-1138 (1944)." (III Bull. JAG 226).

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

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

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

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

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

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 7 September, 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Private Ozell Louis (38308688), 2nd Platoon, Company A, 429th Signal Heavy Construction Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-457).

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

(Sentence ordered executed. GCMO 21, USAFP, 11 Sept 1945.)

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

Board of Review
CM P-458

3 September 1945

UNITED STATES v. Private First Class JOSEPH WILLIAMS (34746739), 608th Port Company, T.C.	)))))))	Trial by G.C.M., convened at APO 24, 30 July 1945. Dishonorable discharge, total forfeitures, confinement for life. The United States Penitentiary, McNeil Island, Washington.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Joseph (NMI) Williams, 608th Port Company, did at APO 159, on or about 1 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Jean (NMI) Johnson, a human being, by shooting him with a rifle.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution reveals that about noon on 1 July 1945 Private First Class Jean Johnson and Private Joseph Williams were arguing outside the kitchen personnel tent of the 608th Port Company then stationed at Talomo, Mindanoa, P.I., of which organization they were members. Johnson said "If you call me another mother-fucker I'll kill you" and, when Williams answered, "Yeah, I'll call you one and a blue one" (R. 9, 12, 25), Johnson attempted to hit him but was prevented by T/4 Theeoplious M. Hunter who took Johnson to his tent and remained with him a few minutes while he "quieted down". Immediately after Hunter left, however, Johnson came out with a carbine in his hand, putting a clip in it as he emerged (R. 9). Hunter and another soldier stopped him, took the rifle, returned with him to his tent, and put the rifle under a blanket. A short time later Williams, who had run down the company street, returned with a rifle and was aiming it into the tent (R. 22) when someone yelled "Look out Hunter he's going to shoot" (R. 10, 20). As Hunter went out the side of the tent Williams fired. Johnson, who was standing in the tent unarmed (R. 11, 27, 54), was struck in the abdomen by a bullet from which wound he subsequently died (R. 7).

Witnesses for the defense testified to the same effect as did those for the prosecution except that one, Private Bernard Brown, testified that at the time Williams shot Johnson the latter was holding a rifle in his hands (R. 37, 38). They further testified that immediately after the shooting Williams surrendered his rifle to the First Sergeant (R. 32, 44). Captain Sylvester G. Sheppard who came up to accused about that time said "Williams you know you are in a lot of trouble" and the accused in a very docile manner answered, "I know it Captain, it just couldn't be helped" (R. 45).

Accused elected to remain silent.

4. The evidence is clear that during an argument between accused and deceased the latter threatened to kill accused and went to his tent and emerged with a gun. However, other soldiers interceded, disarmed deceased and caused him to return to his tent. Nonetheless, accused left the scene, returned to deceased's tent with a gun, and, while other soldiers were talking to deceased, shot and killed him. From all of the circumstances so apparent in the record the court, within whose province it was to make such determination, could properly conclude that the homicide was not committed either in self defense or in the heat of sudden passion caused by adequate provocation (Allison v. U. S., 160 U.S. 203, 217; Acers v. U.S., 164 U.S. 388, 392; Kinard v. U.S., 96 F. 2d 522; MCM, 1928, par. 148a). It follows that the record contains substantial evidence which sustains the findings that the homicide was committed willfully, deliberately, unlawfully, with malice aforethought and premeditation.

A sentence of death or of life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by penitentiary confinement by Sections 273 and 275 of the Criminal Code of the United States.

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

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

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

Board of Review
CM P-486

6 September 1945.

UNITED STATES v. Private WILLIE WILSON (34841879), 3108 Quartermaster Service Company.	Trial by G.C.M., convened at Noumea, New Caledonia, 24 July 1945. Dishonorable discharge, total forfeitures, confinement for life. The United States Penitentiary, McNeil Island, Washington.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie Wilson, 3108 Quartermaster Service Company, APO 502, did at APO 502, on or about 1 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Leroy Wright, by shooting him with a pistol.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on the morning of 1 July 1945 the accused, Private Willie Wilson, a member of the 3108 Quartermaster Service Company,

APO 502, sold to Private First Class Samuel McCray, of accused's unit, a cigarette lighter for $1.50 at which time he received forty-five cents in part payment. About 3:00 o'clock that afternoon the accused went to McCray's tent where he (McCray) was shining his shoes (R. 8). At that time Private First Class Lee P. Jenkins and Private Leroy Wright were also in the tent. Upon entering the tent accused greeted the occupants and said to McCray "Pay me my money" (R. 16). McCray replied "I don't have any money Bill". Accused then said he wanted to demonstrate how shoes should be shined and took the shine brush and rag from McCray and began shining McCray's shoes. McCray then took the brush and rag from accused who said "You will pay me when I come back" but the statement was not said in a "threatening manner" (R. 17, 32). He then left the tent (R. 8). In about five minutes the accused was heard approaching the tent and McCray said "Fasten the door * * * here comes Bill" (R. 10). The tent was pyramidal, sided with boards from the bottom about half way up and with mosquito netting from the boards to the top. It had a screen door which fastened with a latch from the inside (R. 8). Wright latched the door and when accused found that he could not get in he went to the side of the tent, rested his pistol on the top board, pointed it at McCray and said "Open the door". Deceased opened the door (R. 19) and accused entered "waving the gun" (R. 19) and began "chasing" McCray around the tent. McCray said to accused "Put that gun away, boy" and accused "immediately lowered the gun" (R. 10, 20). Accused then said to deceased, "Now, what do you have to say about this?" Deceased replied "You don't mess with me" (R. 12, 24, 29, 35) and started walking towards the door (R. 11). Accused "raised the gun" and advanced towards deceased (R. 22) and said to him "Get back" (R. 11). Deceased then "began walking to the gun" (R. 26, 36). The accused "jumped a step to the left, * * * snapped back the slide on the revolver [automatic] and at the same time he snapped it back the gun went off and * * * [he] said, 'I didn't know that thing is going off'" (R. 13, 29, 36). Looking over his shoulder "as if he wanted to say something" deceased walked out of the tent, and fell on his face (R. 14), a bullet having entered the left front chest, passing through the right side of the heart, causing death (Pros. Ex. 4). The accused then ran to the orderly room and told the first sergeant to "call a doctor, that Wright got shot" (R. 29).

The two eyewitnesses to the killing variously testified that accused "had been drinking a little" (R. 32); "seemed to be feeling very glad" (R. 29), but "wasn't drunk" (R. 32). "He didn't act like he was mad or nothing, angry or anything" (R. 9) and that the reason the door was locked when they heard accused returning was that "We know when he always comes around like that; he plays with the boys in the tent; wrestling and tussling with us" (R. 17); that at that time accused "was acting kind of cocky, playful and in a joking manner" (R. 21); and that deceased and accused were "buddies. * * * They were all friends" (R. 25). The deceased did not "look as if he was angry or nothing" (R. 13) but that he acted as if "He had been worried all day" (R. 26).

At the conclusion of the case for the prosecution the defense made a motion for findings of not guilty claiming that the prosecution "failed utterly in proving, 'Malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation'", which motion was denied.

The accused called no witnesses in his behalf and elected to remain silent (R. 47).

4. The accused is charged with murder which is defined as "the unlawful killing of a human being with malice aforethought" (MCM, 1928, par. 148a). The evidence is undisputed that at the time and place alleged accused shot and killed deceased. The testimony of the two eyewitnesses is subject to two constructions: on the one hand that there was no animosity on the part of the accused toward the deceased, no trouble between them, that they were close friends and "buddies" and that the killing was accidental. On the other hand they testified that accused had been drinking, but was not drunk, that he demanded payment of another soldier of a small debt due him and when payment was not made left the tent with the statement "You will pay me when I come back". He then armed himself with a loaded pistol, returned and when denied admittance forced them to open the door of the tent at the point of a pistol. Upon entering the tent he was "waving" the pistol and then "chased" McCray around the tent. At McCray's insistance he lowered the pistol and approached deceased stating "Now, what do you have to say about this?". Deceased told accused not to "mess" with him and walked toward the door whereupon accused said to him "Get back". Deceased continued walking and accused "jumped back", threw a cartridge in the pistol, and shot and killed deceased. Such facts furnish a basis from which an inference can be drawn that the accused intentionally shot and killed deceased. Having used a deadly weapon unlawfully, the law will presume that such use was with malice (MCM, 1928, par. 112a).

> "'Malice * * * is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.'" (CM 224951, Thompson, 14 B.R. 219, 225).

The facts furnish substantial evidence from which the court could determine that the accused killed deceased willfully, deliberately, unlawfully, with malice aforethought and with premeditation and support the court's findings of guilty of murder as charged (MCM, 1928, par. 148a).

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

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

Leo Cox Robert, Judge Advocate.
Colonel, J.A.G.D.

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

Samuel M. Drucker, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

25 September 1945

Board of Review
CM P-491

UNITED STATES v. Staff Sergeant REED WHITE (34701963), Company M, 322nd Infantry.	Trial by G.C.M., convened at APO 81, 11 and 13 August 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

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

Specification 1: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, without proper leave, absent himself from his regimental area at APO #81, from about 1800, 23 June 1945 to about 0100, 24 June 1945.

Specification 2: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, without proper leave, absent himself from his regimental area at APO #81, from about 1200, 24 June 1945 to about 0030, 25 June 1945.

CHARGE II: Violation of the 89th Article of War.

Specification 1: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, Pfc Jack P. Ratliff (now deceased), Company "M", 322nd Infantry, Pfc Charles E. Holstein, Medical Detachment, 322nd Infantry, Pfc O. D. Hobgood, Company "M",

322nd Infantry, being with 322nd Infantry in the camp at APO #81, did, at APO #81, on or about 23 June 1945, commit a riot, in that they together with certain other soldiers of unknown number, whose names are unknown, did with force and arms unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the native inhabitants of the house belonging to a Domingo Lopez, at the barrio of Liberty, and having so assembled, did unlawfully and riotously assault Marcelino Manatag, two other Filipinos, and two unidentified American soldiers by gunfire, to the terror and disturbance of the inhabitants of the house belonging to Domingo Lopez.

Specification 2: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, Pfc Jack P. Ratliff (now deceased), Company "M", 322nd Infantry, and Pfc Charles E. Holstein, Medical Detachment, 322nd Infantry, being with 322nd Infantry in the camp at APO #81, did, at APO #81, on or about 24 June 1945, commit a riot, in that they together with certain other soldiers of unknown number, whose names are unknown, did with force and arms unlawfully and riotously, and in a violent and tumultuous manner, assemble to disturb the peace of the native inhabitants of the house belonging to a Domingo Lopez, at the barrio of Liberty, and having so assembled, did unlawfully and riotously assault members of the 81st Infantry Division Military Police Company and members of the 2nd Military Police Company (Philippine Army), by gunfire, to the terror and disturbance of the inhabitants of the house belonging to Domingo Lopez.

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

Specification 1: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, at APO #81, on or about 23 June 1945, knowingly and willfully misappropriate a service rifle of the value of $39.00, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, at APO #81, on or about 24 June 1945, knowingly and willfully misappropriate a service rifle of the value of $39.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, at APO #81, on or about 23 June 1945, knowingly and in defiance of standing orders, carry a weapon, viz, a service rifle.

Specification 2: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, at APO #81, on or about 23 June 1945, knowingly and wrongfully and in defiance of standing orders, enter an off-limits area, to wit: a native dwelling.

Specification 3: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, at APO #81, on or about 24 June 1945, unlawfully carry concealed weapons, viz, two (2) service rifles.

Specification 4: In that Staff Sergeant Reed White, Company "M", 322nd Infantry, did, at APO #81, on or about 24 June 1945, knowingly and wrongfully and in defiance of standing orders, enter an off-limits area, to wit: a native dwelling.

The accused pleaded not guilty to, but was found guilty of, all specifications and charges, excepting from Specification 1, Charge II, the words, "Marcelino Manatag, two other Filipinos, and two unidentified American soldiers," of which he was found not guilty and substituting therefor the words "unknown persons," of which he was found guilty, and excepting from Specification 2 of Charge II the words, "together with certain other soldiers of unknown number, whose names are unknown," and except the word "company," of which he was found not guilty and substituting therefor the word "Platoon," of which he was found guilty. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

In the late afternoon of 23 June 1945 the accused, Staff Sergeant Reed White, along with Private First Class O. D. Hobgood, Private First Class George G. Zimmerlie and Private First Class Jack P. Ratliff, all of Company M, 322nd Infantry, went to the home of Domingo Lopez, which was located on Liberty Road about a mile and a half or two miles from their company area (R. 7). The Lopez house, built out of "coconut leaves, boxed up and covered," was located just off the main highway on the south side of which there was a river crossed by two bridges. There were other native houses in the vicinity, three of them located in front of the Lopez house on the opposite side of the highway (Ex. 1, R. 10). The Lopez house was occupied by the Lopez family and six girls, Nellie, Gloria, Anna, Bunny, Quancita and Mary (R. 8). All of the girls knew the accused and his companions.

When the accused and his companions arrived, they found Private First Class Charles E. (nicknamed "Bill") Holstein, Medical Detachment,

322nd Infantry, there (R. 8-9). They drank a small amount of liquor and all except Holstein then went outside where the girls started to teach them a native dance called the "Coconut Dance" (R. 8, 66). While they were dancing, a Filipino boy entered the house and when he left, Holstein came out (R. 9). Holstein had his pistol in his hand and said, "Boys, we are going to have trouble here out of the Filipinos" (R. 9). Without anything more being said there was a sudden burst of gunfire which came from one of the huts across the highway (R. 9-10). It was estimated that fifteen or twenty shots were fired. The shots were going through the matting of Lopez' house. Pfc. Hobgood "took off" and went for cover under the highway bridge. All the others scattered and ran for cover, including the accused and the girls (R. 10, 11).

When the firing ceased, Hobgood started for camp. The accused and "Bill" Holstein caught up with him. "The both of them" said "Let's go in and get our M1's and come back and mix it up with them" (R. 11). Hobgood was reluctant. Holstein told him to go back and get his M1 or "they would kill" him (R. 11). The three of them returned to camp (R. 12). The accused and Hobgood each obtained their rifles, broke them down and put them in a barracks bag which Hobgood carried back to the Lopez house (R. 12). When they got there they put the rifles together. "Bill" Holstein armed himself with Hobgood's rifle, Ratliff with the accused's rifle and the accused with Holstein's .45 caliber pistol. The three of them moved up "to the bluff of the road" toward the house from which the earlier shots were fired (R. 12). They opened fire (R. 13). Hobgood and the occupants of the Lopez house all took cover under the bridge (R. 13). All were "scared" (R. 20-21). Holstein had the ammunition and about forty rounds in all were fired from the M1's (R. 13-14). No pistol shots were heard nor was any .45 caliber ammunition seen around (R. 22-23). There was some return fire but it finally became quiet (R. 14). The accused said to Hobgood when the latter went to get his rifle, " * * * we better get them in and get them cleaned up before morning" (R. 15). They returned to camp around twelve o'clock and cleaned the rifles indarkness (R. 15-16).

In the afternoon of 24 June 1945 the accused and Ratliff again returned to the Lopez house, to which place Hobgood also went between 1730 and 1800 hours (R. 16). "Bill" Holstein and four of the girls were there at the time (R. 16). When Hobgood arrived, Ratliff asked him to come in and have a drink. Ratliff also told Hobgood to " * * * stick around, * * * We are going to have more trouble here tonight," and that he had sent accused back to camp to get Hobgood's rifle (R. 16). The accused was not present when those remarks were made (R. 16-17).

The accused returned "about around dark" carrying two rifles in a barracks bag, one of which rifles belonged to Hobgood (R. 17, 19, 61). Hobgood decided to return to camp and as he was leaving a Filipino boy

ran into Lopez' house "hollering 'MP's, MP's'" (R. 17-18). Hobgood continued on the road toward camp but was stopped by the military police just the other side of the highway bridge which crosses the river near the Lopez house. When the military police found that he was unarmed he was permitted to go on (R. 18). After he had gone down the road a short distance he heard five or six shots being fired in the vicinity of the Lopez house (R. 19).

When the Filipino boy announced that the military police were there (R. 20), "Bill" Holstein advised all the occupants of the Lopez house that they had better leave, which they did with the aid of the accused.

The native house opposite the Lopez house from which the firing first came on the night of 23 June 1945 was occupied by one Marcelino Manatad and others (R. 28, 43, 51). Before the firing began on that day, Manatad and two other men had been over to the Lopez house and wanted to pick up some of the girls (R. 51). Being unsuccessful he returned to his own house and the firing started.

The next morning Manatad reported to the Philippine Army military police "that a certain civilian house owned by a Domingo Lopez was keeping illegally some G.I. pistols" (R. 39), also that there were girls of questionable character living there (R. 29). Acting on that report, a search warrant was obtained from the local police justice (R. 40). Six Filipino military police, accompanied by two American military police and Manatad, the informer, left for the Lopez house about six o'clock that evening, 24 June 1945. Manatad moved off ahead of the military police to see if anyone was in the Lopez house (R. 29, 30) and to give the signal for the military police to attack (R. 40). Manatad's snooping about was detected by "Bill" Holstein (R. 53), and it was then that Holstein told the Filipino girls that "Manatad was coming with two Filipino MP's" and advised them to leave the area (R. 53). It was at that time also that Ratliff commented to the other men that trouble was expected (R. 16) and Hobgood left. The accused, carrying a rifle, escorted the girls to the bridge for safety and then returned to the Lopez house (R. 54). As the military police approached the Lopez house an unidentified soldier with a rifle was seen running from the vicinity of the bridge toward the Lopez house (R. 44).

Upon a given signal the two American military police and the six Filipino military police surrounded Lopez' house. As they were closing in a shot was fired, followed by a burst of fire (R. 31, 41). Modesto, one of the Filipino military policemen, was one of those who fired (R. 41-42). At that moment an American soldier, later identified as Ratliff, ran from the side of the Lopez house and fell dead in the area between the house and the highway (R. 31-32, 42). A second later, Modesto also fell dead (R. 32-33, 40, 42-43).

A .45 caliber pistol, which had been fired, was found about a foot away from the body of Ratliff. A bullet from a .45 caliber pistol was found lodged in the cartridge clip that Modesto carried on his person (R. 33-34). There were three gun shot wounds in Modesto's body (R. 33), and four in Ratliff's body (R. 43). Modesto was the only one of the military police whose weapon had been fired (R. 42), although there is no showing that the bullets from his carbine penetrated Ratliff's body.

The accused was last seen in the vicinity of the firing when he took the girls over to the bridge for cover and returned toward the Lopez house (R. 54). It was dark at the time and nothing could be seen distinctly (R. 40).

On the morning of 25 June 1945 an M1 rifle, which had been fired by someone, was found in the foliage a short distance north of the Lopez house (R. 35-36). The serial number of the rifle indicated that it had been issued to Hobgood (R. 38). Accused had brought Hobgood's M1 rifle along with his own to the Lopez house on the evening of 24 June (R. 19, 61).

First Sergeant Bautista of the Philippine Military Police testified that when they approached the Lopez house Ratliff opened fire first, which Modesto immediately returned, and that when both men fell he gave the cease fire order (R. 41-42). Sergeant Gerez, also of the Philippine Military Police, said that he saw two soldiers carrying M1 rifles running toward the bushes where Hobgood's rifle was found the next morning, but that he could not identify them because of the darkness (R. 44). He said that the sounds which he heard were like "gun shots from a carbine" (R. 46). All the military police were armed with either carbines or pistols (R. 47).

Captain Elias A. Harmon testified that he was the commanding officer of Company M, 322nd Infantry to which organization accused belonged; that "It was the regimental policy that all enlisted men get a signed pass from the company before they left the regimental area"; that the accused had been out of the area on both the 23d and the 24th without a pass and was therefore absent without proper leave (R. 62). He said that the accused's rifle was missing and that a "Statement of Charges has been signed by White [the accused] to recover the loss of this weapon" (R. 63). He testified further that the men were "not allowed to carry or use weapons off the regimental area. * * * except for training purpose or when they are on guard duty. That is the policy in my company and also the regimental policy" (R. 63). The value of an M1 rifle was stated to be thirty-four dollars (R. 64).

4.. The evidence for the defense:

The accused elected to remain silent (R. 67).

5. "A riot is a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist one another against anyone who shall oppose them in the execution of some enterprise of a private nature, and who afterwards actually execute the same in a violent and turbulent manner, to the terror of the people, whether the act intended was of itself lawful or unlawful" (MCM, 1928, par. 147c; see also CM 238214, Johnson, 24 B.R. 207, 213; Black's Law Dictionary, 3d Ed., pp. 1562-1563; 46 Am. Jur. 126; 2 Wharton's Crim. Law, 12th Ed., secs. 1860-1868).

Wharton's Criminal Law, supra, reads in part as follows:

" * * * Riot at common law is a compound offense, including some of the essential elements of criminal conspiracy, involving the execution of express or implied agreement among three or more persons to commit an assault or a battery or a breach of the peace.

* * *

"It must be also shown in riot that the assembling was accompanied with some such circumstances, either of actual force or violence, or at least having an apparent tendency thereto, as were calculated to inspire people with terror, such as being armed, making threatening speeches, turbulent gestures, or the like, or being in disguise.

* * *

"In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional, and where it tends to the encouragement of the rioters, be prima facie inferred to be participants; and the obligation is cast upon a person so circumstanced, in his defense, to prove his actual noninterference.

* * *

"To constitute a riot it is not necessary that there should be actual fright in the public

generally. It is enough if the action of the parties implicated be so violent and tumultuous as to be likely to cause fright, and if individuals are frightened.

* * *

"It is no defense, also, that one of three persons charged as a rioter was not an active participant if he gave to the others intentional support as an aid."

It is charged that the accused, acting in conjunction with others on the 23rd day of June, 1945, did "in a violent and tumultuous manner, assemble" and "riotously assault" certain persons thereby disturbing the peace and terrorizing the local residents (Spec. 1, Chg. II). The evidence shows that there was a riot on the date named and that the accused was an active participant therein. Although there was no showing that he fired any of the weapons, the court nevertheless properly found him guilty as such participant (Wharton's Crim. Law, supra, sec. 1868). The accused's conduct may not be justified on the ground that Manatad and others first rioted against him and the other persons in the Lopez house. One is not authorized to redress a wrong by taking the law into his own hands.

As for the riot which took place on the night of 24 June 1945 which resulted in the death of two men (Spec. 2, Chg. II), there was no direct testimony that the accused was present during the actual affray. The evidence indicates that he brought weapons to the scene; led several inhabitants of the Lopez house to a place of safety and returned to the immediate vicinity of the Lopez house. Hobgood's rifle which accused brought there was abandoned. It had been fired and was found the following day a short distance away from the scene. Accused's own rifle, which he also brought there, was never found, and he thereafter accepted responsibility for its loss. The evidence shows further that the accused did not return to his company area until after the riot had ended. It is a fair inference to draw from all the evidence that the accused was an active participant. Even assuming that he was not an active participant, his giving of aid and intentional support to the others is sufficient to establish his guilt as a principal (State v. Straw, 33 Me. 554; State v. Dean, 38 N.W. (Wis.) 341; Wharton's Crim. Law, supra, secs. 245 and 1868; Dig. Op. JAG, Branch Office, E.T.O., Vol. 2, p. 391).

Article of War 89, insofar as here material, reads as follows:

"All persons subject to military law are to behave themselves orderly in quarters, garrison, camp, and on the march; and any person subject to military law who commits any waste or spoil, or willfully destroys any property whatsoever (unless

> by order of his commanding officer), or commits any kind of depredation or riot, shall be punished as a court-martial may direct."

Is Article of War 89 applicable only to riotous conduct "in quarters, garrison, camp, and on the march," as the language used would appear to indicate? In the Digest of Opinions, Branch Office of The Judge Advocate General, E.T.O., Volume 2, at page 389, the following appears:

> "It may not be soundly argued that an offense in violation of AW 89 may only be committed by troops when in quarters, garrison, camp or on the march, and that riotous conduct on a public street is not an offense thereunder. A careful study of the legislative history of AW 89 requires the conclusion that 'the "riot" condemned by the article may be committed at places other than "quarters, garrison, camp and on the march"'. It is clear that the three accused participated in a '<u>riot</u>' as defined at common law. It need not be decided whether the phrase 'any kind of depradation or riot' in AW 89 is of more general import than the common law definition. (54 C.J., sec.3, p.830, sec.5, p.831, sec.6, p.832, sec.15, p.834; MCM, 1928, par.147<u>c</u>, p.162.)" (CM ETO 804, <u>Ogletree</u>, <u>et al</u>, 1943).

In CM ETO 1284, <u>Davis</u>, <u>et al</u>, 1944, the following appears:

> "the uncontradicted evidence shows that a casual assemblage of colored American soldiers, spontaneously motivated by wholly unprovoked hallucinations of racial discrimination in a British 'pub', precipitated a tumultous disturbance by flinging glassware and other movables, including a knife; assisting one another in a demonstration against the proprietress, employees and customers and - later - civilian and military police, opposing them in an effort to restore peace and order; and actually executing their design in a violent and turbulent manner, to the terror of a considerable number of people. This was a riot in clear violation of Article of War 89."

6. The Manual for Courts-Martial, 1928, paragraph 27, reads: "One transaction, or what is substantially one transaction, should not be made

the basis for an unreasonable multiplication of charges against one person. Thus a soldier should not be charged with disorderly conduct and for an assault when the disorderly conduct consisted in making the assault, or for a failure to report for a routine scheduled duty, such as reveille, and for absence without leave, when such failure to report occurred during the period for which he is charged with such absence without leave. So also the larceny of several articles should not be alleged in several specifications, one for each article, when the larceny of all of them can properly be alleged in one specification (see 149g, Larceny); and where a soldier willfully disobeys an order to do a certain thing, and persists in his disobedience when the same order is again given by the same or other superior, a multiplication of charges of disobedience should be avoided. However, there are times when sufficient doubt as to the facts or law exist to warrant making one transaction the basis for charging two or more offenses.

"Where charges are preferred for serious offenses, there should not be joined with them charges for minor derelictions unless the latter serve to explain the circumstances of the former. Thus, as an extreme case, charges for willfully disobeying an order of a commissioned officer and for absence from a routine duty should not be joined."

Despite the above language, eight specifications of wrongdoing, which are inter-related with the serious offenses of rioting, making ten specifications in all, have been filed against the accused. This ought not be done. If the evidence affirmatively shows, however, that no prejudice resulted to the accused from the unwarranted multiplicity, it may be regarded as harmless error (CM 231487, Campbell, 18 B.R. 225, 232; CM 218876, Wyrich, et al, 12 B.R. 157, 162). We turn therefore to an examination of the other specifications.

The record amply sustains the finding that the accused absented himself without proper leave for several hours on the nights of 23 and 24 June 1945, as charged in Specifications 1 and 2 of Charge I. Although it would appear that the accused probably could have obtained a pass for the asking (R. 62, 65-66), his not having such a pass makes him technically guilty of the offenses charged.

Specifications 1 and 2 of Charge III allege willful misappropriation of a service rifle, value thirty-nine dollars. Any unauthorized use of government property which falls short of larceny or embezzlement, regardless of whether the property was used for the benefit of the accused or others, constitutes a misappropriation within the provisions of Article of War 94 (Dig. Op. JAG, 1912-40, p. 339; Dig. Op. JAG, 1912, p. 139). The proof shows the value of the service rifle to be thirty-four dollars (R. 64). The evidence therefore fails to sustain the court's finding that the rifle had a value of thirty-nine dollars, and to that extent, is legally insufficient.

Specification 1 of Charge IV alleges that the accused did "knowingly and in defiance of standing orders, carry a weapon, viz, a service rifle" (underscoring supplied). Specifications 2 and 4 of Charge IV allege that on the 23rd and 24th days of June, 1945, the accused did "wrongfully and in defiance of standing orders, enter an off-limits area, to wit: a native dwelling" (underscoring supplied). The record is barren of evidence of any standing orders against carrying weapons or to the effect that native dwellings at APO 81 were "off-limits" for military personnel. The accused's company commander testified that there was a company and regimental policy against carrying or using weapons off the regimental area. Such testimony falls short of proving the existence of a standing order.

Before an accused can be convicted of violating a military order, knowledge of that order must be brought to his attention. This may be done by posting a copy thereof on the bulletin board; by furnishing copies to the members of the organization; by oral announcement; or by other means depending upon the facts and circumstances in each case (Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, p. 575; CM 233817, Tillotson, 20 B.R. 149, 154; CM 218393, Callan, 12 B.R. 49; MCM, 1928, par. 134b, p. 149). Were the rule otherwise all members of a command would be chargeable with knowledge of every order and directive issued by the commanding officer even though it never got beyond the file cabinet in headquarters. Since statutory enactments are without binding force until duly promulgated and published (1 Wharton's Crim. Law, 12th Ed., sec. 106; 36 Cyc. 1191), it follows that uncommunicated "orders" which are on a much lower plane are equally ineffective. In any event the specification does not allege that accused carried a weapon outside the regimental area. The evidence, therefore, fails to sustain the findings of guilty of Specifications 1, 2 and 4 of Charge IV.

Specification 3 of Charge IV alleges that the accused on 24 June 1945 did "unlawfully carry concealed weapons, viz, two (2) service rifles."

"The carrying or possession of a weapon is not in itself an offense against the law, nor does it constitute a breach of the peace; it becomes an offense only because it is prohibited by statute * * * " (68 C.J. 11). Most states and the District of Columbia have statutes declaring that the carrying of "concealed" weapons "on" or "about" ones person constitutes an offense (50 American Law Reports 1534; Brown v. United States, 30 Fed. 2d 474). The fact that a pistol or a gun is dismantled or otherwise unfit for instantaneous use does not destroy its character as a dangerous weapon and concealing it, in carriage, constitutes an offense (2 Wharton's Crim. Law, 12th Ed., Chap. 44; Commonwealth v. Murphy, 166 Mass. 171, 44 N.E. 138).

In cases where no local statute is applicable, the carrying of a concealed weapon may nevertheless, under some circumstances, be regarded as an offense in violation of Article of War 96.

"Concealment is an essential element of the crime of carrying concealed weapons * * * ." "Within the purport of statutes directed against the carrying of concealed weapons, 'conceal' has its common, ordinary and well understood signification, meaning to hide, secrete, screen, or cover" (68 C.J. 12, 27). While it is difficult to conceive of an M1 rifle being a concealed weapon, there are circumstances where it may be so secreted and covered up that it may be regarded as such. In this case the court inferred that the accused placed the weapons in the barracks bag for the purpose of hiding or concealing them. There is ample evidence in the record from which such inference may be drawn.

Considerable hearsay and other incompetent testimony was introduced at the trial, but those errors, in view of the compelling evidence of guilt, may be regarded as harmless (CM POA 313, Greenlee, 21 June 1945; CM P-279, Neidhart, 13 August 1945; Bull. JAG, October 1944, p. 417).

7. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specifications 1, 2 and 4 of Charge IV; legally sufficient to support the findings of guilty of Specifications 1 and 2 of Charge I and Charge I, Specifications 1 and 2 of Charge II and Charge II, Specifications 1 and 2 of Charge III excepting as to each specification the figures "$39.00," substituting therefor the figures "$34.00," and Charge III, Specification 3 of Charge IV and Charge IV, and legally sufficient to support the sentence.

Samuel M. Drwier, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Forest J. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 29 September 1945.

To: Commanding General, 81st Division, APO 81.

1. In the case of Staff Sergeant Reed White (34701963), Company M, 322nd Infantry, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the findings of guilty of Specifications 1, 2 and 4 of Charge IV and so much of the findings of guilty of Specifications 1 and 2 of Charge III as involves a valuation in excess of $34.00 be disapproved. Thereupon you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-491).

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

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

10 September 1945

Board of Review
CM P-549

UNITED STATES v. Private HOWARD E. GRIFFIN (32415724), Headquarters and Service Company, 857th Engineer Aviation Battalion.	Trial by G.C.M., convened at APO 75, 4 June 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Howard E. Griffin, Headquarters and Service Company, 857th Engineer Aviation Battalion, did, at A.P.O. 74, on or about 15 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Third Grade Leon I. Steele Sr., Headquarters and Service Company, 857th Engineer Aviation Battalion, a human being by shooting him with a rifle.

He pleaded not guilty to the Specification and the Charge. By appropriate exceptions and substitutions he was found not guilty of murder in violation of Article of War 92, but guilty of manslaughter in violation of Article of War 93. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten

years. The court considered one previous conviction by summary court-martial. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

About 1500 hours on 15 April 1945 the accused, Private Howard E. Griffin, a member of the 857th Engineer Aviation Battalion, went to the "Society Cafe" in the town of Angeles, APO 74. Accompanying him at the time was Technician Third Grade Willie J. Moore. Corporal Edward Baker joined them about 1530 hours (R. 7, 31). The three of them remained at the cafe until about 1830 hours when they decided to go to some girls' house (R. 7, 31). On the way they ran into Technician Fifth Grade Edward Johnson, also a member of their organization (R. 7). Johnson was leaning against a fence and appeared drunk. He refused the accused's offer to take him home saying, "I am not drunk, I am going to see Steele" (R. 7). Johnson then asked the accused, Griffin, if he wanted a drink. Accused said he did, whereupon both of them went into the "Subway Cafe" which was nearby (R. 7, 10).

Within a short time the accused came out and called to his two former companions, Moore and Baker, to come toward him, "that Steele had pulled a pistol on him" (R. 7, 32). Moore said "Maybe he [Steele] is just drunk" and the three of them proceeded to the girls' house (R. 7). The girls were not in so they decided to return to the "Society Cafe." On the way they passed the "Subway Cafe" where Steele was and the three of them went in. Steele, after arguing a while with the accused, pulled out a revolver which he had inside his shirt and said, "I should shoot up the joint" (R. 7, 10). Moore grabbed hold of the accused and pushed him outside. Baker took Steele's pistol away from him and asked what the trouble was between him and Griffin, to which Steele replied, "I don't want no private telling me about what to do" (R. 7, 32). Baker told him to forget it (R. 7, 32). Steele said, "Give me the gun, I am going home" (R. 32). He seemed to have quietened down and so Baker returned his pistol. The accused and Moore returned to the "Society Cafe" (R. 7). Baker went to a Filipino's house to have some "engraving done" (R. 32), and Steele, instead of going home as he said, apparently went to "Serrano's Cafe" where he was later killed (R. 8).

The accused and Moore, along with others, were seated in the "Society Cafe" drinking coffee when the owner's daughter asked accused to get her some "coal oil" or kerosene (R. 8, 10). He agreed to do so and left. On his way he necessarily passed "Serrano's Cafe," to which place Steele had gone after Baker returned the pistol to him.

The Serrano Cafe is apparently an open structure, there being a railing and two doors separating it from the sidewalk (R. 14-15, 26, 29). As the accused passed, Private Joseph R. Bess, who was sitting inside and who knew both the accused and Steele, asked the accused if he would come in and have a drink, to which he replied, "No thanks" (R. 12). Technician Fifth Grade Frank Williams, who was seated with Private Bess, turned to the accused and said, "Hello Griffin" (R. 23). Steele, who had been eating, looked up and when he saw the accused, without saying a word, moved his right hand inside his shirt to take the pistol out. At that time the accused was armed with a "rifle" (R. 12). Williams said he "saw Steele's face light up when he saw Griffin * * * " and "I just saw him make a grab" toward his bosom (R. 24). At that moment the accused opened fire and Steele fell dead (R. 22). The accused returned to the "Society Cafe" where he had left his friend Moore and said to the military police who were sitting there, "A man pulled a gun on me twice down there and I shot him" (R. 8). They thought he was joking and whenthe accused said, "Take me in and put me in the stockade, I really shot him" they proceeded to the Serrano Cafe where Steele was found lying on the floor dead (R. 8).

A medical officer who examined the deceased at the scene, testified that one of the bullets "apparently entered onthe left side of the abdomen and came out on the right side of the abdomen" and that "There was one gunshot wound in the chest at about the level of the tip of the heart" (R. 30). The deceased died of severe hemorrhages due to one or both of the wounds described.

Technician Third Grade James Walker, who was present in the Serrano Cafe at the time of the killing, testified on cross-examination that he picked up the pistol, which the deceased had on his person, as soon as the body fell to the floor and that he threw it into a yard where there was some heavy equipment (R. 19).

4. The evidence for the defense:

Corporal Edward Baker and Private James A. King both testified substantially as did the witnesses for the prosecution concerning the altercation between the accused and the deceased prior to the killing (R. 31-34, 35-36).

Mr. Lorenzo C. Dauson, the owner of the "Subway Cafe," told of the threats that the deceased had made to him on the afternoon in question and that the deceased made threats with a pistol which he had taken from inside his shirt. Dauson asked Baker to take Steele out of the cafe which he did (R. 34-35).

Private First Class James A. Pointer testified that he saw the deceased in the company area on the morning of the day in question and heard the deceased say to one James Walker, "Jim, go back and get the gun, I may have to kill some mother-fucker today" (R. 37).

Technician Fourth Grade Edward Hart testified that on the night in question he picked up the pistol which the deceased had been carrying (Ex. 1); that he found it in a "carryall" in the motor pool (R. 38).

The accused's company commander, Captain David K. Johnston, testified that the accused "was a very efficient man, I never did have any trouble with him previous to this time" (R. 52).

The accused elected to take the stand and be sworn as a witness in his own behalf. He said that he was 33 years of age and had been with the 857th Engineer Aviation Battalion since it was formed in 1942; that on the afternoon of 15 April 1945 he and Sergeant Moore went to the "Society Cafe" where they were to later meet Corporal Edward Baker (R. 39); that the three of them remained in the cafe until about "sundown" during which time they had "a little bottle of whiskey" between the three of them (R. 39); that Baker wanted to go to a friend's house and the three of them started there (R. 39); while proceeding along the street they ran into Johnson who "was leaning up against a fence * * * . He called me and the three of us walked over to where he was. He said to Baker, 'I didn't call you, I only called Griffin', and he asked did I want a drink. I said, 'Yes', so the two of us went across the street and Steele was there when I entered" (R. 39). Johnson said to Steele, "You are drunk, why don't you go to the area?" to which Steele replied, "No damn private tells me what to do" (R. 40). Steele got up and started waving a pistol at the accused. Accused thanked Johnson for the offer to buy him a drink and immediately ran out of the place. He joined his former companions, Moore and Baker, and told them that Steele had drawn a pistol on him (R. 40). They went to see Baker's friend and, upon returning a short time thereafter, stopped in at the "Subway Cafe." Steele was still there. Baker said to Steele, "You are drunk, man, why don't you go to the area," to which Steele said, "No damn private tells me what to do" (R. 40). (Both Johnson and Baker are Tec 5's.) Steele pulled out his pistol and walked toward the accused "cursing" him. Moore pushed the accused out of the place while Baker took the pistol away from Steele (R. 40). After a while Baker gave the pistol back to Steele and the incident was closed. Moore and the accused went back to the "Society Cafe" (R. 40). The accused's testimony continues as follows: "The girl [the proprietor's daughter] asked me would I go around to her sister's and get some coal oil for her lamp, I turned to Moore and said I would. I started going back to get the oil * * * I angled across the street * * * . So I came up on the sidewalk, the building was on my left * * * I looked up and saw Walker when I was passing on the street. * * * Walker was facing the street. * * * when I walked up he said, 'Hello Griffin'. I said, 'Hello Walker'. He said, 'Do you want a drink?', I said, 'No

thanks, I am going to get some oil'. * * * and I turned and started away. The next thing I heard was Walker saying, 'No, Steele, don't do that'. I looked around at this and Steele was at an angle, I only could see his hand. I stepped back and he was reaching inside his shirt. I told him he had pulled his gun on me all night, 'Don't pull your gun on me again, if you do, one of us is going to get hurt or go to hell tonight', those are just the words I said. The first shot I shot was at his hand. * * * I thought, he must be about ready to shoot me * * * From the way things looked around there there was no place to run up the street or across the street, Steele would have shot me in the back, that is why I didn't run" (R. 41-42).

The accused testified that there was bad blood between him and the deceased running back over a long period of time. He also recited the incidents which caused that bad feeling (R. 42-43). Explaining how he obtained the carbine which he did not have when he left the Society Cafe only a few minutes before the shooting, he said that he kept one hidden in a "sewage manhole" (R. 49) down by the railroad because they were "catching Japs" at Clark Field where he worked and "the company wouldn't give us guns" (R. 47). He explained that he expected to go to work as soon as he returned with the coal oil and that he took the carbine out of its hiding place for that purpose; that the hiding place was in direct line between the Society Cafe and the place he was going for the oil; that he had no knowledge of the fact that Steele was in the Serrano Cafe which was en route and that he was not expecting to run into him again (R. 46-50).

5. The accused was charged with murder but the court found him guilty of the lesser included offense of voluntary manslaughter. It was the contention of the defense that the homicide was committed by the accused in necessary self-defense and therefore was legally excusable.

Whether upon all the facts and circumstances there was a showing that the accused made adequate retreat and had reasonable cause to fear bodily harm raised a question of fact which the court determined adversely to the accused. The fact that the court found the accused guilty of the lesser included offense of manslaughter in violation of Article of War 93 is not inconsistent with its findings that the accused did not act in self-defense. A finding that the accused acted in self-defense would necessarily result in an acquittal. By convicting the accused of manslaughter the court necessarily found that the accused "intentionally" killed Technician Third Grade Leon I. Steele, Sr.; that the killing was <u>not</u> in self-defense (either because of inadequate retreat or because there was no reasonable basis for fearing bodily harm), but that the killing was without premeditation and without malice aforethought (See MCM, 1928, pars. 148<u>a</u> and 149<u>a</u>; CM P-369, <u>McFarland</u>, 19 August 1945).

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

"In voluntary manslaughter the provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man; the act must be committed under and because of the passion, and the provocation must not be sought or induced as an excuse for killing or doing bodily harm. (Clark.)" (MCM, 1928, par. 149a).

It is the function of the court to decide disputed questions of fact and if the evidence supports the court's conclusion the Board of Review is without power to interfere therewith (CM 231636, Curtis, 18 B.R. 261; CM 234711, Sandlin, 21 B.R. 131, 137; CM 152797, cited in MCM, 1928, p. 216). In this case the evidence adequately supports the court's finding of guilt (CM P-369, McFarland, supra).

6. The maximum confinement authorized upon conviction of voluntary manslaughter in violation of Article of War 93 is ten years (MCM, 1928, par. 104c). Confinement in a penitentiary is authorized by Article of War 42 for the offense of manslaughter, recognized as an offense of a civil nature and punishable by penitentiary confinement by section 22-2405 of the Code of the District of Columbia.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson S. Clements, Judge Advocate.
Major, J.A.G.D.

Joseph I. Robinson, Judge Advocate.
Major, J.A.G.D.

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

Board of Review
CM P-552

7 September 1945

UNITED STATES v. Major WILLIAM O. NEEL (O-325902), Coast Artillery Corps.	Trial by G.C.M., convened at APO 358, 18 June 1945. Dismissal.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 95th Article of War.

Specification: In that Major William O. Neel, CAC unasgd, did, at sea, aboard the United States Army Transport "Sea Pike", on or about 19 March 1945, with intent to defraud, wrongfully and unlawfully cheat at cards.

He pleaded not guilty to, but was found guilty of, the Specification and the Charge and was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved only so much of the sentence as provides for dismissal. The confirming authority confirmed the sentence as approved and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

In the month of March 1945 the accused, Major William O. Neel, was aboard the vessel "Sea Pike" en route to an overseas destination.

A number of officers, including the accused, engaged in playing poker, stud and draw (R. 6).

About 2300 hours on 19 March 1945 Second Lieutenant Delbert F. Cook approached Lieutenant Colonel Myron M. Layton, who was sitting down reading a magazine a few feet away from a table where a poker game was in progress. Cook said to Colonel Layton, "Do you want to see somebody cheating at cards?" (R. 7, 22). Colonel Layton, looking over, observed five men playing, one of whom was the accused. From where he was sitting he was able to see the accused's movements and his handling of the cards (R. 7). While the officer to accused's right was dealing, some of the players, including accused, dropped out. The accused picked up the discards and shifted the cards around saying, "Let me mix these pairs up" (R. 7). He arranged the aces so that on the next play they would fall to himself (R. 7, 22-23). Then he shuffled and in so doing he separated only a small amount at the bottom (R. 7, 22). After the cut, by shifting the cards from one hand to the other, he reversed the cut and restored the cards to their original position (R. 7, 22). " * * * and then he started to deal. They played stud and they went on and played the game and there was considerable betting and Major Neel won the pot; he had aces back to back." Some 15 or 20 minutes later, after going through the same procedure, Major Neel won a pot with kings back to back (R. 8). From all appearances it was a normal poker game except "that there was a good deal of fooling with the cards and discards by various players at the table" (R. 9).

Second Lieutenant Delbert F. Cook testified substantially as did Colonel Layton. He said the accused used "a side riffle shuffle, keeping these few cards he had fixed on top so that the sequence wouldn't be destroyed whatsoever" (R. 22). He said he saw the accused "manipulate" the cards in the manner indicated at least six times and that about 0100 hours, after accused had fixed a pair of queens, he stepped up to the table and said, "Wait just a minute, gentlemen, I want to show you something" (R. 23). He reached out and took the deck from Major Neel and with that deck demonstrated the fact that the fifth and tenth cards were queens. Everyone stopped playing (R. 23).

Major George C. Ricker testified that on 16 March 1945, three days before the day in question, he saw the accused manipulate the cards in a manner substantially as testified to by Colonel Layton and Lieutenant Cook (R. 15-21).

4. The evidence for the defense:

The accused testified that he at no time "deliberately" manipulated the cards (R. 30); that in playing draw poker there is a tendency for the cards to pair off since each player holds on to a pair or better when they fall to him; that it was agreed between the several players, who played practically all the time, to "set them in

through the deck" (R. 30) and that in splitting them up it was necessary to look at the cards (R. 30). "As far as reversing the cut," he said, "I have no alibi for that * * * I don't know if I reversed the cut but if I did it was unintentional" (R. 31).

Accused testified that he was the father of two children and was then on his second trip overseas; that his efficiency rating since 16 September 1940 had been superior (R. 31-32); that he was a good poker player; that on the trip in question he won about five hundred dollars and that his winnings were legitimate (R. 32-35).

5. The court determined the disputed issues of fact adversely to the accused. It is the function of the court to decide the facts, and if the evidence supports the court's conclusion the Board of Review is without power to interfere therewith (CM 231636, Curtis, 18 B.R. 261; CM 234711, Sandlin, 21 B.R. 131, 137; CM 152797, cited in MCM, 1928, p. 216; CM P-369, McFarland, 19 August 1945).

Cheating at cards or other "Acts of fraud or gross falsity" have long been regarded as "conduct unbecoming an officer and a gentleman" in violation of Article of War 95 (Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, p. 716; Bull. JAG, April 1944, p. 149; CM 249115, Van Horn, 32 B.R. 35).

It is elementary that testimony relating to offenses other than the one charged is inadmissible unless it has some reasonable relationship and is relevant to the offense for which the accused is then on trial (MCM, 1928, par. 112b; People v. Molineux, 61 N.E. (N.Y.) 286; CM P-279, Neidhart, 13 August 1945). Testimony of other offenses is regarded as having relevancy and some reasonable relationship to the offense for which the accused is then on trial if it bears upon the issues of identity, intent, motive, common scheme, plan or design, or absence of accident or mistake (People v. Molineux, supra; 1 Wharton's Crim. Evid., secs. 343-354; Martin v. United States, 127 Fed. 2d, 868).

At page 491 of Wharton's Criminal Evidence, supra, the following appears:

> "The nature of the offense is sometimes, for example, such that the accused may claim he had no knowledge that his act was wrong,—as where he is charged with receiving stolen property, in which case to prove knowledge it may be shown that on other occasions he had received stolen property."

Wigmore on Evidence, Third Edition, Volume 2, Section 300 reads in part as follows:

"Even where the doing of the act involved is not disputed, a knowledge existing at the time of the act may be in dispute. Thus, proof of knowledge becomes a usual necessity for certain offences, such as the uttering of forged or counterfeit paper and the possession of stolen goods; while it is rarely an element to be proved in other offences, such as robbery, rape, and homicide."

In the instant case the burden rested upon the prosecution to show that the act of splitting pairs of cards and setting them in the deck, while apparently innocent on its face, was in fact done deliberately and with intent to cheat. Evidence of similar conduct on the part of the accused which took place within a reasonable time prior to the occurrence complained of was, therefore, properly admitted (Tedesco v. United States, 118 Fed. 2d, 740).

In the Tedesco case the court said:

"That exception may be stated as follows: ' * * * where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as in civil cases, to introduce evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.' Wood v. United States, 41 U.S. 342, 360, 16 Pet. 342, 360, 10 L.Ed. 987, per Mr. Justice Story. This exception has been applied with uniformity down through the years. * * * The exception has also been stated negatively—'Relevant and competent evidence of guilt is not rendered inadmissible because it also tends to prove that the defendant committed another offense.' Crapo v. United States, 10 Cir., 100 F.2d 996, 1001. See also Minner v. United States, 10 Cir., 57 F.2d 506, 510. * * * 'Although the rule [that proof of a distinct, independent offense is inadmissible] is stringent, in criminal cases the conduct of the prisoner on other occasions is sometimes relevant, where such conduct has no other connection with the charge under inquiry than it tends to throw light on what were his motives and intentions in doing the act complained of. The intention with which a particular act is done often constitutes the burden of the inquiry, and to prove the intent it becomes necessary, in many instances, to extend the examination beyond the particular

transaction concerning which the accused is upon trial. For the purpose, therefore, of proving intent, not of proving the act itself, it is often permissible to show other criminal transactions of the same sort springing from like mental condition.' See also Wigmore on Evidence, 2d Ed., vol. 1, secs. 300, 302, pp. 608, 611-616; Wigmore's Principles of Judicial Proof, 2d Ed., sec. 116, pp. 224-228; Atwell, Federal Criminal Law, sec. 26d, p. 166; 20 Am. Jur. secs. 309, 313, pp. 287, 293-296; 62 L.R.A. 193, 214, note."

The evidence pertaining to accused's conduct during the card game of 16 March was, therefore, properly admitted as bearing on the elements of guilty knowledge and intent.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson A. Clements, Judge Advocate.
Major, J.A.G.D.

Joyce V. Robinson, Judge Advocate.
Major, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 9 September, 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Major William O. Neel (0-325902), Coast Artillery Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-552)

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

(Sentence ordered executed, GCMO 22, USAFP, 12 Sept 1945.)

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

Board of Review
CM P-583

18 September 1945

UNITED STATES v. Private DAN J. LEE (38323841), 629th Ordnance Company (Ammunition).	Trial by GCM, convened at Headquarters Base M, APO 70, 18 July 1945. To be shot to death with musketry.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Dan J. Lee, 629th Ordnance Company (Ammunition), did, at APO 70, on or about 11 June, 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Julian Esperanza, a male Filipino civilian by stabbing him in the body with a knife.

The accused pleaded not guilty to, but, all members concurring, was found guilty of, the specification and charge, and was sentenced to be shot to death with musketry. The reviewing authority approved the sentence, and the confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence reveals that on the afternoon of 11 June 1945, Tomasa Esperanza and her husband, Julian, 58 years old, were in their one-room house in San Fernando, La. Union, P. I., when a colored soldier (accused) holding a knife in his hand, entered (R 6, 8). He spoke to her in English but the woman did not answer as she could not understand him, although she recognized the words, "pom-pom" (R 6, 7). He then shook her husband who was sleeping. The Filipino awoke, and, as he sat up, the negro stabbed him (R 7). The woman ran to the home of Vicente Esperanza, her brother-in-law, a short distance away. He proceeded to her house, saw that his brother, Julian, was dead and went out to look for the negro (R 9). About five minutes later he saw a negro, whom he identified during the trial as the accused (R 9), dressed in underdrawers and an undershirt in a house about a third of a kilometer away throwing rice and clothes out the window (R 11). He entered the house, said, "Hello," and accused struck him in the neck with a knife. Vicente then drew his bolo knife and struck accused repeatedly until the latter left the house and ran to the woods (R 9). Vicente testified that accused was drunk (R 10).

The homicide was reported to the Military Police. They immediately investigated and observed accused running down a hill. He stopped and was apprehended, "exhausted" (R 12).

Accused was taken to a hospital where that evening he was questioned by a special investigator. After being warned of his rights (R 15), he made a statement (Ex A) which was reduced to writing and signed by him. In it accused said that he had been drinking on the afternoon of 11 June. He went to a small house where, "For no reason at all I began to stab this man . . . who was laying down . . . in the neck and chest with my pocket knife." He then left, and "tore" off his clothes because they were covered with blood and went to another house where he "lunged" at another Filipino with his knife. The native cut him with his bolo knife, so he ran away but was apprehended (Ex A).

Two days later accused was asked where he had left his clothes, and the investigator found them at the place he indicated. The clothing and knife were shown to accused and he identified them (R 16).

Accused elected to be sworn and testify. He stated that on the day in question he had been drinking "basi" with other soldiers and was "loaded." His companions left without him and he fell asleep. When he awoke it was raining and he felt a "little bit better." He "stumbled up" to a Filipino shack where he asked a woman the way to the casual camp. She

said something that he did not understand, and a man came to the door, tried to pull him into the house, and bit him. Accused kept trying to get away but not being able to do so grabbed the knife which was hanging at his (accused's) side and struck the Filipino. He then left but as he got to the door "something hot" hit him across the right arm and hip and burned him (R 19, 20). He saw another Filipino at another house and asked him the way to the beach. There accused, seeing the native "trying to get his bolo," attempted to prevent him and was cut (R 19). With reference to the statement he made to the investigating officer, he testified, " . . . I was still -- my head was still hurting and feeling tough and being drunk and that ether they had over me, so, when he come there I was hurting and you know -- I said some things, a little to get rid of him, . . . so I could rest" (R 20). He said that he took his clothes off "because something hot" was on them and he did not think that they were blood-stained (R 22).

4. The evidence is clear that on 11 June accused stabbed and killed Julian Esperanza in the latter's house. According to the widow's testimony her husband was, without provocation, assaulted as he was arising after having been asleep. Accused attempted to justify his actions by testifying that he went to their house to ask directions but having been seized, pulled into the house and, bitten by the Filipino, he stabbed him in order to get away. The surrounding facts, even in the light most favorable to accused, furnished no justification for the stabbing (Kinard v. U. S., 96 F. 2d, 522). The circumstances of the act show premeditation and indicate a wicked, depraved, and malignant spirit, from which malice may be inferred (Evans v. U. S., 122 F. 2d, 461, 466).

It appears from the record that accused had been drinking on the afternoon of the homicide and was drunk at the time of its commission. However, he testified that prior to going to the Filipino house he had been asleep and upon awakening was "feeling better." Immediately after the stabbing he had sufficient possession of his faculties to remove his blood-stained clothing and attempt to run away. During the trial he was able to recollect the many details of what had transpired on the afternoon in question. From the evidence the court could properly conclude that at the time of the homicide accused was capable of entertaining the requisite malice aforethought (King v. U. S., 34 F. 302).

The evidence adduced by the prosecution relative to the assault by accused upon Vicente Esperanza subsequent to the crime for which he was on trial was admissible to identify accused and to show his malice (22 CJS, sec 691, p 1141).

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

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

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

(absent), Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Ind.
Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 6 October 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Private Dan J. Lee, 38323841, 629th Ordnance Company (Ammunition), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-583).

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

(Sentence ordered executed. GCMO 32, USAFP, 20 Oct 1945.)

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

23 September 1945

Board of Review
CM P-595

UNITED STATES v. Privates First Class DAVID LATTIMER (36163598), FERRELL L. MANN (35270744) and THOMAS E. OLDS (34722102), all of Headquarters Company, 2nd Battalion, 17th Infantry.	Trial by G.C.M., convened at APO 7, 17, 18 and 20 August 1945. Sentence as to Lattimer and Olds: Confinement at hard labor for six months and forfeiture of $18.00 per month for like period. Sentence as to Mann: Confinement at hard labor for six months and forfeiture of $33.00 per month for like period. Army Service Command I Stockade, APO 331.

OPINION OF THE BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined in the Branch Office of The Judge Advocate General and there found legally insufficient to support the findings and sentences as to the accused Lattimer and Olds, and legally insufficient in part to support the findings as to the accused Mann. The record has now been examined by the Board of Review and the Board submits this, its opinion, to the Assistant Judge Advocate General.

2. The three accused were tried by common trial. The accused Lattimer was tried upon the following charges and specifications:

CHARGE I: (Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Private First Class DAVID LATTIMER,

Headquarters and Headquarters Company, 2nd Battalion, 17th Infantry, did at APO 7, on or about 11 July 1945, wrongfully have sexual intercourse with YASUKO YASUTA, a female Okinawan civilian, in violation of Operational Directive 1A, Headquarters, Tenth Army, dated 2 May 1945.

He pleaded not guilty to all charges and specifications. He was found not guilty of Charge I and its Specification (rape in violation of Article of War 92) and guilty of Charge II and its Specification. He was sentenced to confinement at hard labor for six months and forfeiture of eighteen dollars of his pay per month for a like period. The reviewing authority approved the sentence and designated the Army Service Command I Stockade, APO 331, as the place of confinement.

The accused Olds was tried upon specifications and charges identical to those against the accused Lattimer. He too pleaded not guilty to all charges and specifications. The court's findings and sentence and the action of the reviewing authority were the same in his case as in the case of Lattimer.

The accused Mann was tried upon charges and specifications identical to those upon which both Lattimer and Olds were tried, and also upon three additional specifications to Charge II (The "Specification" of Charge II in the case of the others is designated "Specification 1" in Mann's case.):

Specification 2: In that, Private First Class Ferrell L. Mann, Headquarters and Headquarters Company, 2nd Battalion, 17th Infantry, did at APO 7, on or about 11 July 1945, wrongfully take and use without authority a certain vehicle, to wit; a one-quarter ton truck, property of the United States, of a value of more than $50.00.

Specification 3: (Finding of not guilty.)

Specification 4: (Finding of not guilty.)

The accused Mann pleaded not guilty to all charges and specifications. He was found not guilty of the Specification of Charge I and Charge I, and of Specifications 3 and 4 of Charge II. He was found guilty of Specifications 1 and 2 of Charge II and Charge II, and was sentenced to six months' confinement at hard labor and forfeiture of thirty-three dollars of his pay per month for a like period. The reviewing authority approved only so much of the findings of guilty of Specification 2, Charge II as finds the accused guilty of wrongfully taking and using a government one-quarter ton truck of some value (instead of the value alleged); approved the sentence and designated the Army Service Command I Stockade, APO 331, as the place of confinement.

3. The evidence for the prosecution:

On 11 July 1945 about 1700 hours the accused Mann borrowed a jeep from Private First Class Hall (R. 10), and, accompanied by the accused Lattimer and Olds, drove to a "C.B." camp. There they traded some souvenirs for a quart of whiskey and a case of beer and drove to Company M of the 381st Infantry to visit Mann's cousin, Private First Class Woodrow Lowe (Exs. B, C and D). Lowe became sick and was taken back to his organization, whereupon the three accused, after "talking about getting some girls," drove to a native Okinawan hut at Gushiken, Okinawa (R. 16, Ex. B). Residing there were Yasuko Yasuta, a female Okinawan civilian, another native female and four men (R. 16).

The accused Mann and Lattimer went into the house (R. 16, Ex. C). They took hold of Yasuko Yasuta and caused her to come outside to the jeep. She testified, "I didn't fight back but I had hollered to the others in the house to help me and some of them grabbed onto me. I felt that there was no use to resist and fight back so I went along with the soldiers who were pulling me. * * * then the soldiers beckoned me to get into the jeep so I climbed inside it. * * * They turned the vehicle around and went down the road and stopped some place * * * . I believe that it was some place around Hyakuna. * * * The soldiers took me by the hand and helped me out of the jeep and took me into the field. * * * he did some bad things to me. * * * The soldier pulled on the kimono I was wearing so I knew what he wanted. I took the pants off myself. * * * After I took my pants off and was lying on the ground, the soldier had sexual intercourse with me. Then after he finished, he signaled by whistling to the others. The second soldier then came and he did the same thing and after he finished he signaled to the next man. * * * After the third man finished, another soldier came down again and did the same thing. * * * The same act took place about three times more * * * . After the last man finished, he found my pants for me and I put them on. Then he took me back to the car. * * * one of the soldiers offered me some chewing gum. He urged me to eat the chewing gum so I ate the chewing gum and the other two soldiers also offered me one stick of chewing gum apiece, which I kept. * * * As we were going down the road, the lights of the jeep flashed on a soldier standing by the side of the road. * * * After we passed the soldier by the side of the road, I heard a report of a gun go off. Then we went down the road a short distance and the soldiers in the jeep told me to get out of the car. * * * The place where I got out of the car had a bamboo thicket right close by the side of the road, so not knowing the direction to return home, I stayed in that thicket all night" (R. 16-17).

Yasuko Yasuta was unable to speak English and speaking through an interpreter said that she did not "holler for help" at

the time of the alleged rape because she "felt that there was no one around in the area that could help * * * " (R. 18). She also said that she did not use physical force or try to run away because she was afraid the soldiers would kill her (R. 18).

Private First Class William R. Mason testified that he was a member of the 519th Military Police Battalion and that on the night of 11- 12 July 1945 he was on guard on the highway in the vicinity of Hyakuna—a civilian internment village in Okinawa (R. 27-28). He said he had been ordered to stop all jeeps going either way to ascertain whether any civilian girls were being carried in them and that although he signaled for the jeep driven by Mann to stop, it proceeded on its way, so he fired into one of the tires (R. 28).

Lieutenant Edwin J. Kelly, also a member of the 519th Military Police Battalion, gave chase but was unable to catch up to Mann and his companions (R. 31). Shortly thereafter Lieutenant Kelly found a jeep parked alongside the roadway, the radiator of which was warm, indicating that it had been recently used (R. 31). Lieutenant Kelly said that he gave the order to the guard to stop any passing jeep because he "received a report pertaining to a jeep with a 'gook' [native female] in it" (R. 31).

Written statements voluntarily made and signed by each of the accused were introduced in evidence (R. 21-27, Exs. B, C and D). In their statements each accused admitted in substance that he had sexual intercourse with Yasuko Yasuta, but insisted that no force was applied. They asserted that she went voluntarily and even aided them in having sex relations with her.

The prosecution introduced in evidence Exhibit E which reads in part as follows:

"HEADQUARTERS TENTH ARMY
Office of the Commanding General
APO 357

"OPERATIONAL DIRECTIVE) 2 May 1945
"NUMBER 1A)

"FRATERNIZATION AND RELATIONS WITH CIVILIANS

"1. While definite improvement has been noted in the conduct of military personnel in their relationships with civilians on Okinawa, instances of improper actions indicate that numerous individuals do not yet understand the need for nor the essentials of a correct attitude towards these people. The rules set forth below will govern the behavior of personnel assigned and attached to the TENTH Army in their dealings with civilians.

"2. Troops will conduct themselves so as to maintain the respect of the Okinawans. There must be no familiarity, and military personnel will not perform work for these people which they have been accustomed to do for themselves for centuries. Orientals do not respect conquerors who perform menial tasks for the conquered.

"3. All civilians will be treated with suspicion. * * *

"4. Signs of familiarity by civilians, such as salutes or V-signs, will not be acknowledged. These gestures are for our military personnel and for our allies.

"5. Food, cigarettes and candy will not be given to civilians by individuals. Military Government personnel are on the island to assure that civilians are fed rations sufficient to maintain them in adequate health. * * *

"6. Personnel will be severe and firm in their dealings with civilians but never cruel or brutal.

* * *

"8. Compliance with the terms of the foregoing instructions is a command responsibility.

"9. This directive will be read to all personnel as soon as practicable after its receipt, and will be conspicuously posted on organization bulletin boards.

"BY COMMAND OF LIEUTENANT GENERAL BUCKNER" (Ex. E).

The above directive was forwarded by first indorsement to "CO's, All Units, Asgd & Atchd, 7th Inf. Div." reading as follows:

"1. For your guidance and compliance.

"2. Par 9, above, will be complied with as soon as practicable.

"By command of Major General ARNOLD:

"DIST 'D'" (Ex. E).

4. The evidence for the defense:

Each accused testified substantially in accord with his signed statement (Exs. B, C and D); each maintained that the sex relations which they had with Yasuko Yasuta was with her consent and, in fact, with her assistance; that they talked to the girl in sign language; that they at no time used or threatened to use force; that she seemed to be in "pretty good humor because she was laughing and giggling"; that she "took her pants off" and helped the several accused have intercourse with her (R. 36-38, 48-49, 53-54). Each accused also testified that they had no knowledge of the existence of Exhibit E relating to fraternization with civilians and that they had received no instructions as to its contents (R. 40, 50, 56).

Pfc. Mann testified that on his way back to Hyakuna, he saw an "MP" in the highway standing at port arms, but that the "MP" made no motion indicating that he wanted the vehicle to stop and "didn't holler to us--in fact I thought that he must not have seen us" (R. 38). Mann said he heard a shot fired and that the front tire became flat. It was then that they stopped the car, let the girl out, and "came on home" (R. 39).

The testimony of the accused Lattimer and Olds concerning Mann's failure to stop the car on the sentinel's order, as alleged in Specification 4 of Charge II, is substantially the same as Mann's (R. 46-56).

Captain Bleckfeldt and three non-commissioned officers testified to the good character of each accused; to their excellent performance of duty, and to their good reputation for truth and veracity (R. 57-61). All three accused had been in several campaigns and had received various decorations. None had been court-martialed and no blemish of any kind was ever entered against their military records other than the current charges (R. 46, 55-56, 58-61).

5. Since the three accused were found not guilty of rape in violation of the 92nd Article of War, the only remaining question insofar as their relationship with Yasuko Yasuta is concerned involves the charge that they wrongfully had sexual intercourse with her in violation of Operational Directive Number 1A (Ex. E). Whether their conduct was in fact a violation of the directive need not presently be determined (see in this connection CM ETO 10967, Harris, 1945; CM ETO 11978, Bromley, 1945), since the conclusion is here reached that no person in military service may be found guilty of violating any directive or order which was not duly promulgated and published and of which he had no knowledge.

The identical question was presented in CM P-491, White, 25 September 1945. There the Board of Review said:

"Before an accused can be convicted of

violating a military order, knowledge of that order must be brought to his attention. This may be done by posting a copy thereof on the bulletin board; by furnishing copies to the members of the organization; by oral announcement; or by other means depending upon the facts and circumstances in each case (Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, p. 575; CM 233817, Tillotson, 20 B.R. 149, 154; CM 218393, Callan, 12 B.R. 49; MCM, 1928, par. 134b, p. 149). Were the rule otherwise all members of a command would be chargeable with knowledge of every order and directive issued by the commanding officer even though it never got beyond the file cabinet in headquarters. Since statutory enactments are without binding force until duly promulgated and published (1 Wharton's Crim. Law, 12th Ed., sec. 106; 36 Cyc. 1191), it follows that uncommunicated 'orders' which are on a much lower plane are equally ineffective."

Judicial notice may be taken of the fact that the accuseds' organization was an integral part of the Tenth Army (CM ETO 6203, Mistretta, 1945) and in the absence of evidence to the contrary it may be presumed that all units of the Tenth Army were duly notified of the existence of Operational Directive 1A since on its face it calls for distribution to all units (CM ETO 7553, Besdine, 1945). But distribution to the units does not establish distribution to the individual soldier or knowledge on his part of its contents. Without such knowledge, actual or constructive, there can be no conviction for a violation thereof (Davis, Military Law of the U. S., p. 385; Winthrop, supra, p. 575; CM P-491, White, supra). The rules requiring knowledge of "standing orders" or other military orders differ from the rules relating to knowledge, actual or constructive, of military laws. All laws, whether civil or military, are binding on the individual and his ignorance thereof is no excuse (Wharton's Crim. Law, supra, sec. 102). Directives and orders not having the force of law are always subject to the defense of lack of knowledge. Here the accused invoked such defense.

The failure to produce evidence showing that the accused had knowledge or should have had knowledge of the order relating to fraternization with natives is therefore fatal to the prosecution's case. This, despite the fact that it may be assumed that the directive was communicated to the various subdivisions of the Tenth Army. It would have been a simple matter for the prosecution to show that the directive was posted or read to the accuseds' organization if such were the fact. The failure to introduce such proof gives credence to the defendants' testimony that they had

no knowledge (1 Wharton's Crim. Evid., 11th Ed., sec. 112).

6. The accused Mann was convicted of wrongfully taking and using without authority a certain vehicle, to wit: a one-quarter ton truck (a jeep), property of the United States of value of more than fifty dollars. The record being barren of any proof of value, the reviewing authority accordingly approved only so much of the findings as holds that the vehicle wrongfully taken and used was of some value. While it is true that the accused Mann was authorized to take the jeep by Pfc. Robert W. Hall, the soldier who had custody thereof (R. 11-14), his unauthorized use thereof on a private mission constitutes a wrongful taking, the same as if he had received no authorization to take it (CM ETO 492, Lewis, 1943).

In the Lewis case, supra, the accused, instead of returning a government cargo truck to the motor pool upon completion of a duty to which he had been assigned, used the vehicle for his own purposes without authority. His conviction of wrongfully taking and using a government truck in violation of Article of War 96 was held proper. Here the record indicates that the accused Mann knew that he had no right to use the jeep on a private mission without permission "From the motor officer" (R. 41). He did not have that permission and Pfc. Hall was without authority to give it to him. It follows that his conviction for wrongfully taking and using the jeep was proper (CM ETO 492, Lewis, supra).

The offense of which the accused Mann was legally found guilty is not listed in the Table of Maximum Punishments (MCM, 1928). However, paragraph 104c, Manual for Courts-Martial, 1928, provides that "The punishment stated opposite each offense listed in the table below is hereby prescribed as the maximum limit of punishment for that offense, for any included offense if not so listed, and for any offense closely related to either, if not so listed." The offense of wrongfully taking and using without authority a certain vehicle, property of the United States of some value, is analogous to the offense of larceny or embezzlement of government property of some value, for which the maximum punishment is dishonorable discharge, total forfeitures and confinement at hard labor for six months (CM ETO 2157, Cheek, 1944; CM ETO 492, Lewis, supra). Such offense is also closely related to the offense of misapplication of property of some value belonging to the United States and furnished or intended for the military service thereof, for which the maximum punishment is also dishonorable discharge, total forfeitures and confinement at hard labor for six months. It therefore follows that Mann's sentence of confinement at hard labor for six months and forfeiture of $33.00 per month for a like period is within the legal limits.

7. For the reasons stated above the Board of Review is of the opinion that the record of trial as to the accused Private First Class David Lattimer and Private First Class Thomas E. Olds is legally insufficient to support the findings and sentences; that the record of trial as to the accused Private First Class Ferrell L. Mann is legally insufficient to support the findings of guilty of Specification 1 of Charge II, legally sufficient to support the findings of guilty of Specification 2 of Charge II and of Charge II and legally sufficient to support the sentence.

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Joseph P. Robinson, Judge Advocate.
Major, J.A.G.D.

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1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 30 September 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. Attention is invited to the basic review by a Board of Review in this office, of the record of trials of Privates First Class David Lattimer (36163598), Ferrell L. Mann (35270744) and Thomas E. Olds (34722102), all of Headquarters Company, 2nd Battalion, 17th Infantry. The opinion of the Board that the record is legally insufficient to support the findings and the sentences in the cases of Lattimer and Olds and legally insufficient to support the findings in the case of Mann with respect to Specification 1 of Charge II, but legally sufficient to support the sentence in his case, is concurred in and it is recommended that the appropriate vacations be accomplished. A suggested draft of action to this end is inclosed together with the record of trials.

2. When the inclosed record of trials has served its purpose it is requested that the record, the original holding of the Board of Review, and this indorsement, together with seven copies of the General Court-Martial Orders promulgating the vacations of the findings and the sentence, if such is your action, be transmitted to this office.

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

2 Inclosures:
Incl. 1 - Record of trial.
Incl. 2 - Draft of action.

(As to accused Lattimer findings and sentence vacated. GCMO 29, USAFP, 19 Oct 1945.)
(As to accused Mann findings of guilty of Specification I vacated. GCMO 30, USAFP. 19 Oct 1945.)
(As to accused Olds findings and sentence vacated. GCMO 31, USAFP, 19 Oct 1945.)

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

13 September 1945

Board of Review
CM P-607

UNITED STATES v. Private First Class CRAIG DAVIS (34483410), 742nd Medical Sanitary Company, APO 70.	Trial by G.C.M., convened at APO 70, 21 June 1945. To be hanged by the neck until dead.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Craig Davis, 742nd Medical Sanitary Company, did, at APO 70, on or about 18 April, 1945, forcibly and feloniously, against her will, have carnal knowledge of Juana Pulido, a Filipino civilian, of Pagudpod, San Fernando, La Union, P. I.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence. The confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution shows that on 18 April 1945 Miss Juana Pulido, a thirty year old Filipino girl, was living at "Barrio Pagudpod, San Fernando, La Union" with her uncle, aunt and cousins, "seven in all" (R. 4-5, 11). About 2300 hours on that day,

when all of them were asleep in their house, the accused, Private First Class Craig Davis, a negro soldier, armed with a carbine, entered "without even calling," climbed the stairs leading to the sleeping quarters, and "flashed" his flashlight on the sleeping occupants. When they got up accused told them that he was an "MP," that he was looking for a "pro-Jap girl" and pointed out Juana Pulido as the one he was seeking. He told them that he was taking her to the Provost Marshal's office. When her uncle, Francisco Marzan, objected, the accused pointed his carbine at them and said that if they did not consent he would shoot them. When, at his direction, all of them went downstairs to the yard, accused remarked, "One girl is enough to go with me" and again pointed out Miss Pulido. She "didn't get moving" and "he pointed again the gun," took her by the hand, pushed her uncle away when he tried to interfere, and "dragged" her "to the road" (R. 5, 12, 15-16).

Accused continued to hold Miss Pulido's hand, and, as they walked along the road, he fired a shot (She could not tell which way the gun was pointed.), and led her to a sugar cane field about one-half kilometer from the house. When she tried to scream he put his hand over her mouth and "tried to squeeze" her neck. He "pushed" her to the ground, she again tried to scream, but he "continued to squeeze" her neck. He had sexual intercourse with her (R. 5-6, 8, 10). She resisted and tried to get away from him but was "helpless" (R. 9-10). She felt pain in her neck and in her "organ." When he had finished, accused again took her by the hand and led her back to the road but when two cars came up he ran away. Her "cousin," who was in one of those two cars, was looking for her. She was taken home. She was crying and hysterical, and fainted upon her arrival at the house. There were blood stains on her dress (R. 6, 12, 17). At the time of his attack upon her the accused was not drunk (R. 13).

On cross examination Miss Pulido said that she had never seen the accused before the night of 18 April. When she was asked whether she had made trips to his camp to deliver or pick up laundry she replied, "No, sir, I never went there and I do not wash, also." She had been living with her uncle "only two nights" prior to 18 April 1945 (R. 7).

After the accused had taken his victim away from the house some of the other members of the household reported the incident to the military authorities. On their way back they picked up Miss Pulido in the road and took her home. Shortly thereafter she, together with her cousin, Miss Marzan, went to accused's camp where both of them identified accused as the colored soldier involved in the assault upon Miss Pulido earlier that night (R. 16-17, 20). Both of them also identified him at the trial (R. 8, 18), as did also the cousin Francisco Marzan (R. 11-13).

When the accused entered the house, Miss Pulido could see his face as two "Petroleum lamps" about six inches high were then burning in the room (R. 8-9). Her cousin, Miss Marzan, recognized the accused on 18 April as he previously had visited her house on three different occasions during daylight hours to leave "dirty clothes to be laundered" (R. 17-18).

A short time after midnight on 19 April 1945 Staff Sergeant Joe W. Williams found a khaki shirt, a cap, an "OD" undershirt and "OD" shorts in a depression overgrown with weeds about five or six feet from the tent in which accused was living. The clothing was "wet with perspirations and stains" and "around the crotch" of the shorts and on the tail of the shirt there were red stains which resembled blood. No evidence was presented that any of these articles of clothing belonged to the accused (R. 22-25).

About 1900 hours on 18 April Private Boston C. Lloyd passed accused "on the road." Lloyd was returning to the company area and the accused, who was carrying a "carbine rifle," was going "towards the beach" (R. 27-28).

Captain Arthur R. Olson, Medical Corps, examined Juana Pulido about 0320 hours on 19 April. She was wearing a dress which was stained with blood in the back and there was dried blood "on the inner thighs down on the inside of both legs." Captain Olson found no bruises but " - the vaginal orifice was torn with a laceration extending downward three-quarters of an inch and up the vagina about an inch." It was "a large tear" more extensive than a normal rupture of the hymenial membrane (R. 28-30).

4. The accused elected to remain silent (R. 35)

Private First Class Lester Spencer testifying for the defense said that from one to three days prior to 18 April 1945 he saw Juana Pulido in the area of the accused's camp, "among the boys out there in front getting their laundry, or taking some from them." On examination by the court Private Spencer said that he was "not just positive" that it was Miss Pulido; that it could have been someone else. However, he thought she was the one he saw in the camp area (R. 31-35).

5. The evidence establishes that on 18 April 1945, the accused entered a Filipino home, awakened the seven sleeping occupants, told them he was an "MP" looking for a "pro-Jap" and directed one of them, Miss Juana Pulido, to accompany him to the Provost Marshal's office. When the others expressed their disapproval accused pointed his carbine at them and told them he would kill them if they did not consent. He pushed her uncle away when he attempted to interfere, took his victim by the hand and led her to a sugar cane field, firing a shot

from his carbine on the way. When she tried to scream he put his hand over her mouth and choked her. He pushed her to the ground, again choking her when she resisted him and had sexual intercourse with her without her consent. When he had completed the act his victim was crying and hysterical, the back of her dress was soaked with blood and she fainted shortly after she had returned to her house. A subsequent medical examination disclosed that she had suffered an extensive tear of the vaginal orifice.

The foregoing facts established by the undisputed evidence so clearly and conclusively spell out every element of the crime of rape, namely, the carnal knowledge of a woman by force and without her consent, that lengthy discussion of the applicable principles of law appears unnecessary (See MCM, 1928, par. 148b; CM 227909, Scarborough, 16 B.R. 13, 19; CM 232785, Bee, 19 B.R. 183; 1 Wharton's Crim. Law, 12th Ed., pp. 910-914).

6. A sentence of death is authorized upon conviction of rape in violation of Article of War 92.

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

Samuel M. Drewry, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson A. Clements, Judge Advocate.
Major, J.A.G.D.

George V. Robinson, Judge Advocate.
Major, J.A.G.D.

When the accused entered the house, Miss Pulido could see his face as two "Petroleum lamps" about six inches high were then burning in the room (R. 8-9). Her cousin, Miss Marzan, recognized the accused on 18 April as he previously had visited her house on three different occasions during daylight hours to leave "dirty clothes to be laundered" (R. 17-18).

A short time after midnight on 19 April 1945 Staff Sergeant Joe W. Williams found a khaki shirt, a cap, an "OD" undershirt and "OD" shorts in a depression overgrown with weeds about five or six feet from the tent in which accused was living. The clothing was "wet with perspirations and stains" and "around the crotch" of the shorts and on the tail of the shirt there were red stains which resembled blood. No evidence was presented that any of these articles of clothing belonged to the accused (R. 22-25).

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Captain Arthur R. Olson, Medical Corps, examined Juana Pulido about 0320 hours on 19 April. She was wearing a dress which was stained with blood in the back and there was dried blood "on the inner thighs down on the inside of both legs." Captain Olson found no bruises but " - the vaginal orifice was torn with a laceration extending downward three-quarters of an inch and up the vagina about an inch." It was "a large tear" more extensive than a normal rupture of the hymenial membrane (R. 28-30).

4. The accused elected to remain silent (R. 35)

Private First Class Lester Spencer testifying for the defense said that from one to three days prior to 18 April 1945 he saw Juana Pulido in the area of the accused's camp, "among the boys out there in front getting their laundry, or taking some from them." On examination by the court Private Spencer said that he was "not just positive" that it was Miss Pulido; that it could have been someone else. However, he thought she was the one he saw in the camp area (R. 31-35).

5. The evidence establishes that on 18 April 1945, the accused entered a Filipino home, awakened the seven sleeping occupants, told them he was an "MP" looking for a "pro-Jap" and directed one of them, Miss Juana Pulido, to accompany him to the Provost Marshal's office. When the others expressed their disapproval accused pointed his carbine at them and told them he would kill them if they did not consent. He pushed her uncle away when he attempted to interfere, took his victim by the hand and led her to a sugar cane field, firing a shot

from his carbine on the way. When she tried to scream he put his hand over her mouth and choked her. He pushed her to the ground, again choking her when she resisted him and had sexual intercourse with her without her consent. When he had completed the act his victim was crying and hysterical, the back of her dress was soaked with blood and she fainted shortly after she had returned to her house. A subsequent medical examination disclosed that she had suffered an extensive tear of the vaginal orifice.

The foregoing facts established by the undisputed evidence so clearly and conclusively spell out every element of the crime of rape, namely, the carnal knowledge of a woman by force and without her consent, that lengthy discussion of the applicable principles of law appears unnecessary (See MCM, 1928, par. 148b; CM 227909, Scarborough, 16 B.R. 13, 19; CM 232785, Bee, 19 B.R. 183; 1 Wharton's Crim. Law, 12th Ed., pp. 910-914).

6. A sentence of death is authorized upon conviction of rape in violation of Article of War 92.

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

Samuel M. Drewry, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson S. Clements, Judge Advocate.
Major, J.A.G.D.

George V. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement (153)

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 14 September, 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Private First Class Craig Davis (34483410), 742nd Medical Sanitary Company, APO 70, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-607).

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

(Sentence ordered executed. GCMO 23, USAFP, 20 Sept 1945.)

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

Board of Review
CM P-608

14 September 1945.

UNITED STATES v. Private JOHN L. CYRUS (38634816), (Cas), 269th Replacement Company, 12th Replacement Battalion.	Trial by G.C.M., convened at Headquarters Philippine Base Section, APO 358, 7 August 1945. Dishonorable discharge, total forfeitures, confinement for 20 years. The United States Penitentiary, McNeil Island, Washington.

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private JOHN L. CYRUS, (Casual) 269th Replacement Company, 12th Replacement Battalion, did, at APO 75, on or about 24 June 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Staff Sergeant PAUL TREANOR, Company "B", 672nd Amphibious Tractor Battalion, a human being, by stabbing him with a knife.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence but reduced the period of confinement to twenty years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on the afternoon of 24 June 1945 Staff Sergeant Paul Treanor, the deceased, and Private Floyd W. Smith, both of the 672nd Amphibious Tractor Battalion left their area and went to the city of Manila, P.I.. They visited a number of cafes having drinks at each and at about 2200 hours (R. 22) returned to the "Victory Cafe" located in Paranaque, Greater Manila, one of the places they had previously visited (R. 6, 7). The cafe was about 22 feet wide with two entrances on the street and divided in half by a wooden partition about 3 feet in height with an opening between the two rooms near the rear. Entering from the street in the right hand room there were 7 tables and a piano and in the left 4 tables, one in each corner, the bar being in the back of the latter room (Pros. Ex. A). Upon entering the room on the left deceased and Private Smith seated themselves at one of the tables (R. 8). Deceased, at that time, was "already drunk"; "very drunk" (R. 11, 24, 31, 33, 35, 41, 44) and Smith left the table and went to the bar for a drink (R. 9), leaving deceased at the table. Seated at a table just across the partition from deceased was Private John L. Cyrus, a colored soldier. Deceased said to him "What are you doing here?" Accused replied "Nothing, I like to only hear the music". Deceased then said "You'd better step out if you have nothing to do" to which accused replied "Okay, I'll go but you go outside with me" (R. 22), deceased replying "Yes, I'll go with you" and immediately climbed over the partition (R. 23, 26). The accused got up and backed toward the door (R. 48), deceased, with his hands at his sides (R.23), advancing toward him (R. 26, 34). The accused then said "Alright, come here" (R. 35, 49) and as deceased neared him he reached in his shirt and drew a hunting knife (R. 23, 32, 37) and made a "short jab" at him (R. 40). Ignacio Cruz, the "houseboy", stepped between them and said "Take it easy" and told deceased "Take your seat". The accused then said "Give me way; give me way" (R. 32, 38), took one step forward (R. 33, 49) and stabbed deceased in the left chest, the knife entering his heart, and then ran away (R. 10, 15, 23). Deceased died shortly thereafter (R. 19-21). Various witnesses testified that at that time deceased was drunk (R. 24); that he did not attempt to strike accused (R. 23); "He had his hands down" (R. 26); that he was "crying that night because he was demoted" and was quarrelling with some other white soldiers in the cafe (R. 24); was unarmed (R. 30) and "was not mad, only he is drunk" (R. 44).

The accused elected to remain silent but called Mr. Melchor Aguirre who was in the "Victory Cafe" when the killing occurred. He testified, in substance, as did the witnesses for the prosecution as to the conversation between accused and deceased prior to the homicide, adding that deceased was "very drunk" (R.48) and when approaching accused "he walked trembling" and was "wobbling" (R. 49). "The negro soldier waited for him" (R. 52). He stated that deceased was "much bigger" than accused

and weighed about 165 pounds (R. 50). He saw the accused when he first made a "short jab" at deceased and when deceased "stepped back" and then "stepped forward again" accused stabbed him (R. 51).

4. The accused was convicted of murder which is the unlawful killing of a human being with malice aforethought (MCM, 1928, par. 148a). The facts in the case are undisputed. The deceased, in a drunken condition, apparently resented the presence of a negro soldier in the cafe. He ordered him to leave and climbed over a small partition and advanced toward him. At that time he was "wobbling" and had his hands at his sides. The accused drew a hunting knife from his shirt, made one "jab" at deceased and when a bystander attempted to prevent the difficulty accused said "Give me way; give me way" and then stabbed deceased in the heart, killing him. Deceased was clearly in the wrong in provoking a difficulty with the negro soldier who had given him no cause. Yet such provocation did not warrant accused in inviting the deceased, who was unarmed and at that time apparently in such a drunken condition that he could not have rendered him bodily harm had he desired so to do, to come outside with him and then stabbing him to death. Accused made no claim of self-defense.

Accused's malice may be presumed from his use of a deadly weapon and the nature of the wound inflicted.

> "'Malice * * * is used in a technical sense, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. It is not confined to ill-will towards one or more individual persons, but is intended to denote an action flowing from any wicked and corrupt motive, a thing done malo animo, where the fact has been attended with such circumstances as carry in them the plain indications of a heart regardless of social duty, and fatally bent on mischief. And therefore malice is implied from any deliberate or cruel act against another, however sudden.'" (CM 224951, Thompson, 14 B.R. 219, 225).

The facts furnish substantial evidence from which the court could determine that accused killed deceased willfully, deliberately, unlawfully, with malice aforethought, and with premeditation, and support the court's findings of guilty of murder as charged (MCM, 1928, par. 148a).

Although a sentence of death or of life imprisonment is mandatory upon conviction of murder in violation of Article of War 92, the latter may be mitigated by the reviewing authority to confinement for a term of years. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and so punishable by Sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 455).

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

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

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

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

18 September 1945

Board of Review
CM P-645

UNITED STATES v. Private ROBERT CLARK (34555125), 3446th Quartermaster Truck Company, APO 75.	Trial by G.C.M., convened at APO 75, 13 August 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for ten years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private Robert (NMI) Clark, 3446th Quartermaster Truck Company, did, at APO 75, on or about 7 July 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Francisco Morales, a Filipino civilian, Fourteen (14) Pesos, the property of said Francisco Morales, of the value of about Seven ($7.00) Dollars.

Specification 2: In that Private Robert (NMI) Clark, 3446th Quartermaster Truck Company, did, at APO 75, on or about 7 July 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Rufino Salvador, a Filipino civilian, Seventeen (17) Pesos, the property of said Rufino Salvador, of the value of about Eight and 50/100 ($8.50) Dollars.

Specification 3: In that Private Robert (NMI) Clark, 3446th Quartermaster Truck Company, did, at APO 75, on or about 7 July 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Bartholome Farinas One Hundred Fifty (150) Pesos, the property of said Bartholome Farinas, of the value of about Seventy-five ($75.00) Dollars.

Specification 4: In that Private Robert (NMI) Clark, 3446th Quartermaster Truck Company, did, at APO 75, on or about 7 July 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Amado Dayuta, a Filipino civilian, One Hundred Sixty (160) Pesos, the property of said Amado Dayuta, of the value of about Eighty ($80.00) Dollars.

The accused pleaded not guilty to, but was found guilty of, all the specifications and the charge and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty five years. The court considered one previous conviction by summary court-martial. The reviewing authority approved the sentence; reduced the period of confinement to ten years; designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

The accused was a member of the 3446th Quartermaster Truck Company on detached service with the 3557th Quartermaster Truck Company, which was quartered in the vicinity of Sangandaan near Highway 52, APO 358 (R. 7). On 7 July 1945 about 2230 hours, he entered a store in the vicinity of Sangandaan. In the store at the time were Francisco Morales and his wife, Rufine Salvador, his brother Marcela, and a girl identified simply as "Maria" (R. 15). Pointing his carbine at the occupants, accused demanded seventy pesos. When it was not paid he grabbed hold of Rufine Salvador and, striking him with his fist, threw him down and took seventeen pesos from his person (R. 15-17). He also took fourteen pesos from the person of Francisco Morales, put a gun in his side and told him to walk (R. 8). After walking about three hundred yards from the store, accused stopped a jeep and ordered Francisco Morales in. When they reached "the cross road," he told Morales to get out, and both of them proceeded on foot to the home of Bartholome Farinas (R. 8). Accused then directed Morales to ask Farinas for seventy pesos "in five minutes" or else he (Morales) would die (R. 8). They were outside the house and Morales made the request to Farinas through a window (R. 10). Seeing that accused was armed with a carbine, Farinas paid over the seventy pesos (R. 13). Accused then asked

for eighty pesos more, and when Farinas said he would not give it to him, accused fired his carbine five or six times in the air and toward the eaves of the building (R. 10-11, 13). Farinas paid eighty pesos more, whereupon accused and Morales left (R. 11, 13, 23). Accused ordered Morales to follow him and later told him "to get in the truck and go home" (R. 8). Accused apparently then proceeded to the home of Amado Dayuta, whom he knew (R. 17).

Dayuta was sitting on a balcony and came down when accused called to him (R. 18). As Dayuta approached, the accused fired a shot and asked for money. When Dayuta said he did not have any money accused grabbed him by the shirt and pushed him to the ground. He then struck Dayuta on the forehead with the steel part of the carbine making him "sort of groggy and half unconscious" (R. 18). Accused then searched Dayuta's clothing and took one hundred and sixty pesos from him. While Dayuta was still on the ground accused fired several more shots toward the eaves of the house. Accused then left (R. 18).

Dayuta's testimony was substantiated by that of his wife who said, "I saw him with my own eyes get money from my husband's breast pocket as I was quite close to him" (R. 20). All four persons from whom accused had taken money were assaulted or beaten and placed in fear of bodily harm.

4. The evidence for the defense:

Technician Fifth Grade Clarence Davis testified that he was in charge of weapons and ammunition at the 3557th Quartermaster Truck Company and that, in his organization, weapons were issued to guards only (R. 24).

The accused elected to make an unsworn statement, the substance of which is an alibi (R. 25). He said he was not on duty on the night of 7 July 1945 and went to town sometime after 1700 hours; that he picked up two girls and went to the movies; that at 2130 hours he caught a truck going to North Harbor; that he took the girls home, returned to his company area about 2345 hours, and that he "didn't leave the tent until 8 o'clock next morning" (R. 25).

5. "Robbery is the taking, with intent to steal, of the personal property of another, from his person or in his presence, against his will, by violence or intimidation. (Clark.)

* * *

"The taking must be against the owner's will by means of violence or intimidation. The violence or intimidation must precede or accompany the taking." (MCM, 1928, par. 149f).

All the legal elements of the offense of robbery are shown to have been committed by the direct and uncontradicted evidence of the prosecution's case (See CM 236985, Douglas, 23 B.R. 203; CM 234601, Blankenship, et al, 21 B.R. 69; Dig. Op. JAG, 1912-40, p. 332; Bull. JAG, May 1943, p. 187.).

Confinement in a penitentiary is authorized by Article of War 42 for the offense of robbery recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 284 of the Criminal Code of the United States (18 U.S.C. 463).

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

Samuel B. Drewer, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Joseph V. Robinson, Judge Advocate.
Major, J.A.G.D.

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

Board of Review
CM P-677

25 September 1945.

UNITED STATES v. Lieutenant Colonel ROBERT L. GILLIAM II, MC (0321981), 41st Field Hospital.	)))))))	Trial by G.C.M., convened at APO 442, 20 August 1945. Dismissal, total forfeitures, confinement for two years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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

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

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

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

Specification 1: In that Lieutenant Colonel Robert L. Gilliam II, Medical Corps 41st Field Hospital, did, at Quezon City, Manila, Philippine Islands, in or about February 1945, unlawfully conspire with Technician Fourth Grade Joseph R. Dobrovolny, 41st Field Hospital, unlawfully and wrongfully to sell and dispose of rations, property of the United States furnished and intended for the military service thereof, and did in pursuance thereof wrongfully and knowingly receive from the said Technician Fourth Grade Joseph R. Dobrovolny, at various times between about February 1945 and April 1945, sums of money approximating 1500 pesos, value seven hundred fifty dollars ($750.00), as his share of the proceeds from the unlawful sale of such rations by the said Technician Fourth Grade Joseph R. Dobrovolny.

Specification 2: In that Lieutenant Colonel Robert L. Gilliam II, Medical Corps, 41st Field Hospital, did at Quezon City, Manila, Philippine Islands, in or about March 1945, wrongfully receive and accept a watch as a gift, from Technician Fourth Grade Joseph R. Dobrovolny, 41st Field Hospital, a member of said Lieutenant Colonel Gilliam's command.

Specification 3: In that Lieutenant Colonel Robert L. Gilliam II, Medical Corps, 41st Field Hospital, did, at Quezon City, Manila, Philippine Islands, in or about March 1945, wrongfully and knowingly order Technician Fifth Grade John Lesko, 41st Field Hospital, to deliver to a Filipino, name unknown, in exchange for a watch, description unknown, one can of bacon, value about $4.76, property of the United States furnished and intended for the military service thereof.

Specification 4: In that Lieutenant Colonel Robert L. Gilliam II, Medical Corps, 41st Field Hospital, did, at Milne Bay, British New Guinea, in or about June 1944, wrongfully borrow about thirty pounds, value about $95.00, from Technician Fifth Grade Oliver N. LaCrone, 41st Field Hospital, a member of said Lieutenant Colonel Gilliam's command.

Specification 5: In that Lieutenant Colonel Robert L. Gilliam II, Medical Corps, 41st Field Hospital, did, at Quezon City, Manila, Philippine Islands, in about February 1945, wrongfully take and withhold to about 2 May 1945, from Technician Fifth Grade Oliver N. LaCrone, 41st Field Hospital, a member of said Lieutenant Colonel Gilliam's command, about 80 pesos Philippine money, value about forty dollars ($40.00), property of the said Technician Fifth Grade Oliver N. LaCrone.

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

Specification 1: In that Lieutenant Colonel Robert L. Gilliam II, Medical Corps, 41st Field Hospital, did, at Biak Island, Netherlands East Indies, in or about November 1944, wrongfully dispose of by delivering them to Technician Fourth Grade Joseph R. Dobrovolny, 41st Field Hospital, for an unauthorized purpose, about 16 bottles of alcohol, value about $5.28, property of the United States furnished and intended for the military service thereof.

Specification 2: (Finding of not guilty).

The accused pleaded not guilty to all charges and specifications but was found guilty as charged except that he was found not guilty of Specification 2 of Charge II. He was sentenced to dismissal, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence and the confirming authority confirmed it but remitted one year of the period of confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. a. Charge I, Specifications 4 and 5.

In June 1944 the 41st Field Hospital, of which the accused was the commanding officer, was located on Milne Bay, New Guinea. Technician Fifth Grade Oliver N. LaCrone was, at that time, acting as accused's orderly. Some time during the month accused requested LaCrone to lend him some money. LaCrone complied with the request and loaned him "about 30 pounds or 90 or 95 dollars" (R. 47). On pay day in July he requested the Colonel to repay the money but was told by accused that he did not have the money at that time. Upon being again asked for the money the Colonel claimed that he had not borrowed it, that the transaction was an "exchange", but in September the money was repaid, the Colonel stating to LaCrone, "Here's the money I borrowed from you" (R. 49).

In February 1945, when the unit was stationed at Manaoag, Luzon, P.I., Private LaCrone went to the office of the first sergeant to exchange approximately 120 Dutch guilders into Philippine pesos. The sergeant placed the 150 pesos (R. 80) on the table and, after LaCrone had picked up a ten pesos bill, the accused, who was present at that time, took the balance and put it in his pocket, stating that he (LaCrone) owed him some money (R. 51). A few days later LaCrone asked the Colonel for the money and was told "Dobrovolny had it" (R. 51). Upon asking Dobrovolny for the money he was told by him that the Colonel had it. Repeated requests from both the Colonel and Dobrovolny were to no avail but on 2 May 1945 LaCrone was called to the Colonel's tent and repaid the money (R. 52).

b. Charge I, Specification 3.

In March 1945 Technician Fifth Grade John Lesko, a member of accused's unit, was stationed in Quezon City, Manila, P.I., working in the "PX". After closing hours he was "straightening up the shelves" when accused asked him where he had gotten a wrist watch which he was wearing. Lesko told him he had secured it from a Filipino. After examining the watch accused asked him if he could get him a "pocket watch". Several days later Lesko got from a Filipino a small gold Elgin pocket watch and delivered it to accused, stating to him that the Filipino "wanted some rations /a can of bacon/ for it" (R. 42, 43). The Colonel replied "Alright, give it to him and don't say anything" (R. 44). Lesko asked Dobrovolny, the mess sergeant, to give the Filipino the bacon but as none was on hand he did not get it (R. 44). Insofar as Lesko knew the Filipino was never paid for the watch (R. 46).

c. Charge II, Specification 1.

In October 1944 the 41st Field Hospital was stationed at Biak, N.E.I. The accused approached Technician Fourth Grade Joseph R. Dobrovolny and asked him if he could dispose of some "G.I. alcohol" which he (accused) wanted to sell "for a friend of his" (R.19). Dobrovolny replied that he could and arrangements were made between them for the delivery of the "G.I. alcohol" and the price to be charged by Dobrovolny for it. The price stipulated by the Colonel was from 30 to 35 guilders per bottle (a guilder being equivalent to approximately 50¢ in American money)(R. 19, 26). At times the alcohol would be placed in quart bottles in a little suitcase and left in the accused's jeep and on one occasion Dobrovolny went to accused's quarters and got it from a box underneath accused's bed, each time being advised by the accused when and where to get it (R. 19, 23). When he received the alcohol it was in bottles "about a quart size, some in plasma bottles" (R. 20) and they were "of the type and kind furnished and intended for the use of the military service" (R. 21). Dobrovolny disposed of this alcohol to enlisted men "quite a number of times" and testified that on two occasions he got eight bottles and turned over to accused for these two transactions 480 guilders. Dobrovolny received no compensation from accused for his services in disposing of the alcohol (R. 20) but stated, "Some of it I didn't make enough on, some alittle and some I broke even. Some I disposed of to get rid of it"(R. 26). He had seen "G.I. alcohol" in their supply room. Its proven value was 33¢ per quart (R. 63).

d. Charge I, Specification 1.

In February or March 1945 accused's unit was stationed in Quezon City, Greater Manila, P.I. At that time Technician Fourth Grade Joseph R. Dobrovolny was in charge of the PX, drawing rations, cutting meat and "doing other odd jobs for the unit" (R. 8). One afternoon in March (R. 10) when the accused was in the PX Dobrovolny told him that he knew where rations, primarily preserved butter, dehydrated eggs, canned milk and cigarettes (R. 9) could be disposed of to a Filipino at a good price. Accused "kind of smiled" and said, "Don't forget my cut" (R. 9). Thereafter from time to time Dobrovolny would go to the Colonel and request the use of a vehicle "that night" (R.16). Accused would then give written permission for the use of a vehicle (R. 16, 32, 33). On two occasions the Colonel wrote on pieces of paper a certain sum "Cupped them in his hand and showed them to me * * * One time 200 /pesos/, another time 300" (R. 14). Dobrovolny would then go to the motor pool and secure the vehicle, always getting Private Michael S. Lamoriella (R. 10, 17) who was the regular driver for the "kitchen" (R. 27) and with whom he had made arrangements to deliver certain rations to one Santiago Artacho, a Filipino, who lived at San Juan Heights, Manila (R. 28). On about seven separate occasions Dobrovolny

and Lamoriella took certain rations marked "For Armed Forces Use" drawn for the unit (R. 37) to the Filipino who paid them approximately 3500 pesos (R. 15, 16, 17). All deliveries were made after duty hours and at night (R. 11, 31). When Artacho asked him if there would be any trouble, Dobrovolny said, "Don't be afraid, Santiago, the old man is with us". Artacho asked, "What do you mean by 'old man'", Dobrovolny replying, "You know, the old man in our hospital * * *" (R. 37). He testified, "I would go in the PX [which could be seen from accused's quarters] when I'd get back after making my delivery, put on the light and sit in the PX behind the locked door and the Colonel would knock on the door and I would let him in, lock the door and payments would be made" (R. 12). He paid the accused a total of about 1500 pesos (R. 16), gave Lamoriella about 900 (R. 16) and kept for himself about 1150 (R. 17).

e. Charge I, Specification 2.

Some time during the month of March 1945, while the unit was stationed in Manila, P.I., Technician Fourth Grade Dobrovolny was in the headquarters of the hospital. He testified, "I had a fob hanging from my watch pocket and the Colonel pulled it out, a little silver watch, and he said he'd like to have the watch, one just like that for his son. He told me he'd like to have it so I gave it to him" (R. 18), the Colonel saying "Thanks". At no time thereafter did he ever receive any payment from accused for the watch nor was it ever returned to him (R. 18).

4. The defense called First Lieutenant Garson H. Gossin, who testified that he had been a member of accused's unit from August 1943 untilJune 1945. He stated that accused's reputation for integrity was the best, that his efficiency as an administrator the highest, that he was insistent that supplies be kept in perfect order and that if anyone took property from the supply room that an "MR" be placed on his desk promptly. On several occasions superior officers had written letters of commendation as to accused's efficiency and outstanding work and his cooperation with other units (R. 70, 71, 72). By stipulation it was agreed that if Captain Leo Kagan, MAC, were present his testimony would be substantially the same as the preceding witness (R. 80). Also, by stipulation, it was agreed that if Colonel W. J. Shaw, Surgeon, XI Corps, were present he would testify, in substance, that he had known accused since 1944, and was a surgeon in the 41st Division to which accused's unit was attached. That "the reputation of the accused for honesty and integrity was of the highest * * * that the efficiency and leadership abilities of the accused in his capacity as Commanding Officer of the 41st Field Hospital was outstanding and that his performance in that capacity and also the operations of his organization were outstanding and also of the highest caliber" (R. 81).

Accused elected not to take the stand but submitted an unsworn statement through his counsel in which he recounted his life only "from the military point of view". It appeared accused was 37 years of age, was married and had two children and a dependent mother. He volunteered for active duty in the fall of 1939, and arrived in the Southwest Pacific in 1944. "All his performances have been rated as excellent, superior" (R. 76, 77).

By agreement between accused, his counsel, and the prosecution, Specification 5 of Charge I was amended to reveal that accused wrongfully took and withheld 150 pesos of the value of $75.00.

5. The accused is charged in Specification 1, Charge I, with conspiracy to dispose of government rations. Conspiracy is defined as "a combination between two or more persons to do an unlawful or criminal act, or to do a lawful act by criminal or unlawful means" (United States v. Perlstein et al., 126 F. 2d 789; Beland et al. v. United States, 100 F. 2d 289).

It is evident from the definition that there are several distinct elements of the crime of conspiracy: First, there must be at least two persons to conspire; second, there must be an agreement or confederation, and third, there must be an unlawful purpose or act to be accomplished, or a lawful purpose to be accomplished by unlawful means. The evidence is clear that each essential element of conspiracy is present in the instant case. Accused, when approached by an enlisted man and told that government rations could be disposed of at good prices gave his consent to dispose of the rations which were under his control and became a party thereto by stating, "Don't forget my cut". Thereafter, he actively participated in the unlawful enterprise by furnishing the means of transportation for the delivery and sale of government property and accepted a large portion of the profits arising from such unlawful acts. From this evidence the court properly found accused guilty as charged. It may be noted that the testimony of Dobrovolny with reference to his conversation with Artacho, although not within accused's presence, having occurred during the conspiracy and after the latter had become associated with it, was properly admitted in evidence (Underhill's Crim. Evid., sec. 778).

With reference to Specifications 2, 3, 4, and 5, Charge I, the evidence is undisputed that in June 1944 the accused borrowed thirty pounds, the equivalent of approximately ninety-five dollars, from Private LaCrone, a member of his command. The borrowing of money by an officer from an enlisted man in his command has been so repeatedly held to be a violation of Article of War 96 (CM 242940, Hedges, 27 B.R. 223) that further comment is deemed unnecessary. The taking by the accused of approximately eighty dollars of Private LaCrone's money in February 1945 without his consent and his failure to give it back to him until the following May, although repeatedly requested so to do, is conduct calculated to bring discredit upon the military service and may be charged as a violation of the provisions of Article of War 96.

Likewise is the giving of an order by an officer to an enlisted man to deliver to a civilian government property in payment for a personal obligation violative of the provisions of that Article. Upon observing that one of his men had a "little silver watch" he stated to him that he would like to have it for his son. He then accepted it as a gift. Such conduct on the part of an officer is clearly a violation of the provisions of that Article. There is abundant evidence in the record to support the court's finding accused guilty of these four offenses.

In Specification 1, Charge II, the evidence is clear that accused delivered to an enlisted man large quantities of alcohol to be sold at exorbitant prices, the proceeds to be returned to him. The sale was made on Biak Island where such alcohol was not in the channels of commerce and was, by accused, designated "G.I. alcohol" thereby definitely establishing it as property of the United States. He received the proceeds of the sale for "his own use and benefit". His actions clearly were violative of the provisions of Article of War 94.

At the conclusion of the trial, by agreement between the Trial Judge Advocate, counsel for the defense and the accused, Specification 5 of Charge I was "amended" to reveal that accused wrongfully took and withheld 150 pesos of the value of $75.00 instead of 80 pesos of the value of $40.00 as alleged in the specification. Such amendment was a substantial change in the specification in that it increased the quantity of the offense originally alleged and could not be made without authority of the convening authority even though agreed to by the defense (III Bull. JAG, 286).

The sentence imposed is permissible for the several offenses of which accused was found guilty.

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

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

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

1st Indorsement

Army Service Forces , Branch Office of The Judge Advocate General. APO 75, 28 September 1945.

To: Commander-in-Chief, AFPAC, APO 500.

1. In the case of Lieutenant Colonel Robert L. Gilliam II, MC (0321981), 41st Field Hospital, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of this published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For the convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-677.)

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

(Sentence ordered executed. GCMO 26, USAFP, 7 Oct 1945.)

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

26 September 1945

Board of Review
CM P-693

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 235, 6 August 1945. Dis-
First Lieutenant JACK WICKS	)	missal and total forfeitures.
(0-1167277), Headquarters,	)	
226th Field Artillery Bat-	)	
talion, APO 235.	)	

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

CHARGE I: (Finding of not guilty.)

Specification: (Finding of not guilty.)

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

Specification: In that Second Lieutenant Jack Wicks, Headquarters 226th Field Artillery Battalion, APO 235, did in a public place, to wit the village of Ibara, Okinawa Shima, on or about 4 July 1945, wrongfully, and in the presence of Two (2) enlisted men, have intercourse with one Okuma, Teruko, a sixteen (16) year old Okinawan female.

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

Specification: In that Second Lieutenant Jack Wicks, Headquarters 226th Field Artillery Battalion, APO 235, did, in the village of Ibara, Okinawa Shima, on or about 4 July 1945, wrongfully violate Operational Directive No. 1A, Headquarters Tenth Army, dated 2 May 1945, SUBJECT: Fraternization and Relations with Civilians, by

performing an act of sexual intercourse with one Okuma, Teruko, a female Okinawan.

The accused pleaded not guilty to all charges and specifications and was found not guilty of Charge I and its Specification (rape in violation of Article of War 92); guilty of Charge II and its Specification except the words "Two (2) enlisted men," substituting therefor the words "an enlisted man," and 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. The confirming authority confirmed it, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On the afternoon of 4 July 1945 the accused First Lieutenant Jack Wicks, Private First Class Nick Lucas, Private First Class LaMar Peterson and others were drinking "Raisin Jack" in the area of the XXIV Corps Cub Airstrip, APO 235 (R. 7). The accused, after talking with Lucas about "going out and getting some women," left the XXIV Corps Airstrip in a jeep, accompanied by Lucas and Peterson. They went to the town of Ibara, Okinawa (R. 8-9). Entering the village they "flirted" as they went along (R. 9). They stopped in the town and "started to talk to the people by using signs and conversation trying to make them understand" (R. 9). It was then "towards sunset, about 6 o'clock" (R. 22).

Without saying anything to the enlisted men, the accused left the jeep and took hold of a male native, Arakaki Ansei, who was then returning from his "personal business" (R. 21). He led Arakaki into the yard of house number four where Okuma Teruko, a 16-year-old native high school girl and another native woman were washing dishes at a well (R. 21, 42). The accused was carrying his pistol in an exposed manner and upon entering the yard pointed it toward the house (R. 21). When he saw the two women near the well, he let Arakaki go and approached them (R. 21-22). Arakaki immediately ran away (R. 22, 42).

By the use of his pistol, accused caused Okuma Teruko and Mrs. Kuniyoshi, the other woman who was with her, to move toward the back of the house (R. 42, 43). He released Mrs. Kuniyoshi, and pointing the pistol at Okuma Teruko "took" her to the side of the house. He threw her down by tripping her with his legs, tore off her "Mumpy" and pants and proceeded to have sexual intercourse with her (R. 43-46). She tried to push him away but in vain. She did not scream or call for help because she was frightened by the pistol (R. 45-46).

Soon after accused first encountered the two women he had a talk with Lucas. Lucas left and called to Peterson to back the jeep up (R. 10-11). He then returned and saw the accused having sexual intercourse with Okuma Teruko (R. 10-17). He saw the accused "On top of her" . . . "moving" (R. 12). Lucas was carrying a carbine "in a precautionary manner" and was standing about fifteen feet away (R. 14-15).

On the morning of 5 July 1945 the accused's pistol and holster were found in the yard of house number four, Ibara, Okinawa by one Terkina Kamado (R. 36). She also found Okuma Teruko's "Mumpies" (R. 36-37; Ex. B).

Miss Teruko was examined on the morning of 5 July by Lieutenant Commander J. R. Lockwood, MC, USNR, who testified that he found a small abrasion at the entrance to the vagina but that he could not say whether it was the result of sexual intercourse or an injury (R. 26). There was no other evidence of physical injury about the girl's person (R. 27). The girl herself testified that she was not bruised but that she at no time consented to the act (R. 41, 46). She also said that before the American Army came to Okinawa, she lived at Shuri and attended the "Shuri Higher Girls School" (R. 41). She said her religion was "Ancestor Worship"; that she was taught that it was wrong to tell a lie. She swore by her "ancestors" to tell the truth (R. 41).

Operational Directive Number 1A, Headquarters Tenth Army, APO 357, 2 May 1945, entitled: Fraternization and Relations with Civilians, was introduced by the prosecution (Ex. C). It reads in part as follows:

> "1. While definite improvement has been noted in the conduct of military personnel in their relationships with civilians on Okinawa, instances of improper actions indicate that numerous individuals do not yet understand the need for nor the essentials of a correct attitude towards these people. The rules set forth below will govern the behaviour of personnel assigned and attached to the Tenth Army in their dealings with civilians.
>
> "2. Troops will conduct themselves so as to maintain the respect of the Okinawans. There must be no familiarity, * * *
>
> * * *
>
> "6. Personnel will be severe and firm in their dealings with civilians but never cruel or brutal. We only hurt ourselves if we descend to Japanese levels of behavior.
>
> "7. Observance of these rules facilitates our military operations. Failure to observe them makes our task more difficult, and diverts energies which could otherwise be devoted to our primary mission of killing Japanese soldiers.
>
> "8. Compliance with the terms of the foregoing instructions is a command responsibility.

"9. This directive will be read to all personnel as soon as practicable after its receipt, and will be conspicuously posted on organization bulletin boards."

The record is barren of any evidence as to what extent, if any, Operational Directive Number 1A was called to the attention of the men in the Tenth Army. There is no proof that it was ever promulgated, published or in any manner distributed.

4. The evidence for the defense:

The accused elected to remain silent (R. 55).

Captain Floyd J. Swink of the 420th Field Artillery Group, testified that the accused was a member of his organization; that there was considerably more fraternization between the officers and enlisted men in his organization than in "ground units," because the men "live and operate together" (R. 50); that Operational Directive Number 1A had not come to his "official" attention; that as far as he knew the accused had not been "appraised of the contents of this directive" (R. 51); that he himself had heard of rules and regulations regarding fraternization with civilians on Okinawa (R. 52); that he heard that the rules were similar to those relating to "fraternizing with the Germans in Europe." (R. 52-53). Captain Swink testified further that the accused had been in his organization for about a month and a half prior to 4 July 1945 and that he rated him "Excellent" (R. 51, 53).

5. Although the accused was found not guilty of Charge I and its Specification (rape in violation of Article of War 92), the evidence appears sufficient to have warranted his conviction (MCM, 1928, par. 148b; CM P-711, DuPaul, 24 September 1945).

That the accused "did in a public place, to wit the village of Ibara, Okinawa, Shima, on or about 4 July 1945, wrongfully, and in the presence of [an enlisted man], have intercourse with one, Okuma, Teruko, a sixteen (16) year old Okinawan female" (Specification, Charge II), is amply sustained by the evidence. Query: Does such conduct constitute a wrong in violation of Article of War 95?

Article of War 95 makes punishable any "conduct unbecoming an officer and a gentleman" and requires dismissal from the service as punishment. The conduct contemplated is: "Action or behavior in an official capacity, which, in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman; Or action or behavior in an unofficial or private capacity, which, in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." (Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, p. 713).

" * * * Not everyone is or can be expected to meet ideal standards or to possess the attributes in the exact degree demanded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet can not fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness" (MCM, 1928, par. 151).

The Manual cites as an instance of a violation of Article of War 95 "committing or attempting to commit a crime involving moral turpitude" (MCM, 1928, par. 151, p. 187; see also the examples cited in Winthrop's Military Law and Precedents, 1920 Reprint, pp. 710-720 and footnotes). That the accused's conduct in the instant case brands him as a person morally unfit and lacking the attributes of an officer and a gentleman, is clearly established. Dismissal from the service is mandatory punishment for a violation of Article of War 95.

The findings of guilty of Charge III and its Specification (fraternization with a native civilian of Okinawa in violtion of Operational Directive Number 1A) cannot be sustained (CM P-595, Lattimer, et al, 23 September 1945; CM P-491, White, 25 September 1945). Aside from the question whether the accused's conduct constituted fraternization (see CM ETO 10967, Harris, 1945; CM ETO 11978, Bromley, 1945), accused may not be convicted of violating a standing order without a showing that he had knowledge, actual or constructive, of such order. A standing order is not in the same category as an army regulation or other War Department directive of general application which has been duly promulgated and published. The latter, if it does not contravene the Constitution or acts of Congress, has the force of law (Winthrop's Military Law and Precedents, 2d Ed., 1920 Reprint, pp. 25-33) and lck of knowledge will not excuse a vilation thereof (Wharton's Crim. Law, 12th Ed., Vol. 1, sec. 400). On the other hand lack of knowledge (actual or constructive) of a standing order will excuse a violation thereof (CM P-595, Lattimer, Supra).

6. For the reasons stated above the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Charge III and its specification; legally sufficient to support the findings of guilty of Charge II and its specification as modified by the reviewing authority, and legally sufficient to support the sentence.

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Joseph F. Robinson, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 29 September 1945.

To: Commander-in-Chief, AFPAC; APO 500.

1. In the case of First Lieutenant Jack Hicks (O-1167277), 226th Field Artillery Battalion, I concur in the foregoing holding of the Board of Review. I recommend, for the reasons therein stated, that the findings of guilty of Charge III and its specification be disapproved; thereupon you will have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-693).

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

(Findings of guilty of the Specification of Charge III and Charge III be disapproved. Sentence ordered executed. GCMO 33 ESAFP, 23 Oct 1945.)

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

Board of Review
CM P-696

10 October 1945.

UNITED STATES v. RICHARD M. CASSELBERRY, JR., TC0781, Merchant Marine Ship's Master, USAT "Albert Kahn".	Trial by GCM, convened at Headquarters Philippine Base Section, APO 358, 14 July 1945. Fine of $5000.00, confinement for 5 years, further confinement at the rate of $31.00 per day until said fine or any portion remaining unpaid be paid. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, DRIVER and ROBINSON
Judge Advocates

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Richard M. Casselberry, Jr., then a person serving with the Army of the United States in the field as Master aboard the USAT Albert Kahn, said vessel then and there carrying cargo in connection with the military operations of the United States in the war, did, aboard the USAT Albert Kahn, at sea, on or about 21 March 1945, wrongfully and without proper authority misappropriate two (2) cases of cigars from the ship's cargo, of the value of more than Fifty ($50.00) Dollars, property of the United States and intended for the military service thereof.

Specification 2: (Finding of not guilty).

Specification 3: In that Richard M. Casselberry, Jr., then a person serving with the Army of the United States in the field as Master aboard the USAT Albert Kahn, said vessel

then and there carrying cargo in connection with the military operations of the United States in the war, did, aboard the USAT Albert Kahn, at sea, on or about 24 March 1945, wrongfully and without proper authority, and in violation of his obligations as Ship's Master, order the ship's hatches to be open and did permit members of the ship's crew to take from the ship's cargo for their own use, an unknown number of cases of beer of the value of more than Fifty ($50.00) Dollars, property of the United States and intended for the military service thereof.

Specification 4: In that Richard M. Casselberry, Jr., then a person serving with the Army of the United States in the field as Master aboard the USAT Albert Kahn, said vessel then and there carrying cargo in connection with the military operations of the United States in the war, did, aboard the USAT Albert Kahn, at sea, on or about 24 March 1945, wrongfully and without proper authority, and in violation of his obligations as Ship's Master, misappropriate an unknown number of cases of beer from the ship's cargo of a value of more than Fifty ($50.00) Dollars, property of the United States and intended for the military service thereof.

Specification 5: (Finding of not guilty).

Specification 6: (Finding of guilty disapproved by reviewing authority).

The accused pleaded not guilty to the specifications and the charge. He was found not guilty of Specifications 2 and 5; guilty of Specifications 1, 3, 4, and 6; guilty of the charge, and sentenced to a fine of $5000.00, confinement at hard labor for 5 years and to further confinement at hard labor at the rate of one day for every $31.00 of the fine remaining unpaid. The reviewing authority disapproved the finding of guilty of Specification 6; approved only so much of the finding of guilty of Specification 4 as involves misappropriation of an unknown number of cases of beer of a value of more than $20.00 and less than $50.00, property of the United States; approved the sentence; designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence with reference to the offenses of which accused, Richard M. Casselberry, Jr., stands convicted reveals that during the month of March 1945, he was serving with the armies of the United States in the field as Master of the "Albert Kahn" (R. 27, 32, 47). The ship carried a general Navy cargo, "Navy stuff" (R. 48, 51, 52, 78, 86) included in which were cigars and beer (R. 29, 30, 56). About 24 March accused ordered one of the holds to

be opened, and, pursuant to his direction, two "big wooden" cases, each containing probably thirty or forty boxes (R. 85) of cigars, were taken out and placed in the ship's trunk locker (R.56, 63) where the "slop-chest" cigars, that is, those kept for sale to the members of the crew, were kept (R. 64). One witness testified that the cigars were taken to the accused's cabin and that in the presence of accused he "took some of the boxes of cigars * * * out of the case" (R. 85) but that he "couldn't tell" whether they were cargo or "slop-chest" cigars (R. 87). Other witnesses testified that cigars were sold by accused aboard ship for $3.50 a box and were smoked by members of the crew. They did not know whether such cigars were from the cargo or the "slop-chest" (R. 56, 64, 82) but they were of the same brand as that carried as cargo (R.92). A few days later accused ordered the First Officer to open the hold and "let the crew have all the beer they wanted from 8:00 o'clock in the evening until midnight" (R. 51). In accused's presence the hold was opened. About 20 double cases of beer were removed (R.52, 53, 74) and placed in the ship's linen closet and trunk locker (R. 54). The beer was subsequently drunk by members of the crew (R. 74, 90). A "few cases" (R. 57, 88) were drunk by accused and other ship's officers and their guests at a dinner on shipboard (R. 57, 64).

By stipulation it was admitted that "the Subsistence Value Price List, Army Quartermaster, on the dates in question were as follows:

> "Beer $1.92 per case * * * Cigars, El Roitan, Panatella $60.00 per case." (R. 103).

On behalf of the defense, the ship's First Officer testified that the lock on one of the manholes had been broken; that a bulletin had been posted on the ship stating, in effect, that anyone caught pilfering would be turned over to the authorities (R. 106); and that accused went ashore at Hollandia, purchased cigars and brought them aboard (R.108).

Accused elected to make an unsworn statement (improperly in question and answer form). In it, in pertinent part, he stated that he saw several members of the crew with beer taken from the cargo and posted a notice that anyone caught pilfering would be prosecuted (R. 110); that he used his personal funds to purchase supplies for the ship's "slop-chest", and that cigars were among such supplies.

4. The evidence establishes that pursuant to accused's order, two cases, each containing about 30 or 40 boxes of cigars, part of the ship's cargo, were removed from the hold and either placed in the accused's cabin or stored with cigars carried in the ship's "slop-chest" and thereby made available to accused for sale to members of the crew. There is nothing in the record to indicate that for the proper operation of the vessel or the protection of the cargo it became necessary for accused, in his capacity as Master of the ship, to change the place of stowage of the cigars.

The evidence with reference to the subsequent disposition of the cigars is indefinite. There is nothing in the record to indicate that they were

thereafter treated as ship's cargo and properly discharged but there is testimony that cigars of the brand carried as cargo were smoked by members of the crew. One member of the crew testified that he took some cigars from the case while it was in accused's cabin and in the latter's presence. On the evidence, therefore, the triers of the facts were justified in drawing the inference that accused wrongfully removed the cigars from the hold and misappropriated them.

Being naval cargo the property was not properly described in the specification as that "intended for the military service" (CM POA 124, Renner). The charge was under the 96th and not the 94th Article of War. The inclusion of such language, therefore, did not prejudice the accused and may be regarded as surplusage.

The evidence does not clearly indicate that the cigars were of a value greater than $50.00. The stipulation with reference to "the Subsistence Value Price List" was of no probative value as there was no evidence that the cigars removed from the hold were of the kind mentioned therein. However, in view of the number of boxes of cigars involved (at least 60) and the fact that there was some evidence that cigars were sold on shipboard for $3.50 a box, the court could properly conclude that the cigars wrongfully appropriated by accused were of a value of more than $50.00. It follows that there is substantial evidence in the record to sustain the findings of guilty with reference to Specification 1.

The evidence is uncontradicted that accused wrongfully ordered the hold to be opened and permitted the crew to take about twenty cases of beer from the ship's cargo. Such conduct by the accused was clearly violative of his duties as master of the ship and prejudicial to good order and military discipline. The record is legally sufficient to support the findings with reference to Specification 3. Having aided and abetted the members of his crew in their wrongful act, he was legally charged as a principal for the offense committed by them (Collins v. U.S., 20 F. 2d 574). In addition thereto, accused, himself, misappropriated "a few cases" of the beer. The record, therefore, supports the finding as approved with reference to Specification 4 that accused misappropriated property of the United States of a value of more than $20.00 and less than $50.00.

The sentence imposed is authorized for the offenses of which accused was found guilty and penitentiary confinement is authorized (18 U.S.C., 82,87).

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

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

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

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

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

28 September 1945

Board of Review
CM P-699

UNITED STATES v. Private First Class NATHAN PONCHER (36903070), Battery C, 771st Antiaircraft Artillery Gun Battalion.	Trial by G.C.M., convened at APO 246, 11 August 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Nathan Poncher, Battery C, 771st Antiaircraft Artillery Gun Battalion did, at APO 246, on or about 25 May 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Doylebert L. Lampley, Battery C, 771st Antiaircraft Gun Battalion, a human being by shooting him with a rifle.

The accused pleaded not guilty to, but was found guilty of, the Specification and the Charge. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington,

as the place of confinement and forwarded the record of trial for action under Article of War 50½. The accused was theretofore on 23 June 1945 tried for the same offense, found guilty, and sentenced to be shot to death with musketry. The reviewing authority disapproved the sentence and ordered a rehearing before another court, which rehearing was had on 11 August 1945 and resulted in the sentence above set forth.

3. The evidence for the prosecution:

Both the accused, Private First Class Nathan Poncher, and the deceased, Private First Class Doylebert L. Lampley, were members of Battery C, 771st Antiaircraft Artillery Gun Battalion, APO 246.

About 1545 hours on 25 May 1945 Technician Fifth Grade Treff obtained forty bottles of beer from the battery refrigerator consisting of one full case (24 bottles) of "Reingold" and another case containing sixteen bottles of "Ballantines," which he started to take back to the men of Battery C, 771st Antiaircraft Artillery Gun Battalion (R. 14-15). Lampley came by and volunteered to help him. He carried the case containing "Ballantines" (R. 15, 16). They returned to the company street and placed the beer on two chairs in front of the accused's tent.

Accused came out to get the ration allowance for the men in his tent (two bottles for each man). At that time Lampley was taking ten bottles of "Ballantines" for the men in his tent (R. 15-17). Accused said to Lampley, "You don't get all the Ballantines" (R. 26). When Lampley disregarded him, accused became very angry. He tried to grab the case of beer away from Lampley, and began calling him vile names, such as "cocksucker" etc. (R. 26). Lampley said nothing. He pushed accused away and proceeded to his tent with the ten bottles of "Ballantines" (R. 18-19, 26, 27).

The accused, who in the past very often distributed the beer (R. 22), again made distribution of the remaining bottles to the men of the battery (R. 27). As he went by Lampley's tent, which was next to his own, he again made vile remarks to Lampley. Someone asked the accused what the trouble was. He replied, "Some asshole wanted some beer" (R. 91). Lampley yelled out to him to watch out what he was saying and that he "would come out and stop him" (R. 29). Another witness reported Lampley as saying, "I'll come out there and get you if you don't shut up" (R. 103). Whereupon the accused replied that "it would take a man" (R. 29) or "It will take a better man than you" (R. 103). Lampley came out of his tent and when he approached the accused, accused started "scuffling with him right away, and Lampley was holding him off with his arms, * * * " (R. 30). Accused aimed a kick at Lampley's groin and missed.

Lampley then struck accused in the jaw knocking him to the ground (R. 30). Accused appeared unconscious, but within a minute sat up and before Private First Class Warren S. Gray, the medical aid man for the battalion, arrived, accused was up and about (R. 30).

Lampley, along with his tent mate, Private First Class William J. O'Brien, returned to his tent (R. 30-31). Within less than a minute Pfc. Gray came into Lampley's tent and asked "Who hit him?" (R. 33). Lampley grinned and said, "I did." Whereupon Gray (referred to in the company as "Doc") said, "Well, it must have been a beaut" (R. 33). At that moment, Lampley's tent mate O'Brien heard the "click" sound of a shell being inserted into an M1 rifle. The sound was coming from the accused's tent which was next adjoining Lampley's (R. 33, 46, 47).

Accused, after the scuffle with Lampley, was seen moving about the area (R. 59). He was cleaning up the sawdust which fell from the beer cases in front of his tent and carrying it to a trash pile across the roadway about seventy-five feet away (R. 38, Ex. 1). He then returned to his tent. His tent mates, Corporal Joseph J. Janoschak, Technician Fifth Grade Lester L. Simpson and Private First Class Randolph S. Warner, were all present. Janoschak was about to go on guard duty, it being almost 1600 hours (R. 78). Without saying a word to anyone accused got a clip out of his cartridge belt and loaded it into his rifle (R. 78-79). Janoschak, suspecting that he was going after Lampley, said to him, "Poncher, put the gun down; you don't want to do anything like that" (R. 79). Accused in a calm voice said, "Joe, don't try to stop me" and proceeded toward the door (R. 79). Janoschak grabbed him but he broke loose. Simpson made similar efforts without avail. Accused went out of his tent and proceeded directly to Lampley's tent (R. 79-80).

When the "click" sound of a clip being inserted in an M1 was heard by O'Brien and Gray, occupants of Lampley's tent, they both immediately rushed out and took cover (R. 48). They saw the accused approaching with his rifle (R. 48-50). Accused came to the entrance of Lampley's tent, pushed the door open with his rifle, said "Come out, you hillbilly son of a bitch," and stepped back (R. 118). Lampley stepped to the doorway, and from a distance of not more than three or four feet, the accused fired at him. Not a single word passed between them at that time (R. 117-120, 124-125). "Lampley fell to the ground with a sort of twisting motion. His feet were still on the steps" (R. 118). He was pronounced dead by Captain John A. Bannon, Medical Corps, while still in a vehicle en route to the hospital (R. 139).

The bullet entered the lower left front side of Lampley's face and came out on the right rear side of his neck (R. 139, 142). It shattered the jaw bone "right below the angle of the left lip."

It also shattered "the left mandible" and "severed the trachea and the esophagus, which is the windpipe, from its suspension. * * * There was noticeable a large powder burn at the side of entry, and the skin had a black discoloration all around the initial wound" (R. 146). The doctor testified further that the "bullet severed the connection of the windpipe and blood was aspirated, and asphyxiation occurred" (R. 146).

After the shooting the accused, in what seemed to be a "Very calm" manner, returned to his tent (R. 94). Without saying anything he "put his rifle against Private Warner's barracks bag, put on his hat and jacket, and walked back out" heading toward the office (R. 94, 106, 130).

First Sergeant Harry E. Gnas asked "'What happened, Poncher?' and he said, 'I just shot Lampley through the fucking head.'" (R. 130). Several witnesses said that his manner and tone of voice were" ** * self-satisfied; a big shot" (R. 80, 106); another said that his manner seemed "normal" (R. 130). First Sergeant Gnas and Pfc. Warner examined the rifle and found that there were six bullets in the clip, one having come out when the bolt was pulled back (R. 107-108, 132-133). The eighth one had been fired (R. 108). Accused was placed in arrest by his company commander, Captain Parker H. Devlin.

The above facts were testified to by nine persons in the military service who witnessed various parts of the events hereinabove related. Two medical officers testified to the injury and cause of death. Lieutenant Colonel Samuel A. Weiss, Chief of Neuropsychiatry of the 204th General Hospital, testified in the prosecution's direct case that the accused was sane, could distinguish right from wrong and was legally responsible (R. 153-154).

4. The evidence for the defense:

The accused elected to remain silent (R. 165).

Captain Devlin was recalled as a witness for the defense and testified in substance that the accused was a member of his organization since September 1944; that he had an opportunity to observe him and had rated his character and performance of duty as "Excellent" (R. 161).

5. The undisputed evidence introduced by the prosecution so clearly spells out every element of the crime of murder, namely, the unlawful premeditated killing of a human being with malice aforethought, that lengthy discussion of the applicable principles of law appear unnecessary (see MCM, 1928, par. 148a; 1 Wharton's Crim. Law, 12th Ed., Chap. 14; CM P-369, McFarland, 19 August 1945). Whether the accused acted in the "heat of passion" or without appreciable understanding of

the wrong he was committing because of the blow he suffered a short time before as well as all other questions of his legal and mental responsibility were duly before the court. Within its province, the court decided all issues adversely to the accused and the evidence amply sustains its findings (CM P-455, Witherspoon, 1 September 1945).

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-2404 of the Code of the District of Columbia.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Louis F. Robinson, Judge Advocate.
Major, J.A.G.D.

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

Board of Review
CM P-710

26 September 1945

UNITED STATES v. Captain THEODORE K. PIOTROWSKI (01797180), CMP, 602nd Military Police Battalion.	Trial by GCM convened at Headquarters Philippine Base Section, APO 358, 19 June 1945. Dismissal, total forfeitures, and confinement for 2 years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.

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

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

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

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

Specification 1: In that Captain Theodore K. Piotrowski, CMP, 602 Military Police Battalion, APO 75, did at APO 501, on or about 21 March 1945, wrongfully and knowingly and without proper authority dispose of by turning over to one Private Walter Sypniefski, a person not authorized to receive the same, one bale of confiscated Japanese cloth, property of the United States of a value in excess of $50.00.

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

Specification 1: In that Captain Theodore K. Piotrowski, CMP, 602 Military Police Battalion, APO 75, did at APO 501, on or about 21 March 1945, wrongfully state to Captain Sidney C. Jenkins,

CMP, while acting in his official capacity as Commanding Officer of Warehouse No. 2, Civil Affairs Section, United States Army Forces in the Far East, that: "Do you have any more of that cloth which is not on record? I can make you one hundred thousand pesos in the next three months. You will get one third in a three way split. I have 21 contacts and this stuff is selling on the black market at five pesos per yard," or words to that effect, such statement and conduct being unbecoming an officer and a gentleman.

Specification 2: In that Captain Theodore K. Piotrowski, CMP, 602 Military Police Battalion, APO 75, did at APO 501, on or about 21 March 1945, with intent to deceive Special Agent John G. Gabbert, 34th Criminal Investigation Section, and Special Agent Russell L. Strobel, 34th Criminal Investigation Section, state officially to the said Special Agent John G. Gabbert and Special Agent Russell L. Strobel that, " . . . The list of stock headed 'Manila Civil Relief Warehouse No. 2, list of stock taken by Captain Theodore K. Piotrowski,' and listing certain transactions from the dates of March 5, 11, 21, and 24, 1945, . . . , is a consolidated, compilation of all stock received by me from warehouse number 2 . . . " or words to that effect which statement was known by the said Captain Theodore K. Piotrowski to be untrue in that Captain Theodore K. Piotrowski had nine bolts of confiscated Japanese cloth from warehouse No. 2 in addition to that shown on the list above referred to.

The accused pleaded not guilty to, but was found guilty of, all specifications and the charges, and was sentenced to dismissal, total forfeitures and confinement at hard labor for seven years. The reviewing authority approved only so much of the findings of guilty of Charge I as involves a finding of guilty of a violation of Article of War 96, and approved the sentence. The confirming authority confirmed it but remitted five years of the confinement, designated the United States Disciplinary Barracks, Fort Leavenworth, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. On 21 March 1945 accused, an officer in the Corps of Military Police, went to a Civil Affairs Relief Warehouse operated by the Army in the city of Manila, P. I., and presented a requisition for five bales of cotton sheeting to Captain Sidney C. Jenkins, the officer in charge. The Captain (now Major) testified:

> "He asked me if I had anything there that was not on record that I could let him have. He told me that he had 21 contacts through which he could dispose of that and that he could make me one hundred thousand pesos within the next three or four months" (R 8).

Captain Jenkins turned over to accused in addition to the sheeting some buttons, thread (R 10), and one bale containing 80 bolts of cloth (R 14) seized by the Army from the premises of a Japanese importing and exporting company in Manila (R 9, 11, 31). The requisition was altered accordingly and a talley-out was signed by accused (R 11; Ex B). The type of cloth received by him was sold at the PCAU stores for 25 centavos a yard, and each bolt was slightly in excess of 15 yards in length (R 14).

Captain Jenkins contacted the Inspector General (R 20) and told him of accused's conversation (R 21).

On 23 March accused again saw Captain Jenkins in the warehouse and asked to speak to him privately. They walked to the rear of the building, and accused said, "I have your one-third in my pocket" (R 11) and handed him a "roll" of Filipino money. He said, "I have thirty of this coming back to me," and took some of the bills (R 12). The Captain asked where the money had come from and accused replied that it came from the sale of the bale of cloth (R 12). Captain Jenkins subsequently counted the money, found it to be 360 pesos, and turned it over to the investigators of the CIB. The following day accused again came to the warehouse, received some material on another requisition and asked Captain Jenkins if he "had any more of that stuff which was not on record" (R 12) and asked for "some bolts of the same kind of cloth to place on the shelves of his supply room" (R 13). Captain Jenkins refused to give it to him, and accused said, "For God's sake try and get me some so that I can replace it on the shelves" (R 13).

On 26 or 27 March two agents of the Criminal Investigation Division saw Captain Jenkins at the warehouse. They marked nine bales of cloth (R 23, 33) of the same kind as that previously given to accused on the 21st (R13), and told him to give them to accused (R 24). On that day accused again saw

Captain Jenkins and told him that there "was some kind of an inventory afoot," and asked for some bolts of cloth similar to that which he had previously received to place on his shelves, and Captain Jenkins gave him nine bolts of the marked cloth (R 13).

On 16 April, Technician Fourth Grade Russell L. Strobel and Technical Sergeant John G. Gabbert, both special agents for the Criminal Investigation Division, saw accused (R 48). They read to him the 24th Article of War and told him that they were making an investigation of the disposition of goods from PCAU warehouses and that they desired to know what goods he had obtained from the warehouse run by Captain Jenkins (R 32). The accused gave them a list of such goods (Pros Ex G) which, insofar as it pertains to confiscated Japanese cloth, revealed receipt by accused of only one bale and that on 21 March 1945. The agents saw 29 bolts of cloth (R 34, 47, 49) on accused's premises and asked him when they had been secured, and he said that they were a portion of the bale received by him on 21 March indicated on the statement. The agents examined the cloth and found on nine of them the markings that they had placed on the cloth on 26 March at Captain Jenkins' warehouse and so told accused (R 34, 49). Accused then admitted that he delivered the bale of cloth he received on 21 March to Private Walter Sypniefski at the prison compound for the purpose of sale (R 34). The enlisted man put it on his truck and drove out of the compound (R 50). He further said that Sypniefski returned later that day, told him that he had sold the bale for 1,000 pesos, and gave him 675 pesos.

At the conclusion of all the testimony upon motion of the prosecution specification 2 of Charge II was amended to show that the offense alleged therein occurred on 16 April 1945 instead of on 21 March 1945. The defense announced that it did not desire a continuance because of the amendment but "would like to take exception to the ruling of the court for the purpose of record" (R 52).

Defense moved that the several specifications be dismissed which motion was denied.

The accused elected to remain silent.

4. In the specification of Charge I it is alleged that accused disposed of, by wrongfully turning over to an enlisted man not authorized to receive the same, property of the United States of a value in excess of $50.00. Accused admitted that he gave confiscated Japanese cloth, property of the United States, to a soldier, Private Walter Sypniefski, for the purpose

of sale at a profit and that the goods were so disposed of. In addition to his confession there was evidence touching upon the corpus delicti (CM 239085 Jones, 25 BR 41) in the testimony of the enlisted man that he received the property and that of Captain Jenkins that accused gave him a sum of money stating that it was his share of the proceeds of the sale. His conduct was clearly an offense against military law. As the property was not furnished or intended for the military service the offense was violative of Article of War 96. The record contains substantial evidence to sustain the findings of guilty of the specification and the charge as approved.

It was established by the evidence that accused, in effect, asked the officer in charge of a government warehouse to give him property not on record for the purpose of sale to their mutual profit. Although the words proven to have been spoken by accused and those alleged were not the same, they were substantially to the same effect. Such conduct is within that proscribed by the 95th Article of War (Winthrop, 1920 Reprint, p 710, et seq).

The record is equally clear that accused knowingly gave a false official statement in the course of an official investigation. Such conduct is properly chargeable as a violation of Article of War 95 (CM 232661 Nelson, 19 BR 157). That the statement was given to investigators who were enlisted men and who were not deceived thereby is immaterial (CM 218415 Bethard, 12 BR 67; CM 233722 Growdon, 20 BR 77).

There was interjected by the defense the question of entrapment. "One who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of 'entrapment'" (22 CJS, sec 45; CM 242253 Bower, 27 BR 29). There is no evidence even remotely showing that accused was instigated or induced into the commission of his several offenses. The principle of entrapment clearly is not applicable to the facts in the instant case and further discussion thereof is deemed unncessary.

The punishment imposed is authorized for the offenses of which accused was found guilty.

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

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

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

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

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 28 September 1945.

To: Commander-in-Chief, AFPAC, APO 500.

1. In the case of Captain Theodore K. Piotrowski (01797180), CMP, 602nd Military Police Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-710).

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

(Sentence ordered executed. GCMO 27, USAFP, 8 Oct 1945.)

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

24 September 1945

Board of Review
CM P-711

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 331, 16 August 1945. Dis-
Private First Class EDWARD	)	honorable discharge, total
H. DUPAUL (20126315), Com-	)	forfeitures and confinement
pany D, 52nd Military Police	)	at hard labor for life.
Battalion.	)	United States Penitentiary,
	)	McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
DRIVER, CLEMENTS and ROBINSON
Judge Advocates.

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

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

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

Specification: In that Private First Class Edward H. DuPaul, Company "D", 52nd Military Police Battalion, did, at APO 331, on or about 12 June 1945, forcibly and feloniously, against her will, have carnal knowledge of Kiku Kiyuna.

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

Specification: In that Private First Class Edward H. DuPaul, Company "D", 52nd Military Police Battalion, did, at APO 331, on or about 12 June 1945, commit the crime of sodomy by feloniously and against the order of nature having carnal connection per os with Kiku Kiyuna.

The accused pleaded not guilty to, but was found guilty of, both charges and their specifications. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

On the afternoon of 12 June 1945, Kiku Kiyuna, a thirty-nine year old married native female and the mother of six children, was resting on the side of a "trail" in the vicinity of Camp Shimabuku, Okinawa, APO 331. Sitting along side of her was another native female, Uto Fukado. Both women had been out digging "spuds" (potatoes) and were returning to the Shimabuku native enclosure (R. 7-9).

The accused Private First Class Edward H. DuPaul of the 52nd Military Police Battalion, who "was wearing the usual soldier's uniform" but "had no shirt on" (R. 12), approached the two women and grabbed Mrs. Kiku Kiyuna by the wrist (R. 9, 18). When he began pulling her away she called to her companion, Uto Fukado, for help (R. 9). When Fukado intervened, the accused told her "to go home" (R. 18). The accused took Mrs. Kiyuna to a point about fifty yards from where he first grabbed her and threw her to the ground (R. 10). He removed her clothing, took off his own trousers and proceeded to have sexual intercourse with her (R. 10-11, 20, 24). Mrs. Kiyuna testified, "* * * I struggled for a long time. * * * I rolled on my side. * * * I struggled very hard but after a while he just pinned me down. * * * He held me down and tried to do something funny. * * * he finally inserted it and then because I struggled he put it in my mouth. * * * I thought he was going to kill me. * * * I tried as much as possible to avoid it. * * * He had a discharge in my mouth" (R. 9-13).

Uto Fukado testified substantially as did Mrs. Kiyuna to the events leading up to the attack. She said she "saw the soldier lying on her [Kiyuna]." She sought the aid of the military police, and when one arrived he "stood looking for a while and then just went on his way" (R. 20).

Two marines, Corporal Louis Duclos and Private First Class James R. Rossiter, both of the 6th Marine Division, were walking along the trail when they observed the accused " * * * on top of this girl * * * in the act of intercourse * * * " (R. 24). They stayed there for about twenty minutes and watched and then proceeded down the trail. The girl "looked scared and her eyes a little watery" (R. 25). Walking by, Pfc. Rossiter said to the accused,

"God damn, your time is through there," whereupon the accused said, "take a powder" (R. 24-28).

The two marines proceeded on down the road about thirty yards and turned around. Corporal Duclos testified in part as follows: "He had the girl by the head and hair. It looked to me as if she had her mouth down on his penis. That's when I said there was something wrong, and we went back and he got up and put up his pants and she got on a pair of pants and she ran up a hill" (R. 24). Approaching the accused, Pfc. Rossiter asked him if he had a good time. Accused replied, "I am an MP"; Rossiter said, "I'm a Marine" (R. 28). A personal fight ensued after further bickering, which resulted in the accused being knocked to the ground twice (R. 28). Rossiter then said, "to hell with him," and both marines moved off (R. 28).

The accused's voluntary sworn statement, made prior to trial, was introduced on the prosecution's direct case (R. 32-35, Ex. 1). It is in question and answer form. Accused, in answer to specific questions, said that he did "have sexual intercourse with the woman on that day"; that she "didn't protest"; that had he used force the two marines there "would have rectified the situation"; that he did not remember if she tried to hold her skirt down and knees together to prevent him "from making penetration"; that he did not have any sexual gratification and that he does not remember putting his penis in her mouth (Ex. 1). Accused said further that he was not on duty on the day in question because he had been transferred and was awaiting transportation; that he drank a part of a bottle of "saki" and then went out to look for another soldier, to whom he had entrusted his gun for repairs; that he then noticed the women coming up the hill with the potatoes; that he took her by the hand and walked around the edge of the bank; that he had sexual intercourse with her but that "There was no assault as far as I know." He also said that the trouble with the marines started because "They wanted seconds." He "told them no dice" and she "galloped towards the hill when these Marines started coming for us." There is the implication in accused's pretrial statement that he did not commit sodomy because, first, the victim under those circumstances would bite and he was not bitten, and, second, that the marines would have interfered had he assaulted Mrs. Kiyuna or otherwise abused her (Ex. 1).

4. The evidence for the defense:

Private First Class James F. Smith testified that on the afternoon of 12 June he was at post number seven talking to a "couple of MP's" when the accused, who was on the hill, hollered to them. The

accused told them that he had a fight with some marines, whereupon they went back "and got the rest of the guys" and went looking for the marines (R. 35). This witness was asked, "Do you think if DuPaul had done anything wrong he would have called you?" An objection to the question was sustained, the witness was excused, and no further evidence was introduced by the defense. The accused elected to remain silent (R. 36).

5. The undisputed evidence for the prosecution establishes every element of the crime of rape, namely, the carnal knowledge of a woman by force and without her consent (MCM, 1928, par. 148b; CM 227909, Scarborough, 16 B.R. 13, 19; CM P-607, Davis, 13 September 1945; 1 Wharton's Crim. Law, 12th Ed., secs. 682-686). In this case the prosecutrix was doubtful about the extent of the penetration (R. 12), although admittedly there was some penetration (R. 12, 13; Ex. 1). The evidence also shows that there was no emission until later when the act of sodomy was committed (R. 13). The accused's acts nevertheless constitute the offense of rape. It is not necessary in the crime of rape that there be complete penetration, nor is emission an essential element (1 Wharton's Crim. Law, 12th Ed., secs. 698-699).

The crime of sodomy of which the accused was also found guilty consists " * * * in sexual connection, by rectum or by mouth, by a man with a human being" (MCM, 1928, par. 149k; see also Wharton's Crim. Law, 12th Ed., Chap. 16).

There is ample evidence in the record to sustain the court's findings that the accused committed the acts of rape and sodomy as charged.

A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-2801 of the District of Columbia Code.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

Joseph Robinson, Judge Advocate.
Major, J.A.G.D.

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

Board of Review
CM P-715

9 October 1945

UNITED STATES v. First Lieutenant JAMES T. WRIGHT (0544831), Transportation Corps, 475th Amphibian Truck Company, APO 86.	Trial by GCM, convened at Headquarters Army Garrison Force, APO 86, 4 September 1945. Reprimand and forfeiture of $91.67.

OPINION of the BOARD OF REVIEW
ROBERTS, DRIVER and ROBINSON
Judge Advocates.

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

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

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

Specification: In that First Lieutenant James T. Wright, 475th Amphibian Truck Company, APO 86, did, at APO 86, on or about 27 July 1945, wrongfully, through neglect, suffer twenty cases of intoxicating liquor of the value of about Four Hundred Eighty Dollars ($480.00), property in the custody of the United States, to be lost.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to be reprimanded and to forfeit ninety one dollars and sixty seven cents ($91.67). The reviewing authority approved the sentence

and ordered its execution. The sentence was published in General Court-Martial Orders No. 32, Headquarters Army Garrison Force, APO 86, 12 September 1945.

3. The evidence for the prosecution reveals that prior to 26 July 1945 cargo was being unloaded from the S. S. Swordknot at APO 86. In accordance with the procedure which had been adopted at that base, Captain Stolzman, executive officer of the transportation section (Army), notified Lieutenant (SG) Charles Rice, who was in charge of the Navy mess, that a portion of the cargo was whiskey consigned to the Navy and that it would be unloaded on the morning of the 26th. Lieutenant Rice, as he had done in the past, arranged for a detail of twelve officers to act as guards to accompany the loaded dukws from shipside to the warehouse where the loads would be checked off.

On the 26th the Lieutenant was advised by Captain Stolzman that the ship would not be ready to unload the whiskey until the following morning. Lieutenant Rice told him "to be sure and see that it did not break out that night" (R 38) and arranged for the officer guards to be present at 0830 the next morning (27 July).

However, some time during the early hours in the morning of 27 July stevedores began to unload the whiskey into the dukws of the 475th Amphibian Truck Company then engaged in lightering the cargo from the Swordknot to dumps on the shore. When the dukws bearing whiskey reached the beach, the accused Lieutenant Wright, who was the beach officer of the Amphibian Truck Company, ordered that they be driven to the Quartermaster dump. No one accompanied the drivers of the dukws to the dump.

About 0200 on the 27th the first dukws with whiskey arrived at the Quartermaster dump. Lieutenant Clifford L. Haynes, the officer then on duty, immediately telephoned "the Navy" and was told by them that they had no way of receiving the liquor. He then communicated with Lieutenant Rice. Lieutenant Haynes also sought guards from the military police detachment but was advised that none could then be furnished. He therefore unloaded the whiskey from the dukws as they came in, checking the cases received against the tally of cases in each dukw driver's possession.

Between 0200 and about 0600 four hundred and sixty five cases of whiskey and one case of Coca Cola had been unloaded from twelve dukws at the Quartermaster dump. At about 0600 Major Brown, the transportation officer and port group commander, at Lieutenant Rice's request, ordered the ship to stop unloading whiskey (R 38). Several of the dukws checked short, and,

by reference to the ship's manifest, it was later determined that thirty three cases of liquor were missing. No cases fell into the water nor were any removed from the cargo nets during the unloading from the ship's hold to the dukws.

Major Raymond M. Brown, the transportation officer and port group commander, testified on cross-examination that the beach officer (in this case, Lieutenant Wright) had no control over the loading of cargo into the dukws as that was the responsibility of the stevedore officer (R 9). He further testified that the transportation officer or his subordinates and not the beach officer was responsible for the furnishing of guards for critical cargo (R 9, 10). It was the latter's responsibility "to see that the cargo from the time it reaches the beach is secured on the dukw to the extent that it is not going to bounce off on the rough road to the dump and to see that the dumps are receiving it and that no partial tie up of any great time to that dukw while at the dump" (R 10).

Major Edward Paul Butler, the operations officer of the 43rd Amphibian Truck Battalion, to which organization accused's company was attached for administration, testified on cross-examination that when liquor was unloaded it was usually guarded by officers, but that it was not the responsibility of the beach officer to furnish such guards (R 41, 42).

In behalf of the defense Lieutenant John L. Myers testified that on the afternoon of 26 July he was in charge of the stevedore company then engaged in unloading the cargo of the Swordknot into dukws. He further testified that he had been instructed by Captain Stolzman of the transportation section not to unload the whiskey that night and that he went off duty at 1850 but did not so advise Lieutenant Holcomb, the succeeding stevedore officer (R 55).

Accused's commanding officer and the commanding officers of four other amphibian truck companies testified that at the time in question it was the duty of a beach officer to dispatch speedily the dukws as they came in from the ships to the proper dumps to be unloaded. It was not the duty of such officer to provide guards for the movement nor to count the cargo carried (R 44, 47, 53) even though it was pilferable and included PX supplies, such as beer, Coca Cola, and watches (R 48, 50, 52). Accused's commanding officer further testified that he rated as excellent accused's efficiency, conduct, and the manner in which he performed his duties (R 45).

The standard operating procedure for dock operations then in effect was made a part of the record. It revealed no obligation or duty on the part of a beach officer to guard pilferable

cargo. On 6 August a new SOP was published which required that guards accompany pilferable cargo (Ex 1 and 2).

Accused elected to remain silent.

4. Based upon the evidence as summarized above the accused was found guilty of wrongfully, through neglect, suffering intoxicating liquor in the custody of the United States to be lost, in violation of Article of War 96. A "neglect," in its ordinary meaning, "is an omission, from carelessness, to do something that can be done or ought to be done. The obligation to perform the act or thing neglected is military in character, and arises in connection with the requirements of military duty. Law, regulations, orders, and, where these are silent, the custom of service prescribe the several military duties and obligations the neglect of which is chargeable under this Article; . . . " (p 473, Davis, Military Law). According to Winthrop (p 722) it is "the not taking proper precaution, or doing the best according to the ability and judgment of the party." As stated in paragraph 143, Manual for Courts-Martial, 1928 (with reference to Article of War 83, and is here applicable), "A suffering through neglect implies an omission to take such measures as were appropriate under the circumstances to prevent a probable loss, . . . ".

It is not apparent from the record what specific duty or duties with reference to the liquor the prosecution claimed accused failed to perform. Whether he failed to perform any military duty must be tested by the circumstances shown by the evidence to have existed at the time in question. The loss, assuming that it was sufficiently established by the record, was presumably occasioned because the whiskey was unloaded before the guard arranged for by the Naval officer arrived and no guard accompanied the dukws from the shipside to the Quartermaster dump.

Prosecution as well as defense witnesses testified that it was the standard practice at that time to transport pilferable cargo without guards. Because of that practice, Lieutenant Rice arranged for officer guards to accompany the whiskey consigned to the Navy and asked that it not be unloaded until 0830 in the morning when his guards would be present.

There is no evidence in the record from which it may be inferred that accused knew prior to 0200 on 27 July when the first load of whiskey arrived on the beach that the dukws of his company were to carry such commodity. At that time the military police detachment, although requested to do so by Lieutenant Haynes, were not able to furnish guards, and it does not appear that men would have been available to accused for such purpose had he been informed by Lieutenant Haynes that the

loads were being pilfered.

The fact that the whiskey was unloaded that morning contrary to the transportation officer's instructions clearly cannot be charged to accused. It was the stevedore officer who determined what cargo would be unloaded and placed upon the dukws. Accused's duty was merely to dispatch expeditiously the loaded dukws from the beach to the proper dumps. He is not charged with a violation of that duty. The whiskey continued to be received at the Quartermaster dump over a period of about four hours, and Lieutenant Haynes, the officer there in charge, although cognizant that some was being stolen, apparently did not consider it his duty or privilege to instruct the stevedore officer to stop the unloading and did not inform accused that any loss was being suffered. Lieutenant Rice of the Navy, the most interested party, although advised at 0200 that the whiskey was unaccompanied by guards, did nothing to stop the unloading until about 0600 hours when he communicated with Major Brown, the transportation officer.

It is further noted that the record does not reveal that any of the liquor was taken from the dukws after they reached shore. It may have been taken prior to that time. Because of such possibility, Lieutenant Rice of the Navy had arranged for his guards to accompany the dukws from the cargo ship at the time when he thought the unloading would take place, and such procedure was subsequently required in the SOP published after the loss in question.

In the opinion of the Board of Review the record does not establish that accused negligently omitted to do anything required to be done by him with reference to the safe transportation of the liquor in question, and it therefore cannot be said that he suffered it to be lost.

5. For the reasons stated above the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and the sentence.

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

Samuel M. Driver, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Joseph V. Robinson, Judge Advocate.
Major, J.A.G.D.

(202)

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 10 October 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. Attention is invited to the basic review by a Board of Review in this office of the record of trial of First Lieutenant James T. Wright (0-544831), Transportation Corps, 475th Amphibian Truck Company. The opinion of the Board that the record is legally insufficient to support the findings and the sentence is concurred in, and it is recommended that the appropriate vacation be accomplished. A suggested draft of action to this end is inclosed together with the record of trial.

2. When the inclosed record of trial has served its purpose it is requested that the record, together with the original holding of the Board of Review, and this indorsement, together with seven copies of the General Court-Martial Orders promulgating the vacation of the findings and the sentence, if such is your action, be transmitted to this office.

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

2 Inclosures:

(Findings and Sentence vacated. GCMO 37, USAFP, 27 Oct 1945.)

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

Board of Review
CM P-747

29 September 1945

UNITED STATES v. Second Lieutenant FRANCIS J. STEEPLES (01109695), Technician Fifth Grade HAROLD S. SCRIBNER (31315137), and Private HERBERT W. STEPHENS (35610930), all of 594th Engineer Boat and Shore Regiment.	Trial by G.C.M. convened at Headquarters Philippine Base Section, APO 358, 19 July 1945. As to Steeples: Dismissal, total forfeitures confinement for three years; the United States Disciplinary Barracks, Fort Leavenworth, Kansas. As to Scribner and Stephens: Dishonorable discharge (suspended), total forfeitures, confinement for three years; the Philippine Detention and Rehabilitation Center, APO 75.

HOLDING by the BOARD OF REVIEW
ROBERTS, DRIVER, and ROBINSON
Judge Advocates.

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

2. The accused were tried upon identical charges and specifications save that the names of the accused therein were stated in different order:

CHARGE: Violation of the 94th Article of War.

Specification: In that Private Herbert W. Stephens, Second Lieutenant Francis J. Steeples, Technician Fifth Grade Harold S. Scribner and Private Leon Q. Hughes, all of the 594th Engineer Boat & Shore Regiment, APO 75, acting jointly and in pursuance of a common intent, did, at APO 75, on or about 1 April 1945, knowingly and willfully apply to their own use two (2) cases of cigars of the value of about Four Hundred and Fifty Dollars ($450.00), property of the United States, furnished and intended for the military service thereof.

The two accused enlisted men pleaded guilty to the charge and specification pertinent to them, were found guilty as charged, and were sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for three years. The accused officer pleaded not guilty to, but was found guilty of, the specification and charge pertinent to him and was sentenced to dismissal, total forfeitures, and confinement at hard labor for five years. The reviewing authority approved all the sentences and, with respect to the accused enlisted men, suspended the execution of the dishonorable discharge, and designated the Philippine Detention and Rehabilitation Center, APO 75, as their place of confinement. The confirming authority confirmed only so much of the finding as to the accused officer "as involves a finding of guilty of misapplication at the time, place, and in the manner alleged of property of the United States furnished and intended for the military service thereof of a value of more than fifty dollars," reduced the period of confinement to three years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial with respect to that accused for action under Article of War 50½.

3. On 1 April 1945 Private Leon Q. Hughes (named in the Specification but not tried) was dispatching trucks engaged in transporting quartermaster supplies which were being unloaded from ships in Manila Bay. He noted that a part of the cargo which was then being loaded onto one of the trucks contained two cases of cigars. Before the truck left the pier Hughes approached Second Lieutenant Francis J. Steeples, who was in charge of the unloading detail (R 7) and suggested that the cigars be taken to his (Hughes') home, to which Steeples agreed. Also present at that time and participating therein were two other enlisted men, Stephens and Scribner (R 13). After the cigars had been delivered as agreed, the four of them went to the house, broke open the cases which contained 200 boxes of cigars and stored them in the loft (R 13). One hundred boxes of cigars were given to Hughes' "girl" who sold them for 325 pesos. She gave the money to Hughes who kept 125 pesos and gave accused Steeples 200 pesos (R 12).

On 4 May 1945, Harry J. Painter, CID Agent, interviewed accused Steeples. After having had his rights explained to him by Painter accused made the following statement:

> "I Francis J. Steeples - 2nd Lt - O-1109695 Co-D- 594 EB & SR - make the following voluntary statement, to Harry J. Painter who has identified himself as an agent

of the Provost Marshal - Manila - No threats, promises or duress have been used to obtain this statement.

approximately 1 month ago while on duty at the beach from 4:00 to 12:00 - Pvt Hughes made a deal with me to sell 2 cases of cigars 100 boxes in each case. I gave Hughes Permission to leave the beach. He got a Negro truck driver and took the cigarettes to his girl friends house -

That nite after mark, Hughes and Stevens and I went to the girls house

I was given a cut of P 200 after they were sold by Hughes-

I have been explained my rights under the 24th Article of War - "

(Pros Ex 1)

By stipulation it was agreed that the cigars in question were of a value in excess of fifty dollars and were the property of the United States, furnished and intended for the military service thereof (R 25).

The defense called Captain Glenn W. Kennedy and Major Cecil G. Austin, both of the 594th Engineer Boat and Shore Regiment, who testified that they knew accused Steeples and that his reputation for veracity in his organization "was good" (R 26, 27).

The accused elected to remain silent (R 29).

4. The accused was charged with willfully applying to the use and benefit of himself and others two cases of cigars, government property intended for the military service, of a value of approximately four hundred and fifty dollars. The testimony is uncontradicted that accused gave an enlisted man permission to divert two cases of cigars, government property intended for the military service, from cargo under his supervision; that he agreed that the cigars be sold; and, further, that he shared in the proceeds of such sale. The charge of misapplying government property intended for the military service, of a value in excess of fifty dollars, for the use and benefit of the accused and others is clearly proven (III Bull JAG, June 1944, p 236, 237).

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

The action of the confirming authority is expressed in ambiguous words. In view of his Staff Judge Advocate's review it is obvious that the confirming authority intended to approve findings involving the misapplication of the property alleged in the specification but of an indefinite value of more than fifty dollars instead of the value of $450.00 as alleged. The action permits the construction that he approved a finding of the misapplication not of the property alleged but of some government property, otherwise unidentified. Giving to the action a "reasonable intendment and construction" (Chadwick v. U. S., 117 F. 2d 902; 23 CJS, sec 1409, p 1107), its language, although not to be recommended, may be held to express sufficiently the intention of the confirming authority.

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

Morgan J. Roberts, Colonel, JAGD., Judge Advocate.

Samuel M. Driver, Lieutenant Colonel, J.A.G.D., Judge Advocate.

Joseph F. Robinson, Major, J.A.G.D., Judge Advocate.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 1 October, 1945.

To: Commander-in-Chief, United States Army Forces Pacific, APO 500.

1. In the case of Second Lieutenant Francis J. Steeples, O-1109695, Company "D", 594th Engineer Boat and Shore Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-747).

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

(Sentence ordered executed. GCMO 25, USAFP, 6 Oct 1945.)

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

Board of Review
CM P-761

29 October 1945

UNITED STATES v. Private IRVINE GREEN (34071055), Company F, 96th Engineer General Service Regiment, and Private JAMES C. CAMPBELL (34661363), Headquarters and Service Company, 96th Engineer General Service Regiment.	Trial by GCM, convened at APO 24, 1 September 1945. As to Green: Dishonorable discharge, total forfeitures, and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington. As to Campbell: Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. Federal Reformatory, El Reno, Oklahoma.

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Irvine Green, Company F, 96th Engineer General Service Regiment, and Private James C. Campbell, Headquarters and Service Company, 96th Engineer General Service Regiment, acting jointly and in pursuance of a common intent, did, at APO 159, on or about 29 July 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Pacito Navarro.

The accused pleaded not guilty to, but were found guilty of, the specification and charge and were sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentences, but reduced the confinement imposed as to accused Campbell to ten years, and designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement for accused Green and the Federal Reformatory, El Reno, Oklahoma, as the place of confinement for accused Campbell. The record of trial was then forwarded to this office for action under Article of War 50½.

3. The evidence discloses that at 0100 on 30 July 1945, Privates Irvine Green and James C. Campbell (accused), both members of the 96th Engineer General Service Regiment, broke into the market place in Tugbok, Mindanao, by severing the wire that secured the front gate (R 13, 18, 28, 31, 34, 41, 47). Green wore khaki trousers and carried his shirt in his arm; he also carried a Garand rifle. Campbell was attired in a complete khaki uniform (R 15, 20, 21, 30, 33, 38, 41, 52). The market place was a rectangular building with a concrete floor and walls consisting of a picket fence seven feet high. A small portion of the floor space was partitioned off into several rooms (R 9, 25). It was a moonlit night, and visibility within the building was good (R 19, 20, 30, 41). The two accused proceeded to a room to the left of the entrance where Victoria Corboral and her husband were sleeping. They awakened the pair, saying that they wanted to take the husband away. The Corborals, however, succeeded in fleeing out of their room to the opposite wall of the market place. Victoria screamed, and one of the accused fired a shot (R 28, 29, 31, 32, 48).

The accused then made their way to the room at the right of the entrance where Cosme Navarro, his wife, Pacito, and their seven-year old daughter were sleeping. One of the accused pushed the door to the room open with his rifle and ordered Cosme and his wife to get up. They then told Pacito to go outside (R 13, 14, 35, 36, 48). As Cosme and Pacito got out of bed, Green gave his rifle to Campbell (R 41, 48). The accused explained their actions on the ground that three Filipinos had killed three soldiers (R 36). The accused then forced Cosme to go outside, and Pacito followed, holding her daughter in her arms (R 14, 15, 22, 36, 48). Outside, Pacito cried and called for help; Cosme knelt on the ground and begged for mercy (R 15, 23, 49).

The accused then reentered the building with the Navarros, and Campbell stood guard with the rifle over Cosme as the latter sat in the front of his room (R 15, 23, 36, 48, 49). Green seized Pacito by her wrist and pulled her while she held her child in her arms to the back of the room at the left of the entrance to the building, formerly occupied by the Corborals (R 16, 23, 36, 49). Green pushed Pacito and she stumbled and fell on one of the two beds. He took her daughter from her arms and put her on the edge of the other bed (R 37, 43). Removing his trousers, Green lay on top of Pacito and, holding her down by her shoulder, ripped off her pants (R 27, 44). While Pacito squirmed and cried for her husband, Green inserted his penis "all the way" (R 38, 39). He slapped her on her cheek once to quiet her (R 39). Cosme, fearing that he would be shot, did not come to her assistance (R 40). Finally, after a time estimated at three minutes by Pacito, but at twenty minutes by Cosme, Green arose and left with Campbell (R 39, 40). Pacito then grasped her baby and together with Cosme sought refuge in a nearby neighbor's house (R 40, 50). Both Pacito and Cosme asserted that they had never seen accused before the night in question (R 35, 41, 52).

4. Electing to make a sworn statement, accused Green testified that prior to the offense charged he visited Tugbok almost daily, going, ordinarily, to the home of a Mr. and Mrs. Smith with whom he was friendly (R 55, 69). The Smiths' house was located about 120 feet from the market place (R 55). A few days before the date of the offense charged, he left for Tugbok immediately after evening mess. He went to Mrs. Smith's house, but waited for her husband, who was down the road, to return before entering the house (R 55, 62). While he was there Mrs. Navarro came out of the market place and called him by name, saying that she wanted mosquito bars, blankets, coffee, or crackers. He told her he would get her these supplies if she would give him "pompom." At first she objected to this proposed barter, but she finally consented to let him bring her the goods that night (R 56, 62). He then proceeded to his organization, but did not return to Tugbok that night (R 56). He arrived in Tugbok on 29 July at about 1800 (R 56). On the way he was joined by Campbell (R 57, 69). He was dressed in a mixed uniform, with a khaki shirt, blue fatigue trousers, a green cap, and combat boots, while Campbell wore "all green" trousers, jacket, and hat (R 57). Neither carried a rifle (R 62). The two accused proceeded to Mrs. Smith's house, remained there with Mrs. Smith, her husband, and several other persons for about ten minutes, and then Green left to purchase

a bottle of whiskey, returning soon thereafter (R 57, 62). The accused stayed at the Smith house until 2200 drinking the whiskey and rice wine (R 57, 70-72). Green denied that he was drunk or that he took his shirt off (R 61). Green left the Smith house at 2200 and later went to a nearby house where he took two dresses and a shirt from a box. This clothing was found under his tent the next morning. Green testified that he told the occupants of the house, whom he did not know, that he wanted to borrow the clothing and that he would return it later and throw in a pair of trousers for good measure (R 63, 64, 67, 70, 71). Accused testified further in regard to his actions after leaving the Smith house at 2200:

> As we passed I saw a light in the [market place]. I said to Campbell, "I'm going to stop here . . . a few minutes" . . . So me and him walked in the door . . . the door was open (R 58) . . . There was a light . . . in a saucer with some oil in it . . . Then I heard a woman (Mrs. Navarro) call me, "Green, come here" (R 60) . . . When I got there she said, "Did you bring the stuff?" First I said, "Yes." So she said, "Bring it here - let me see." Then I said, "No, I ain't got it - it was too much - I couldn't carry it." I said, "But I'll bring it tomorrow night." She said, "No, no, I don't believe you." I said, "I'll bring it tomorrow night. You give me Pompom tonight and tomorrow night I'll bring it for sure." She said, "No, I'm married." I put my hand . . . on her left shoulder and I patted her on the back just one time. She said, "No, because you have been drinking whiskey." She said, "I can't do that." She said, "My husband would not like. American soldiers come here all the time and eat and drink and never bring anything. We will buy." I said, "No, I don't want any money." I said, "I'll bring the stuff if you will give me Pompom." I said, "How can I trust you if you don't trust me?" She said, "No" again. "Well," I said, if that's the way it is I'll keep my stuff and you keep your Pompom. If you don't want to do that - the hell with you - you can kiss my ass," and I walked out in the center of the room. I lit a cigarette - got a light from Campbell. I told him, "Let's go." We got outside and Campbell said, "How did you make out?" I said, "No good - she wants a whole supply room for her ass" (R 60).

Both accused then left Tugbok, returning to their organization separately (R 60, 61). Green admitted that he once left a carbine with Mrs. Smith, who later returned it to his headquarters, but he denied that he had been trading Government issue items for "pompom" (R 67, 68).

Green was followed by accused Campbell, who was sworn and testified substantially the same as Green, corroborating the latter's testimony in every detail save Green's excursion to a nearby house where he "borrowed" some clothes. Campbell asserted that he knew nothing of where Green had gone but that Green did not return to camp with him because Green stopped at a house to visit other friends after they had left the Smith house and had seen Mrs. Navarro (R 84). He testified that he was never issued a rifle or a carbine while in his present organization (R 78).

In support of accused's statements, the defense called as a witness the supply sergeant of Headquarters and Service Company, 96th Engineer General Service Regiment, who testified that according to his records the accused were never issued a weapon of any type while members of his organization (R 91). Mrs. Genevieve Smith testified that accused visited her house in Tugbok between six and seven o'clock on the evening of 29 July along with several other soldiers, part of the group being armed, and that accused remained there until 2200, neither of them leaving her house during this period (R 86-88). Accused were neither drunk or disorderly (R 86, 87). She admitted that Green had once given her a carbine and that she had returned it to his organization after he was confined (R 86, 87). Green had never taken the carbine from her house during the period that she had it in her possession (R 87). She stated that the accused left her house at 2200 and that later that night, after she had gone to bed and fallen asleep, she awoke and heard Pacito and her husband calling for help (R 88, 89).

5. Reopening its case, the prosecution called Mrs. Constancia Tomo as a witness who testified that accused came to her house in Tugbok located near the market place at 0800 on the same night that Pacito was attacked (R 93, 99). Green had a rifle and he said he was looking for someone because one of his buddies had been killed (R 94). Though she protested, he took some of her clothes that were in the house and brought them outside. She immediately went out and retrieved the clothing, but accused returned and Green fired a shot at the trunk and retook the clothes (R 94). They came back at 0100 and fired a shot through the door of the second floor (R 95). Miss Nenita

David testified for the prosecution that she lived in the same house as Mrs. Tomo, that on the night of 29 July accused came to her house at about 1900 and under the guise of searching the house to inspect clothing took her to a nearby coconut plantation where one of the accused said he wanted "something that a man and wife can make" (R 100, 101). She ran away after he slapped her, and she had screamed (R 101).

Recalled to the stand by the court, Pacito Navarro said that she did not know the penalty for rape in the United States, that she was frightened and was physically unable to resist Green at the time of the attack, and that she had never accepted or purchased anything from him (R 103, 104). Also recalled by the court, Cosme Navarro testified that he was too frightened to go to his wife's assistance and that he had never seen the accused before (R 106).

6. The evidence adduced from witnesses for the prosecution established that the accused, one of whom was armed, broke into a dwelling place in the dead of night, terrorized the occupants, forced their way into a room where a family lay sleeping, and finally, while one accused stood guard with a rifle over the husband, the other forced his wife into a nearby room and ravished her. Pacito Navarro, the woman so attacked, cried for help when brought outside by the accused just before the rape, resisted when one of the accused pulled her into a room and pushed her into a bed, and squirmed and implored for assistance while the accused completed the act of sexual intercourse. The record at no point reveals any cessation of resistance or yielding of consent on her part. There is ample testimony as to the force employed by the accused in the perpetration of the act. There is also ample evidence as to the identity of the accused. Both admitted in sworn statements made at the trial that they were present at the locus delicti on the night in question.

Both accused, testifying in their own defense, denied that any act of sexual intercourse took place, although they admit having seen and talked to Mrs. Navarro on the night in question. Their testimony as to the events of that evening preceding the alleged rape was rebutted by several prosecution's witnesses, one of whom, a female, testified that accused had taken her out into a coconut plantation and after proposing intercourse had slapped her. After she screamed and the neighbors turned on their lights she was released. Such rebuttal testimony

depicts a mind of lascivious and evil intent, bent on social mischief. The court by its findings rejected accused's testimony as unworthy of credence.

7. The facts as disclosed by the record clearly establish the crime of rape (Par 148b, MCM, 1928). While the record reveals no examination of the genitalia to determine the extent of vaginal injury and to corroborate the victim's assertion of penetration, the testimony is sufficient to show that the coitus alleged was accomplished by force and without the consent of the woman involved.

While accused Campbell did not engage in the commission of the sexual act itself, he was nevertheless an active principal in the commission of the offense. He assisted the accused Green in breaking into the dwelling and rousing the occupants. He stood guard over the victim's husband with a rifle while Green ravished the wife. His knowledge that Green was bent upon engaging in sexual intercourse, to the extent of committing rape if such was necessary, and that Green eventually was actually in the process of at least attempting to commit rape is evidenced by his mischievous and lustful conduct with the accused Green during the hours preceding the entry into the market place, the demand for "pompom" made by the accused upon entering the market place (R 13), his guarding of the victim's husband with a rifle commencing in point of time when Green forcibly took Mrs. Navarro from the presence of her husband to the seclusion of a bedroom, and the cries uttered by Pacito while she was being ravished scarcely more than twenty-five feet from him (Ex A). Moreover, in his own sworn testimony accused Campbell admitted that he was aware of Green's intention to have intercourse with Mrs. Navarro when they entered the market place after leaving the Smith house. The foregoing events and circumstances charge him, as a reasonable man, with knowledge that Green was using force in order to carry out his stated purpose of having intercourse with Mrs. Navarro. With this knowledge, Campbell's action in giving assistance to Green throughout the entire occurrence and particularly in guarding the husband with a rifle while Green ravished the wife only twenty-five feet away makes him a principal to the rape, and the record contains substantial evidence to support the court's finding to that effect.

Although it is true that two or more persons cannot jointly and directly commit a single rape because by the very nature of the act individual action is necessary (Par 27, MCM, 1928), it has been held that "One who aids and abets the com-

mission of rape by another person is however chargeable as a principal" (Bull JAG, Feb 44, p 62). Any person who assists, aids, abets or induces the commission of an act constituting an offense under any law of the United States is a principal and may be charged directly with the commission of the offense (18 USC 550; CM 240646 Hall et al (10 Mar 44); CM P-119 Edwards et al (27 Jul 45); see also CM P-809 Robinson et al (9 Oct 45).

A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape recognized as an offense of a civil nature and punishable by penitentiary confinement by Section 22-2801 of the District of Columbia Code.

8. For the reasons stated above the Board of Review holds the record of trial legally sufficient to support the findings and sentences as approved and modified by the reviewing authority.

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

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

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

19 October 1945

Board of Review
CM P-772

UNITED STATES v. Private First Class HENRY M. SMITH (34678858), 37th Quartermaster Company.	Trial by G.C.M., convened at Headquarters 37th Infantry Division, 22 August 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for 20 years. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private First Class Henry M. Smith, 37th Quartermaster Company, did, at APO 37, on or about 16 July 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Miss Rosalinda Recto, a human being, by shooting her with a Carbine M1.

Specification 2: In that Private First Class Henry M. Smith, 37th Quartermaster Company, did, at APO 37, on or about 16 July 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Sergeant Harry W. Smedberg, a human being, by shooting him with a carbine M1.

The accused pleaded not guilty to the specifications and the charge. He was found guilty of both specifications except the words "with malice aforethought," "deliberately," "and with premeditation," in each and not guilty of the charge but guilty of a violation of the 93rd Article of War. He was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that shortly after their evening meal on 16 July 1945, Sergeant Harry W. Smedberg and Private First Class Henry M. Smith (accused) were in the former's tent in the 37th Quartermaster Company area drinking homemade brandy (R 7). With them were one Nicasio Santos, a Filipino who worked in the area, and other soldiers. After remaining about an hour, Santos and the accused went a short distance from the camp to a house where Rosalinda Recto and Conchita Legaspi lived and returned with the girls to Smedberg's tent. Accused had met Rosalinda about 12 July and they had spent the next three nights together (R 8, 17). The five of them and the other soldiers remained in the tent drinking for the next hour and a half. The group "tried to drink all of this stuff in the five gallon can" (R 9). Smedberg then asked accused if he could have intercourse with Rosalinda. Accused assented (R 9, 20) and he, Smedberg, Santos, and the two girls went to the salvage tent (R 9) where the accused and the Filipino were quartered (R 23). Smedberg and Rosalinda lay down on one of the three beds in the tent. Santos and Conchita occupied another, and the accused the third. Conchita, who was drunk, immediately fell asleep, and at accused's invitation Santos moved over to his (accused's) bed (R 10, 20). After having sexual intercourse with Rosalinda, Smedberg was heard to tell her that he would take care of her and take her with him wherever he went (R.10, 11, 31). He invited the girl to go with him to have another drink. They got up and began to leave the tent, but accused, who was stripped to his shorts, arose from his bed and informed Rosalinda that she was going to stay with him that night. When Rosalinda insisted on leaving, accused grabbed her and kissed her (R 32). She struggled to free herself, they fell to the ground, and she began to cry. Smedberg remonstrated with accused, telling him to let her go (R 11, 21). Accused got to his feet, seized a carbine which was at the foot of his bed, stood in front of Rosalinda who was then sitting on the ground and told her to get out. Smedberg enjoined accused "to lay off," saying, "That's not the proper way of handling a girl. I know you better than that" (R. 11, 22). Whereupon he was invited by accused to "get the hell out" (R 13). The latter, however, did not point the gun at anyone nor did he make any threatening gestures (R 24). Smedberg asked for a cigarette, and accused told him to get one out of his jacket on his (accused's) bed. Smedberg obtained a cigarette, lit it, and accused again told him to get out (R 24).

Smedberg started to leave, but suddenly turned around and struck accused "with his elbow" (R 13), knocking him to the ground. Accused, from the ground, fired his carbine (R 13, 33) and Santos ran out of the tent (R 13).

Hearing two groups of about three shots each a few seconds apart (R 48), Lieutenant Colonel Lyle V. Jones and Captain Samuel H. Warren ran to the salvage tent about a hundred yards away (R 14, 42). On the way they heard two or three more shots (R 35, 49, 41, 44). They reached the salvage tent within two minutes (R 14, 29), after the shooting had finally ceased, and found Smedberg on his back, shot through the body (R 36, 44) writhing in pain and calling for help (R 13, 46). He was asked who had done the shooting and answered, "Smitty" (R 37, 52), and further said, "Get Smitty before he gets somebody else" (R 15, 36, 45). Rosalinda was lying dead about three feet away (R 14, 44, Ex. B). Smedberg was removed to the hospital where he died the next day as a result of the gunshot wound (Ex. A).

Leaving the tent the two officers returned some twenty yards (R 42, 45) along the path they had come to a place where accused, muddy and covered with blood, was lying on the ground (R 37). He had a bullet wound in his right foot and another in his shoulder (R 37, Def. Ex. A). Accused said to the Colonel, "Colonel, I'm sorry I messed things up for you * * * will you write my mother and tell her I shot myself?" He made an unsuccessful effort to raise himself and said, "If I could get up I would finish the bastard. He tried to steal my girl * * * I shot both of them. I loved her. She tried to run out on me. I shot her" (R 37, 45, 52, 60). His words "were very clear" although "there were lapses in the conversation" (R 39).

Santos testified that at the time of the shooting the accused "was a little bit tipsy, but he can control himself * * * He wasn't so drunk * * * He can stand up and talk straight and walk straight" (R 16, 27).

Defense witnesses testified that accused was not of a quarrelsome disposition (R 63, 65). One testified that accused said as he was lying on the ground after the shooting "I loved the girl but she ran away from me * * * I tried to kill them all, but they got me" (R 66).

The accused chose to be sworn and testified that he was a Cherokee Indian and that he and Sergeant Smedberg were good friends (R 68). He said that he had been drinking on the night in question and remembered permitting the Sergeant to "borrow" the girl and that about twenty-five minutes later he went to the salvage tent but that he did not remember removing his clothes, picking up the gun, being knocked down or any of the events that subsequently transpired there (R 69). He further testified that in the past when he drank excessively he had a lapse of memory.

Major Saul Greizman, MC, a psychiatrist, testified that at the time of the shooting accused was probably under the influence of liquor (R 73), that he showed signs of amnesia and that he was a "dull normal person" but not psychotic (R 74).

4. Based upon the evidence thus summarized the court found that accused willfully, feloniously, and unlawfully shot and killed Sergeant Harry W. Smedberg and Rosalinda Recto and thus found him guilty of two acts of voluntary manslaughter, offenses lesser included in that of murder as charged. The circumstances surrounding the shooting, accused's attempt immediately thereafter to take his own life, his acknowledgment to the Colonel that he had shot both the sergeant and the girl, the latter because she "tried to run out" on him and his desire "to finish" the Sergeant because "he tried to steal" her furnish ample substantial evidence to sustain the findings of the court-martial (40 C.J.S. 1194, 1196). It is noted that the statement of the Sergeant that accused had shot the girl and himself was admissible as part of the res gestae if not as a dying declaration (40 C.J.S. 1199).

It is recognized that if an accused is found guilty of two or more offenses constituting different aspects of the same act or omission, punishment should be imposed only with reference to the act in its most important aspect (par. 80a, MCM, 1928; II Bull. JAG 187; IV Bull. JAG 177). In the instant case it is not known whether the Sergeant and the girl were killed by the same bullet. However, as accused showed by his statement immediately after the shooting that he had intended to kill each of them, and as there were two bursts of fire seconds apart, it properly may be inferred that the homicides were the results of entirely different acts. Although closely related to each other both in circumstance and in point of time they were in law separate and distinct offenses and punishable as such (20 A.L.R. 341; 113 A.L.R. 222). The sentence imposed, therefore, is permissible.

Confinement in a penitentiary is authorized by Article of War 42 for the offense of voluntary manslaughter, recognized as an offense of a civil nature and punishable by penitentiary confinement by section 22-2405 of the Code of the District of Columbia.

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

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

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

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

15 October 1945

Board of Review
CM P-774

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 331, 31 August 1945. Dis-
Private First Class JAMES T.	)	honorable discharge, total
STEVENSON (31299378), 4099th	)	forfeitures and confinement
Quartermaster Railhead Company.	)	for life. The United States
	)	Penitentiary, McNeil Island,
	)	Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class James T. Stevenson, 4099th Quartermaster Railhead Company, did, at Army Post Office Number 331, on or about 6 July 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Private First Class Harry Kaialiilii, a human being, by stabbing him with a bayonet, and shooting him with a rifle.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the findings of guilty except for the words "and shooting him with a rifle," designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that at about 1000, 5 July 1945, accused and Acting Corporal Harry Kaialiilii, deceased, both members of the 4099th Quartermaster Railhead Company, argued over the right of accused to look at a certain piece of paper. Deceased cursed accused, asking him if he were looking for trouble, and the accused responded in the negative (R. 34), but none the less deceased struck him. They exchanged blows, accused was knocked to the ground and deceased continued pommeling him (R. 35). The fight was stopped, and the accused said, "I won't forget I will get even with you yet" (R. 35). That afternoon a sergeant saw accused in the latter's tent and told him that he could prefer court-martial charges against Kaialiilii if he so desired. Accused said merely, "No, just forget it" (R. 7).

About 0115, 6 July, Private First Class Joseph Villaverde, Jr., one of Kaialiilii's tentmates, was awakened by a noise which he thought was a shot and he heard deceased repeat "Lots of times * * *" "Somebody help me" (R. 11). Seeing someone jabbing the deceased with a bayonet affixed to a rifle, Villaverde got up and walked down to the far end of the tent. The assailant, carrying a rifle with its fixed bayonet, passed Villaverde, and by the lights of bulldozers working some yards away the latter recognized him as accused (R. 12, 14). About ten minutes later the corporal of the guard saw accused standing in the orderly room holding an '03 rifle to which was attached a bloody bayonet (R. 25) and asked him what he was doing there. Accused replied that he wanted to give himself up to the company commander because he had just shot and bayoneted Kaialiilii.

Examination disclosed that Kaialiilii had suffered numerous stab wounds and possibly a bullet wound in the body (R. 17, 28, 32). He died a few hours after the attack upon him as the result of his wounds (R. 31).

The only witness introduced by the defense was a neuropsychiatrist who testified that he observed accused daily for about ten days (R. 22). It was his opinion that the accused was emotionally unstable, but not mentally unbalanced (R. 20); that he knew what he was doing when he stabbed deceased; that he could "establish right and wrong" and "appreciate the actual logical consequences of his actions" (R. 21, 22).

Accused made the following unsworn statement:

> I just wanted to state to the court that I am not a habitual murderer. It has never entered my mind before, and for the past two and a half years, ever since I entered the army, things have seemed to have gone from bad to worse. I can never claim to have ever gotten a break, and never been in a position of being able to strike back. I was sent overseas

> October 1943, just after I completed basic training. I didn't have a furlough or anything. I was drafted just sixteen days after I was married. I was sent to the west coast and took my basic training, and was sent overseas as I have said. Last January I got a letter from home telling me my wife had been going out. I wrote to her, but it was never confirmed by her or never denied it. Last March we decided on a divorce. It's one of those things. Last January my father was operated on for cancer of the throat. I don't know what the medical term for it is, but it was serious. I couldn't get a furlough to go home to see him. I had to sit back and have people dictate to me what I was going to do tomorrow. There were numerous things like that not so major. Then when Kaialiilii was standing over me hitting me without a chance to hit back, it seemed to characterize everything. So when it took material form that I could hit back, I did and I killed him. That's all I have to say.

4. The evidence is undisputed that accused stabbed deceased with his bayonet several times as the latter was lying asleep in his tent, thereby causing his death. The act was clearly unlawful, deliberate, and premeditated. That accused might have been wrongfully hit by the deceased in an altercation some hours earlier furnished no legal justification or excuse for the homicide (par 148a, MCM, 1928; Acers v. U.S., 164 U.S., 388, 392). The circumstances of the act indicate a wicked, depraved, and malignant spirit, from which accused's malice may be inferred (Evans v. U.S., 122 F. 2d, 461, 466). A psychiatrist who was introduced as a witness for the defense testified that accused was sane both at the time of his act and when examined by him and was legally responsible for his wrongdoing. There was substantial evidence in the record on which the court could find accused guilty of murder as charged.

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 275, 330, Criminal Code (18 U.S.C. 454, 567).

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

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

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

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

10 October 1945

Board of Review
CM P-809

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	Headquarters Philippine Base
First Lieutenant VENANCIO	)	Section, APO 358, 16 July
D. DEMANDANTE (0-1825906),	)	1945. Dismissal.
Infantry, Company A, 2nd	)	
Filipino Battalion, APO 565.	)	

HOLDING by the BOARD OF REVIEW
ROBERTS, CLEMENTS and ROBINSON
Judge Advocates.

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

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

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

Specification: In that 1st Lt. Venancio D. Demandante, Inf., Co. A, 2nd Philippine Battalion, did, at the 493rd CIC Detachment APO 75, on or about 2 May 1945 with intent to deceive Major Carlos P. Marcum, officially report to said Major Carlos P. Marcum that he had disposed of an indeterminate quantity of cow and carabao hides of the value of about $3500.00, property of the United States Government, by selling same for $250.00, which report was known by the said Venancio D. Demandante to be untrue in that he had sold the hides for about $3500.00 instead of $250.00.

CHARGE II: (Finding of guilty disapproved)

Specification: (Finding of guilty disapproved)

The accused pleaded not guilty to, but was found guilty of, the charges and their specifications, and was sentenced to dismissal and total

forfeitures. The reviewing authority disapproved the findings of guilty of Charge II and the specification thereunder and approved only so much of the sentence as provides for dismissal. The confirming authority confirmed the sentence as modified by the reviewing authority and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on or about 15 February 1945 accused, First Lieutenant Venancio D. Demandante, 2d Filipino Battalion, then in charge of the motor pool of the Operational Intelligence Detachment, was instructed to clean out a warehouse in the city of Manila, to be used as quarters for that unit. A quantity of vile-smelling carabao and cow hides, which had belonged to a Japanese mercantile firm, was stored there, and accused asked Major Carlos P. Marcum, his superior officer, what he should do with them. The Major answered, "I don't give a damn what you do with them, but get them out of there. Throw them away, or store them - but get them out of the place" (R. 7). The accused caused the hides to be moved and stored elsewhere. A few days later he approached a Mr. Alfredo Ferrer and asked him to sell the hides (R. 14). Ferrer arranged for their sale to one Isidro Hermoso and received one thousand pesos as an advance payment which he turned over to accused. On two successive nights during the latter part of March the hides were delivered to Hermoso. On each occasion they were carried away by three army trucks, one of which was driven by accused.

Thereafter Hermoso made several additional payments to Ferrer, totaling about five thousand pesos. Ferrer turned over all the money to accused and received from him approximately seven hundred pesos as his commission. Some time later accused delivered a note to Hermoso in which he stated that if anyone investigated the matter he should say that the hides cost five hundred pesos (R. 19).

On or about 2 May, Major Marcum, having heard that the hides had been sold, questioned accused. The latter stated that he had disposed of them for five hundred pesos. The Major testified:

> I then asked the Lieutenant if he didn't know he was doing wrong, and he answered something to the effect that he made a mistake. I then directed him to get the name and address of the man to whom he sold the hides, a receipt as to the amount of money paid for the hides, and to describe in detail all transactions and report as to the disposition of the hides by this agent (R. 8).

Later that day, accused informed the Major that he did not know "the man's address." The Major asked the accused if he had the money that he had received from the sale and the accused handed him five hundred pesos. Accused denied that Ferrer or anyone else was "in on the transaction" (R. 9).

A pretrial statement given by accused was introduced in evidence (Pros. Ex. 3). In it he admitted that he had received from Mr. Ferrer approximately thirty-five hundred pesos; that after being questioned by Major Marcum with reference to the transaction he advised the enlisted men who had hauled the hides "that if they were further questioned to say that they know nothing about the disposition of the hides"; and that he delivered a note to Mr. Hermoso, informing him "that if anyone inquires about the hides, my name should not be mentioned and that the transaction had been between he [Hermoso] and Ferrer and the only amount involved was ₱500." (Ex. 3).

In behalf of the defense three witnesses testified that they were acquainted with the accused and that he enjoyed a good reputation for truth and veracity. Accused elected to make an unsworn statement wherein he said, in effect, that, on the basis of the instructions he had received with reference to cleaning out the warehouse and the latitude he was given in disposing of the hides, he was fully convinced that he had not violated any Army regulations in their sale (R. 24).

4. The evidence as thus summarized establishes that accused, pursuant to his military duties, removed hides, formerly the property of a Japanese mercantile concern, from a warehouse occupied by the Army. He thereafter sold the hides. When queried by Major Carlos P. Marcum, his superior officer, with reference to the sale, he stated that they were disposed of for five hundred pesos ($250.00), although he had sold them for a far greater sum. The accused's answer, obviously made with intent to deceive, given in response to an inquiry by a superior officer in the performance of his duty, was a false official statement. Such wrongful conduct by an officer is properly charged as a violation of Article of War 95 (CM 232346 Staples, 19 B. R. 64), and dismissal is mandatory upon conviction thereof.

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

Leo Rhea Lehman, Judge Advocate.
Colonel, J.A.G.D.

Judson J. Clements, Judge Advocate.
Major, J.A.G.D.

Joyce L. Robinson, Judge Advocate.
Major, J.A.G.D.

(228)

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 14 October 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of First Lieutenant Venancio D. Demandante (0-1825906), Infantry, Company A, 2nd Filipino Battalion, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-809).

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

(Sentence ordered executed. GCMO 28, USAFP, 18 Oct 1945.)

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

18 October 1945

Board of Review
CM P-826

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at Headquarters Fifth Air Force, APO 710, 10 and 12 September 1945. Dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. United States Penitentiary, McNeil Island, Washington.
	)	
Private HANSON JACKSON (34243690), Company B, 1873d Engineer Aviation Battalion, APO 322.	)	

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Hanson Jackson, Company "B", 1873rd Engineer Aviation Battalion, (then Technician Fifth Grade, Company "B", 1873rd Engineer Aviation Battalion), did, at APO 322, on or about 23 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Walter Welch, Company "B", 1873rd Engineer Aviation Battalion, by shooting him in the body with a .30 Caliber Carbine.

The accused pleaded not guilty to the specification and charge. He was found guilty of the specification except the words "with malice aforethought" and "and with premeditation," and not guilty of the charge but guilty of a violation of the 93rd Article of War. He was sentenced to

dishonorable discharge, total forfeitures, and confinement at hard labor for ten years. The reviewing authority approved only so much of the findings as finds accused guilty of "willfully, feloniously and unlawfully killing Private Walter Welch" on the date and in the manner alleged; approved the sentence; designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement; and forwarded the record of trial for action under Article of War 50½.

3. The evidence discloses that about 1030 on the morning of 23 February 1945 Privates Hanson Jackson (accused) and Walter Welch were sitting in the latter's tent together with several other soldiers, "talking about how long they had been in the army" (R. 7, 8). The conversation was terminated by accused, the permanent sergeant of the guard (R. 12, 54), who told Welch that "he [Welch] had to go on guard in a few minutes" (R. 8). Welch said that he would be ready in a few minutes, adding, "if you hang around for another minute I will throw you out." Accused then said, "throw me out" (R. 9). A witness to this exchange testified that neither seemed angry, but both appeared to be "engaging in horse play" (R. 8, 12). However, Welch picked accused up and threw him out of the tent (R. 10). Accused "told him he would see him and got up and left."

About ten minutes later (R. 20), accused, carrying his carbine, entered the mess hall and said to Welch, then standing at the counter, "Come on, Welch, let's go * * * You broke my teeth * * *" (R. 21, 23, 28, 29). As Welch ran out through the rear door (R. 21, 32, 37, 43) the accused raised his carbine and fired once, the bullet passing through the screening at the side of the door. Struck by the bullet, Welch stumbled, regained his feet, ran forward another fifteen feet, and then collapsed, dead (R. 22, 28, 33, 47, 52). Accused surrendered his carbine to a Captain Harman, saying, in effect, that he told Welch he would kill him because he threw him out of the tent and broke his "teeth" (R. 22, 38, 42).

In behalf of the defense several witnesses testified that accused was a good soldier and until the incident in question caused no trouble in the company (R. 53, 57). Accused elected to make an unsworn statement in which he said that he told Welch it was time to go on guard and "he threw me out on my face . . . . And after then I couldn't tell what next for right then. And that is all I know. * * *" (R. 69).

The defense offered in evidence a report of the proceedings of a sanity board dated 30 March which found that although accused was not psychotic "his hysterical state prevents him from assisting his counsel in his defense at the present time." After hospitalization he was reexamined on 3 May 1945, and the same conclusion was reached. He was further hospitalized and again examined on 14 May, and at that time the Board found:

* * *

4. * * *

b. He [accused] was sane and legally responsible for his actions at the time of the crime, and is sane and legally responsible for his actions at the present time.

c. His mental condition at the present time permits him to cooperate in his own defense.

* * *

(Def. Ex. A)

The prosecution then introduced a psychiatrist who testified that he had examined accused on 8 September and found that he was sane and should be able to cooperate in and conduct his defense intelligently, but that because of his intelligence level his reactions toward an injury or affront would be "primitive" and characterized by a "passion . . . of intense emotion" (R. 65, 67).

4. The evidence clearly establishes that accused, after having been physically ejected from a tent by Private Welch, procured a carbine, sought Welch out, and shot and killed him. The shooting was without legal justification or excuse (par 148a, MCM, 1928; Acers v. U.S., 164 U.S. 388, 392) and was obviously intentional. There is substantial evidence in the record which would have supported a conviction of murder. The court, however, for reasons of its own, elected to find by appropriate exceptions to the specification that accused was guilty of the lesser included offense of voluntary manslaughter, in violation of Article of War 93. The accused was benefited by the court's findings, and although it cannot be said as a matter of law that the homicide was committed in the heat of sudden passion caused by adequate provocation he cannot complain because he was not found guilty of the more serious offense (CM 202359 Turner, 6 B.R. 87, 114; CM A-1994 Carpio; Owens v. U.S., 85 F. 2d 270).

5. The maximum confinement authorized upon conviction of voluntary manslaughter in violation of Article of War 93 is ten years (par 104c, MCM, 1928). Confinement in a penitentiary is authorized by Article of War 42 for the offense of manslaughter, recognized as an offense of a civil nature and punishable by penitentiary confinement by section 275 of the Criminal Code (18 U.S.C. 454).

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

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

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

Judson J. Clements, Judge Advocate.
Major, J.A.G.D.

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

22 October 1945

Board of Review
CM P-844

UNITED STATES v. Technician Fifth Grade WILLIAM A. SPOON (34205837), Battery B, 373d AAA Searchlight Battalion.	Trial by G.C.M., convened at APO 74, 30, 31 August and 1 September 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

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

Specification: In that Technician Fifth Grade William A. Spoon, Battery B, 373d Antiaircraft Artillery Searchlight Battalion, did, at APO 74, on or about 6 June 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the person of Jose E. Cruz, P 50, lawful currency of the Philippine Islands, the property of Jose E. Cruz, value about $25.00.

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

Specification 1: In that Technician Fifth Grade William A. Spoon, Battery B, 373d Antiaircraft Artillery Searchlight Battalion, did, at APO 74, on or about 10 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Bartolome Mariano, a human being, by shooting him with a rifle.

Specification 2: In that Technician Fifth Grade William A. Spoon, Battery B, 373d Antiaircraft Artillery Searchlight Battalion, did, at APO 74, on or about 10 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Beatrice Mariano, a human being, by shooting her with a rifle.

The accused pleaded not guilty to, but was found guilty of, all the specifications and charges and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record for action under Article of War 50½.

3. The record reveals that at about 0900 on 6 June 1945 Technician Fifth Grade William A. Spoon (accused), a member of an antiaircraft artillery searchlight battalion stationed on Luzon, P. I., and another soldier visited the "Country Grill," a barroom in Angeles, a nearby town. They remained there drinking for more than a half hour and then left (R 7, 14, 19, 26, 93). Accused, drunk (R 29), returned alone within the hour (R 15, 26) and, holding an unsheathed knife in his hand, went to the bar where he drank some water (R 26, 31) and asked the bartender for money (R 7-10, 16). The latter, in effect, directed him to the manager, Jose E. Cruz, and accused, still holding the knife in his hand (R 16, 31), walked over to a nearby table at which the manager and his bookkeeper were seated. Accused asked Cruz for some money. He said, "What for?" and accused answered, "That's none of your business." Cruz attempted to rise to his feet but accused, placing his hand on his shoulder, prevented him and, displaying his knife, warned, "Do you see this knife? Don't make a false move" (R 27). The Filipino then asked him if he wanted fifty pesos; accused answered in the affirmative and was given a fifty-peso note (R 11, 17, 27). Accused, "somewhat staggering" (R 29), left, saying, "Now don't do anything. Don't shout, don't move, because if you do and I get caught . . . I will try to come back and kill you and if I can't my friends will" (R 18, 28, 31).

Cruz was asked why he gave accused the money. The defense objected to the question on the ground that "What went on in this man's mind is not competent evidence" and the objection was sustained (R 25).

Shortly after leaving the barroom, accused, drunk and staggering (R 35), was apprehended and taken to the military police station. There he surrendered about seventy-five pesos, including a fifty-peso note (R 69), and a small hunting knife the blade of which was about three inches long (R 40). He was returned to camp and apparently was not placed in confinement.

The record further reveals that during the evening of 9 July accused and several other soldiers were drinking at a store about four miles from their camp (R 107, 122). About 2330 accused returned to the camp in a truck with his companions (R 122). At that time he showed the effects of drinking (R 97, 99, 115), but several witnesses testified that he talked in a normal manner (R 81, 102, 130). He went with Tec 5 Gritzinger to the latter's tent. Accused vomited on the outside of the tent, and the corporal told him to go to bed. Accused said that he would and left (R 124). Accused's tent was located about seventy-five yards away (R 124). About twenty minutes later (R 128), the muffled sound (R 125) of shots being fired in two groups a few seconds apart was heard. Gritzinger arose, dressed, and walked toward the radar unit, and saw accused at the guard gate in front of his (accused's) quarters (R 125). As the corporal approached, the accused pointed his rifle at him, but the former seized the barrel and brushed it aside. Observing that the barrel was hot, he asked the accused if he had done the shooting. The latter said he had not, but "thought it was Japs" (R 116). Gritzinger continued to the radar unit a few yards away and, learning that the shooting had occurred at the native hut occupied by Domingo Mariano and his family about a hundred yards away (R 88, 124), immediately went there.

Domingo lived with his sister, Beatrice, 27 years of age, his father, Bartolome, 60 years of age, his wife Clarita and her four small children. A short time after midnight Domingo was awakened by his father who told him to light a lamp (R 43). There was a "buzzing sound" near the door. Striking a match Domingo saw Bartolome and Beatrice both grasping the barrel of a rifle protruding inside the door. He could not see the bearer of the weapon (R 43, 44, 45, 60). Before he had time to light the lamp the rifle was discharged several times (R 46, 67), and Bartolome and Beatrice fell to the floor (R 46, 49, 50, 63). Bartolome called for help and said, "I was shot by the American, Spoon" (R 52, 63). Beatrice died almost instantly (R 60), and Bartolome died during the night (R 50, 61, 70).

About 0300 accused was seen sitting apparently asleep with his rifle--a Garand (R 83)--across his knees. It was taken from him, and he was placed in custody. There was one cartridge in the chamber, and the barrel smelled as if it had recently been fired (R 83, 84).

The evidence further reveals that accused had been to the Mariano dwelling on at least two prior occasions where he was seen playing with the one-year old baby there (R 61, 64). He also was acquainted with Bartolome (R 64).

Several times during the week preceding 10 July accused was heard by members of his organization making threatening remarks against Filipinos (R 103, 104, 119). "He said he was going to kill some of the mother-fuckers; some of the Filipinos" (R 104).

Three witnesses testified for the defense that accused was drunk on the night of 9 July 1945 (R 143, 146, 150, 154). A fourth witness testified that accused was drunk early in the evening, but that he had "sobered up some" when he saw him about five minutes after the shots were fired (R 161). The defense called an officer who related that he had test-fired a Garand rifle and found that the barrel was hot and retained some warmth for more than five minutes, but that at the end of fifteen minutes the barrel was cold (R 168, 169).

At his own election, accused was sworn and testified that he had drunk considerably during the morning of 6 June 1945 and, after returning to the "Country Grill," he was short-changed fifty pesos (R 179). When he complained the manager hit him in the stomach and told him to leave, whereupon he (accused) drew his knife, and the Filipino gave him a fifty-peso note. He was later apprehended and confined in the local jail and then released and returned to his organization (R 180, 181). The accused further testified that on the night of 9 July he had consumed much liquor and that he remembered nothing that transpired after boarding a truck to return to his organization until the next morning when he awoke in the stockade (R 183-185). He admitted knowing who Bartolome was, though he stated that he was not personally acquainted with him (R 186). He testified that in 1928 he was confined in an insane asylum for sixty days "or more" (R 188), that he attended school for the first four grades (R 189), and that he was uncontrollably addicted to alcohol (R 194), and that it was common for him not to remember what he did after drinking (R 195). He admitted that he might have said something about killing Filipinos, but that if he had made such a remark he was "not serious" (R 186).

Several prosecution witnesses testified on cross-examination that accused was a "peculiar" individual, that he slept with his clothes and shoes on (R 76, 106), and that he was of low mentality (R 76, 80). While cross-examining a prosecution witness, the defense counsel stated: "If the court please, comes now the defense and enters a plea of insanity" (R 77). In behalf of the defense, there was introduced in evidence a certificate of a neuropsychiatrist who had examined accused on 24 July 1945 wherein it was stated that he found that accused was a moron and suffered from chronic alcoholism; and that he "is sane, able to distinguish right from wrong and responsible for his actions . . . No Neuropsychiatric condition exists that will prevent this man from appearing before a Courts Martial Board" (Def Ex C; R 172).

4. The evidence establishes that accused, holding an unsheathed knife with a blade about three inches long in his hand, entered a barroom where he had been a short time before, had something to drink, and then, still exhibiting the knife, told Jose E. Cruz, the manager, to give him some money. Accused prevented Cruz from rising from the table where he was sitting and told him not to "make a false move." The manager gave him fifty pesos, and accused, warning him under pain of death to do nothing, left. The prosecution asked the Filipino why he had

given the money to accused but upon objection by defense counsel the witness was not permitted to answer. Such ruling was erroneous (54 CJ 1057). The inference is clear that, intimidated by the drawn knife, Cruz gave accused fifty pesos ($25.00), and that accused took the same with intent to steal. Accused, therefore, was guilty of the offense of robbery (par 149f, MCM, 1928).

The evidence further establishes that shortly after midnight on 9-10 July 1945 someone pointed a rifle into the hut wherein Domingo Mariano and his family were sleeping. Bartolome and Beatrice Mariano, awakening, seized the barrel of the rifle and were shot. Immediately thereafter Bartolome, who knew accused, said that the latter had shot him. That statement was admissible as a part of the res gestae to identify the accused (Underhill, Criminal Evidence, p. 1130). Both of the natives died during the night as the result of their wounds. The Filipino's hut was about 100 yards from accused's unit. He was in his organization area before the shooting and, within fifteen minutes after the shooting, he was seen there holding a rifle, the barrel of which was hot. Testimony of an officer that the barrel of a rifle was not hot fifteen minutes after he had test-fired it was erroneously admitted in evidence as it was not shown that the rifle tested was that taken from accused. The error, however, was to accused's benefit. About two hours later when accused was taken into custody and his rifle was taken from him the barrel smelled as though it had been recently fired. There is substantial evidence that accused fired the fatal shots.

Every person is presumed to intend the natural and probable consequences of his act, and the use of a dangerous weapon resulting in a homicide by one having no right to use the weapon at that time and place, and in the absence of any mitigating circumstances, is always regarded as evidence of the existence of malice aforethought. The facts here do not show that accused had any right to fire his rifle into the room where the decedents were nor does it tend to show any facts which would mitigate such conduct. Other than some indefinite threats against Filipinos made the week before, the record reveals no motive for his actions. The presence of motive, however, is not indispensable to a conviction of murder (Pointer v. U.S., 151 U.S., 396, 14 S.C. 410; sec. 156, 420, Wharton's Criminal Law; 41 C.J.S. p. 135) for malice may be inferred from the circumstances of the killing. Accused's general threats were admissible to show his general malice for the class of people of which the victims were members (40 C.J.S. p. 1110 and cases there cited). The circumstances herein "clearly tend(s) to establish that, whether or not he had any special malevolence toward any particular individual, he was possessed of a 'generally depraved, wicked, and malicious spirit, a heart regardless of social duty, and a mind deliberately bent on mischief,' * * * " (Liggins v. U.S., 297 F. 881; Allen v. U.S., 164 U.S. 492; 17 S.C. 154; Evans v. U.S., 122 F. 2d 461), and thus supports the determination that the homicide was deliberate and perpetrated with malice aforethought.

The evidence is clear that during the evening preceding the shooting accused had drunk a considerable quantity of liquor and he was showing its effects. Accused testified that because of the liquor which he had consumed he could remember nothing from about an hour prior to the homicide until he awoke in the stockade the next morning. However, he talked in a normal manner about five minutes before the shooting and talked intelligently about fifteen minutes thereafter. Although there was evidence that the accused was of low mentality, had little schooling, and was a "peculiar individual," a psychiatrist who had examined the accused and whose testimony was introduced by stipulation in behalf of the accused stated that accused was sane, could distinguish right from wrong and adhere to the right. Whether the accused was in fact so drunk as not to be able to entertain the specific intent to take life at the time of the homicide or had the mental capacity to be criminally responsible for his acts were questions of fact for the determination of the court-martial (U.S. v. King, 34 F. 302). By its general findings of guilt the court determined that he was legally responsible for his acts (CM 225837, Gray, 14 B.R. 339, 346) and that he was able to entertain such a specific intent at that time. The record contains substantial evidence in support of the court's findings.

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of robbery and murder, recognized as offenses of a civil nature and punishable by penitentiary confinement by sections 284, and 275, 330, respectively, of the Criminal Code (18 U.S.C., 463; 454, 567).

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

Charles L. Roberts, Judge Advocate.
Colonel, J.A.G.D.

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

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

Board of Review
CM P-890

28 October 1945

UNITED STATES v. Private JAMES E. YOUNG (34850213), Company A, 1889th Engineer Aviation Battalion, APO 901.	Trial by GCM, convened at APO 331, 20 September 1945. Dishonorable discharge, total forfeitures, and confinement at hard labor for 25 years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private (then Technician Fifth Grade) James E. Young, Company "A", 1889th Engineer Aviation Battalion, did, at APO 901, on or about 18 August 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Eddie L. Peguese, Company "A", 1889th Engineer Aviation Battalion, APO 901, a human being by shooting him with a rifle.

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

The reviewing authority approved the sentence but reduced the period of confinement to twenty-five years and forwarded the record for action under Article of War 50½.

3. The evidence discloses that at about 0800 on 18 August 1945 Private First Class Eddie L. Peguese (deceased) entered the tent of Private James E. Young (accused) who was then lying on his cot (R 7, 16). Peguese grasped accused's foot, released it when accused objected, and then grasped it again (R 7, 15, 17). The two began to tussle, apparently in play (R 12, 18), accused lying on his cot and Peguese standing over him. During the scuffle accused displayed an unsheathed trench knife in his hand (R 7, 8, 12) whereupon Peguese struck him in the face with his fist and wrested the knife from him (R 7, 12, 17). One of the men in the tent asked for the knife, and Peguese gave it to him, and upon being directed to leave the tent, left (R 7, 12, 13, 16). The accused left the tent immediately thereafter (R 7, 9, 12, 16).

Accused returned within forty-five minutes with his eye bandaged. He reclined on his cot for about an hour, then secured his rifle, manipulated the bolt, and left the tent (R 7, 12, 14). He was thereafter seen standing in front of his tent aiming his rifle in the direction of Peguese's tent, 100 to 150 feet away (R 18). He fired once (R 7, 10, 12, 14-20).

Peguese at this time was sitting on his cot writing. When the report of the rifle was heard, he said he was shot and lay down on his cot (R 10). Accused was then seen about twenty-five yards away, carrying his rifle in port arms position and walking toward the orderly room (R 10, 11, 12, 14, 19). He entered the orderly room at about 1000 and said to First Sergeant Edward Johnson, "Sergeant Johnson, I think I have shot Peguese" (R 21). The First Sergeant took accused's rifle from him and found it to be still loaded and smelling as if it had just been fired (R 21).

Peguese was admitted to the hospital at 1130 where his injury was diagnosed as a gunshot wound of the left leg (R 22). He was operated on at 1500, failed to recover, and died at 1845 of the same day (R 22; Ex B). The medical officer who attended him testified:

> My opinion is that the man died as a result of his wound, but that the wound was not the main cause of death. There were other factors involved, of which

> three seemed to me the immediate cause of his death. First, psychic shock, second, surgical and traumatic shock, third, hypersensitivity to the type of anesthesia sedation used on the patient (R 24).

After having been advised of his rights as a witness, accused elected to remain silent (R 26). The defense offered no testimony in behalf of the accused.

4. The evidence is uncontradicted that about an hour after an altercation between the accused and deceased, the accused procured a rifle, sought deceased out, and deliberately fired the fatal shot. Immediately after the shooting, accused admitted to his First Sergeant that he had fired upon deceased. The deceased died the same day as the result of the gunshot wound, although shock arising from the infliction of the wound itself and the subsequent surgery necessitated thereby, including the anesthesia sedation used, was shown to be the primary cause of death.

5. The evidence establishes indisputably the crime of murder. The shooting of the deceased was an act wilfully and deliberately accomplished, and the malicious intent entertained by accused in its perpetration is unquestionable (Par 148a, MCM, 1928; 1 Wharton's Criminal Law, 12th ed, Chap 14). The accused did not defend his act on the ground of self-defense, and the court was not duty-bound to find that the homicide could be so justified (Par 148a, MCM, 1928; CM P-369 McFarland (19 Aug 45)). Nor did the accused attempt to palliate the severity of the offense on the ground of accident or as an act conceived in the heat of sudden passion.

Evidence to the effect that the primary causes of death were those other than the initial gunshot wound does not relieve accused of the legal responsibility for the death of the decedent.

> . . . the unlawful act or omission of accused need not be the sole cause of the death; the test of responsibility is whether the act of accused contributed to the death, and, if it did, he is not relieved of responsibility by the fact that other causes also contributed. So, if any injury or act committed by accused contributed to the death, he is responsible . . . although other injuries or wounds, whether or not mortal, inflicted independently by

> another, also contributed thereto, and were subsequent in point of time . . . Accused cannot escape responsibility where his act produced a condition causing death, although the condition might have been the immediate cause of death. If a wound or other injury causes a disease or infection . . . from which deceased dies, he who inflicted the wound or other injury is responsible for the death . . . Thus it is not a defense that the victim died during or as the immediate result of a surgical operation rendered necessary by the existence of the wound.
>
> -- 40 CJS 851-855 (emphasis supplied)

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by Sections 275, 330, Criminal Code (18 USC 454, 567).

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

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

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

Judson L. Clements, Judge Advocate.
Major, J.A.G.D.

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

Board of Review
CM P-907

31 October 1945

UNITED STATES v. First Lieutenant JOHN L. BARRETT (01172744), 4038th Quartermaster Truck Company.	Trial by GCM, convened at Headquarters Base X, APO 75, 24 August 1945. Dismissal.

HOLDING by the BOARD OF REVIEW
ROBERTS, DUDLEY and CLEMENTS
Judge Advocates.

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

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

CHARGE I: (finding of guilty disapproved by confirming authority).

Specification: (finding of guilty disapproved by confirming authority).

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

Specification 1: In that First Lieutenant John L. Barrett, QMC, 4038th Quartermaster Truck Company, did, at APO 75, on or about 22 May 1945, wrongfully and without proper authority have one truckload of dunnage in his possession of the value of about $150.00, property of the United States and intended for the military service thereof.

Specification 2: In that First Lieutenant John L. Barrett, QMC, 4038th Quartermaster Truck Company, did, at APO 75, on or

about 28 May 1945, wrongfully and without proper authority absent himself from his assigned post of duty as Pier Officer at Pier No. 3.

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

Specification: In that First Lieutenant John L. Barrett, QMC, 4038th Quartermaster Truck Company, did, without proper leave, absent himself from his organization at APO 75, from about 7 July 1945 to about 26 July 1945.

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

Specification: In that First Lieutenant John L. Barrett, QMC, 4038th Quartermaster Truck Company, having been duly placed in arrest in his Company area on or about 13 June, 1945, did, at APO 75, on or about 7 July 1945, break his said arrest before he was set at liberty by proper authority.

The accused pleaded not guilty to Charge I and its specification and to Charge II and the specifications thereunder. He pleaded guilty to Charges III and IV and the specifications thereunder. The court found accused guilty of Charge I and by exceptions and substitutions only so much of the specification as alleged a wrongful signing of the instrument with intent to deceive to the prejudice of good order and military discipline; guilty of Charge II and its specification, excepting the value of the property alleged and substituting therefor the words, "less than $50.00;" and guilty of the remaining charges and specifications. Accused was sentenced to dismissal, total forfeitures, and confinement at hard labor for four years. The reviewing authority approved the sentence but reduced the period of confinement to two years. The confirming authority disapproved the findings of guilty of Charge I and its specification and confirmed the sentence as approved, but remitted the total forfeitures and confinement imposed. The record was then forwarded to this office for action under Article of War 50½.

3. The evidence discloses that on 22 May 1945 First Lieutenant John L. Barrett, QMC, (accused), 4038th Quartermaster Truck Company, was observed loading lumber that was piled on Pier No. 3, South Harbor, Manila, onto a truck, with the help of two enlisted men (R. 10, 11; Prox. Ex. E). The lumber was of various sizes and had been unloaded from ships docked at the pier where it had been used as dunnage (R. 10-12). The head checker approached accused and advised him that the Pier Officer had ordered that no lumber was to be removed from the pier (R. 10). The accused replied that his orders were to truck the lumber to the 1060th Engineers, and that it belonged to that organization. Accused's truck, which had a load capacity of four tons,

was three-quarters full of lumber (R. 12; Pros. Ex. E). The accused was given a cargo tally, wherein he acknowledged receipt of one truck load of lumber, three tons in weight and 334 cubic feet by volume. The truck number on the tally was shown as "531" and the consignee as "1060th Engineer." Accused was seen to sign the cargo tally as "F. D. Williams, 2nd Lt, Ord." The original and duplicate of the tally was given to accused, and the triplicate copy was retained at the pier (R. 7, 8, 12,13, 14; Pros. Ex. A; Pros. Ex. E). The two enlisted men mounted the truck and drove off, the accused following in a jeep (Pros. Ex. E). It was stipulated that if the Pier Officer, Second Lieutenant Harry Hampson, were present he would testify that prior to 22 May he had, in compliance with instructions from higher authority, issued orders to personnel working on the pier that no dunnage would be hauled from the pier without first having been released by the Dunnage Officer, and that in the instant case no such release had been procured. It was further stipulated that the Commanding Officer of the 1060th Engineers would testify that on 22 May his organization neither ordered nor received any light rough lumber from any source; that the Commanding Officer of the 4037th Quartermaster Truck Company would state that Truck No. 531 was a U. S. Government vehicle assigned to that organization; and that the value of thirty-five pieces of dunnage, approximately one inch by six inches by sixteen feet (234 board feet) was less than fifty dollars (R. 29; Pros. Ex. E.). The head checker estimated the amount of lumber taken by accused as 234 cubic feet (R. 13).

On the night of 28 May accused was on duty as Truck Officer at Pier No. 3. His duty hours were from 1800 to 0600 the following morning, and his constant personal supervision and presence were necessary to carry out his duties (R. 14, 16, 19). The Control Officer for South Harbor visited Pier No. 3 at 2000, drove around the pier in a jeep, but did not see the Truck Officer who was supposed to be on duty. He reported this fact to the Operations Officer for South Harbor an hour later and he was then ordered to return to Pier No. 3 and wait until the Truck Officer arrived (R. 19). The Control Officer returned to the pier at 2200, made a search for accused, and could not find him (R. 20). He then waited for accused at the pier's single entrance. Accused arrived at 2246 in a 2½ ton truck, entering from the street (R. 19, 20). The Control Officer reported to the Operations Officer, who proceeded to the pier and at 2300 found accused sleeping in the seat of a truck parked at the end of the pier (R. 16, 17, 24). The Operations Officer awoke accused and asked for an explanation, and accused stated that he had a headache and could not sleep during the daytime and so had to sleep at night. He asserted that operations on the pier were "fine" and that he had been on the pier all evening (R. 17).

On 13 June the Commanding Officer of the 29th Quartermaster Battalion, to which organization the 4038th Quartermaster Truck Company was attached, summoned accused and notified him that a delinquency report and a CIR Report had been received from the Provost Marshal. After informing accused of the offenses recited therein, he asked for

an explanation but received none. He then told accused he was being placed under arrest in his company area pending the preferment of court-martial charges. Accused said he understood the meaning and the limits of the arrest (R. 26, 27).

The Commanding Officer of the 4038th Quartermaster Truck Company, to which accused was assigned, testified that accused was absent without leave on 12 July (the day he assumed command) and was so carried in the morning report of the company (R. 25; Pros. Ex. C). The Commanding Officer stated he made a search for the accused without success (R. 25). The accused voluntarily returned to the company area on 27 July and on the same day was placed in confinement at the PHIBSEC Stockade (R. 26; Pros. Ex. D). It was stipulated that the accused voluntarily restored himself to military control on 26 July.

4. Electing to be sworn, accused testified that on 22 May at Pier No. 3 there were thirty-five pieces of lumber on the truck; that the lumber was used for company construction of an orderly room, mess hall, and supply tent; and that he had at no time received any personal benefit from the lumber. He admitted on cross-examination that he had no permission to remove the dunnage from the pier and, on examination by the court, that his company commander did not ask him to procure the lumber (R. 29). It was stipulated that if accused's Company Commander, Captain Townsend D. Baker, QMC, were present, he would testify that the lumber in question was used for company construction (Pros. Ex. E).

5. The evidence in support of Specification 1, Charge II, shows that accused was loading dunnage (lumber) on a truck at the pier, that he was told by the head checker that the pier officer had ordered that no lumber be removed, that he then stated he had orders to take the lumber for the 1060th Engineers (to which organization accused's company was attached), and that the lumber belonged to that organization. After some discussion, he was permitted to take the lumber upon signing a tally-out therefor. He signed a name other than his own to the tally-out. Accused testified that he had no permission to obtain the dunnage, and that no one had asked him to get it, but that he got it on his own initiative for use on company construction. His testimony was corroborated by other evidence to the same effect.

The checker did not testify what finally induced him to disobey the instructions of his superiors by permitting the accused to take the lumber, or whether the misrepresentations of accused induced such action on his part. However, accused's false representations to the checker that he had orders to take the dunnage and that it belonged to the 1060th Engineers constitute substantial evidence to support a finding that accused obtained the dunnage by means of those misrepresentations. Possession obtained by fraud is wrongful (CM 244666, Schallenberg, 28

BR 379). Further, the checker informed accused, in effect, that he (the checker) had no authority to permit the lumber to be removed. Nevertheless, accused removed such lumber with full knowledge of the fact that he had no permission from anyone in authority to do so. Such acts made his possession wrongful.

The evidence as to Specification 2, Charge II, establishes that accused was assigned the duty of truck officer at Pier No. 3 on the night of 28 May 1945, that such assignment required his constant personal presence on the pier, and that he was absent for a period of at least forty-six minutes. Defense introduced no evidence on this specification, but on cross-examination of prosecution's witnesses attempted to show that accused might have been present on the pier. There is substantial evidence supporting the court's findings that he was not present and justifying the conviction of this specification. While the established period of absence from duty was short, it nevertheless constituted an offense and justifies a conviction on this specification.

The evidence is undisputed, and accused admitted by his plea of guilty that he was absent without leave for a period of nineteen days as alleged in the specification of Charge III and Charge III, and that he broke arrest as alleged in the specification of Charge IV and Charge IV.

The sentence as confirmed is authorized upon conviction of a violation of Articles of War 96, 61, and 69.

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

(absent), Judge Advocate
Colonel, JAGD

[signature], Judge Advocate
Lieutenant Colonel, JAGD

Judson L. Clements, Judge Advocate
Major, JAGD

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 31 October 1945.

To: Commander-in-Chief, AFPAC, APO 500.

1. In the case of First Lieutenant John L. Barrett (01172744), 4036th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-907).

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

(Sentence ordered executed. GCMO 38, USAFP, 6 Nov 1945.)

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

20 November 1945

Board of Review
CM P-942

UNITED STATES v. Second Lieutenant BENJAMIN F. LOONEY (0-1295569), Infantry, United States Army Training Group, AFPAC, APO 500.	Trial by G.C.M., convened at Headquarters Base X, APO 75, 15 August 1945. Dismissal, total forfeitures and confinement at hard labor for two years. United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

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

Specification: In that 2nd Lt Benjamin F. Looney, U. S. Army Training Group, did, at APO 75, on or about 6 June 1945, feloniously take, steal and carry away ₱740, value about $370.00, the property of M/Sgt John C. Carlisle, 863rd Engineer Aviation Battalion.

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

Specification 1: In that 2nd Lt Benjamin F. Looney, U. S. Army Training Group, did, at APO 75, on or about 6 June 1945, without proper authority, wrongfully take and use one (1) quarter-ton, 4x4 vehicle No. USA 20234692, value about $950.00, property of the United States.

Specification 2: In that 2nd Lt Benjamin F. Looney, U. S. Army Training Group, did, at APO 75, on or about 7 June 1945, wrongfully attempt to alter the identification of one (1) quarter-ton, 4x4 vehicle No. USA 20234692, property of the United States, by causing to be removed from said vehicle the windshield, spare tire and top.

The accused pleaded not guilty to, but was found guilty of, all specifications and charges and was sentenced to dismissal, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority confirmed the sentence, but reduced the confinement imposed to two years and designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement. The record was then forwarded to this office under Article of War 50½.

3. The evidence for the prosecution reveals that a ¼ ton truck No. 20234692, commonly known as a "jeep," and valued at $950, was dispatched to Master Sergeant John C. Carlisle, 863rd Engineer Aviation Battalion on 6 June 1945 and that a trip ticket was given him (R. 8-10, 13, 34). At about 2230 Sergeant Carlisle was seated in the rear of the vehicle as it was parked on Quezon Boulevard, Manila, when he "came to" and found two men in the jeep. He had been drinking at a Filipino cafe, where, he believed, he had been drugged. Fearing theft of his money, he hid his billfold under the flap of the rear seat. The billfold contained at least ₱800, including a ₱500 note. He again relapsed into insensibility and remembered nothing of what thereafter occurred until he later awoke in an alley (R. 13, 14).

The record further reveals that the accused, Second Lieutenant Benjamin F. Looney of the United States Army Training Group, accompanied by Staff Sergeant William R. Ellis of that organization, left their camp at 1900 on what Ellis stated was 5 June 1945 and drove to Manila in a USATG jeep. Later that night the two observed a parked jeep occupied by a soldier. The accused, who was driving, stopped his vehicle a few feet behind it and Ellis turned off their headlights. Accused awoke the soldier who got out and, with the assistance of the accused, walked up the street and then sat down on the curb. He appeared to be very drunk (R. 20-22, 25, 39). "I was thinking then," the accused admitted in a pretrial statement introduced in evidence by the prosecution, "here was a chance to get a vehicle to have at any time that I wanted" (R. 39). The accused re-entered the drunken soldier's jeep and, followed by his enlisted companion in the other vehicle, drove to their organization's motor pool (R. 20, 22, 39).

Upon arriving the accused aroused the shop foreman and a mechanic and asked them to look at the jeep. It bore the Aviation Engineer insignia (R. 15, 29). As they were examining it, a wallet

containing some money and a paybook was found under the back seat. The accused picked it up and counted the ₱750 which it contained, including a ₱500 note. Saying that "he was badly in need of the money and he could use it at that time" (R. 16), and mentioning "something about paying off some fellows" (R. 31), he extracted and pocketed the funds (R. 31, 39). A trip ticket made out to a master sergeant was found in the glove compartment (R. 30).

At accused's direction the motor pool men removed the spare tire, windshield and top from the jeep. The tire and windshield were placed in the motor pool supply room. It does not appear what disposition was made of the top (R. 17, 19, 31).

All of the jeeps in the USATG motor pool had windshields (R. 18, 26, 32) and tops (R. 26, 32, 36). The mechanic was not informed why the parts were removed and they were not, to his knowledge, to be used on the vehicles in their motor pool (R. 32). The shop foreman did not intend to use the top and spare tire on the jeeps in the motor pool that needed them (R. 18). Accused inquired whether the vehicle serial number could be removed (R. 33). He then drove the jeep north of the camp, left it and returned in a vehicle driven by Ellis (R. 24).

The vehicle dispatched to Sergeant Carlisle was found 7 June 1945 in a rice paddy by a member of his organization. The top, windshield, spare tire and seat covers were missing. No trip ticket was found therein (R. 11, 12).

Electing to testify under oath, the accused denied that he directed anyone to remove the windshield, spare tire and top of Carlisle's jeep. He admitted that he "found" the billfold containing approximately ₱740 and that he had used a little over ₱600 of it to repay debts that he owed in his old outfit. The remainder he applied to his own use (R. 42, 45). He gave no reason why he took the jeep but endeavored to explain his actions with reference to the money by stating, "not knowing who to get in touch with, who to give it to or where it belonged, human nature would tell you to go ahead and use it" (R. 45). He testified that during the investigation of the matter, he learned to whom the money belonged, whereupon he secured funds and paid Sergeant Carlisle ₱750 (R. 43, Ex. 1, R. 46).

4. There is substantial evidence in the record from which the court could find that accused wrongfully took and used without authority the vehicle described in Specification 1, Charge II. While the witnesses to the actual taking and subsequent stripping of the vehicle nowhere describe it by number, the circumstances indicated it to be the jeep which was dispatched to Sergeant Carlisle. Its value was stipulated as alleged. The fact that it came from the 863rd Aviation Engineer motor pool and bore Aviation Engineers' insignia and the number "US 20234692" adequately established its ownership in the United States (CM 248919, Christ, 31 B.R. 377, 385).

With respect to the Specification of Charge I, it was shown that money in the amount of 740 pesos, property of Master Sergeant John C. Carlisle, was found in a billfold in the vehicle at the motor pool. The billfold also contained a "paybook." A trip ticket bearing the name of a master sergeant was found in the jeep, and the vehicle bore the insignia of the Aviation Engineers. Despite such ready means of identification, the accused made no effort to find the owner of the money but by his own admission devoted it to the payment of his personal obligations. Under any of several theories, the evidence is legally sufficient to sustain the findings that accused was guilty of larceny.

Although accused was charged only with the offense of wrongfully taking and using the jeep, the facts would have sustained a finding of guilt of larceny thereof had he been so charged. Therefore, under the settled principle that one who steals property containing property concealed therein is guilty of the larceny of both, although he is unaware of the presence of the latter (36 C.J. 763; 2 Wharton's Criminal Law, 12th Ed., sec. 1132, fn 17), the evidence is legally sufficient to sustain the findings that accused was guilty of the larceny of the money.

If it be assumed that the original taking of the jeep was merely a wrongful taking and using and did not constitute a larceny, accused's subsequently formed intent permanently to deprive the owner of his money consummated a larceny (CM 228274, Small, 16 B.R. 111, 115, 2 Bull. JAG 12; MCM, 1928, par. 149g, p. 173).

Lastly, considering the accused merely as the finder of lost property, the light most favorable to him, he was legally guilty of larceny of the money as the evidence reveals that at the time of the finding he had knowledge of facts sufficient to establish reasonable grounds for believing that the owner could be discovered, but nonetheless expressed the felonious intent to, and did, appropriate it to his own use (36 C.J. 792; 2 Wharton's Crim. Law, sec. 1141, 1143; Dig. Op. JAG 1912-40, sec. 451(40), CM 121178).

It is unnecessary to decide whether the misconduct described in the Specification of Charge I, and that set forth in Specification 1 of Charge II were but parts of a single offense, namely, larceny of the jeep and its contents, as the sentence imposed is permissible upon conviction of either of such offenses (SPJGJ 1945/4033, 20 April 1945, 4 Bull. JAG 139).

Specification 2 of Charge II alleges a wrongful attempt to alter the identity of the jeep in question by removal of the top, windshield and spare tire. It is undenied that such removal was accomplished and there is substantial evidence that it was effected at the direction of accused. The question remains as to the intent motivating the accused thus to despoil the jeep.

There was evidence that none of the USATG jeeps lacked tops or windshields and that it was not intended that the removed parts

should be used on their vehicles. The mechanic was not told why they were taken from the vehicle. Thus the court could reasonably infer that since the parts were not removed for use on other trucks the accused's only purpose must have been the concealment of the jeep's identity. It is not for the Board of Review to determine whether such inference should, but rather whether it could reasonably have been drawn from the evidence (CM 161833 (1924), Dig. Op. JAG, 1912-40, sec. 408(2); CM 274647 (1945), 4 Bull. JAG 279).

Accused was tried only two days after the charges were served upon him. No inquiry was made as to whether he had been afforded an opportunity adequately to prepare his defense. However, he made no request for a continuance and it appears that he had been apprised of the nature of the charges against him at the time of the investigation, some three and a half weeks before the trial. No prejudice appears and the procedure was legally unobjectionable (CM 135290, Dig. Op. JAG, 1912-40, sec. 428(15)).

5. The sentence as confirmed is authorized upon conviction of a violation of Articles of War 93 and 96.

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

Harlan H. Roberts, Judge Advocate.
Colonel, J.A.G.D.

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Hart Snyder, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 21 November 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Second Lieutenant Benjamin F. Looney, O-1295569, Infantry, United States Army Training Group, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-942).

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

(Sentence ordered executed. GCMO 41, USAFP, 23 Nov 1945.)

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

14 November 1945

Board of Review
CM P-944

UNITED STATES v. Private LEONARD F. HOLLEY (14057783), Medical Detachment, 25th Infantry.	Trial by G.C.M., convened at APO 926, 28 September 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Pvt. Leonard F. Holley, Medical Detachment 25th Infantry, did at APO 926, on or about 2 September 1945, with malice, aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Pfc Robert C. Lloyd, Hq. Co. 25th Inf., a human being by shooting him with a Pistol, cal. .45.

The accused pleaded not guilty to, but was found guilty of, the specification and charge and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The court considered two previous convictions by summary courts-martial and one by special court-martial. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial to this office for action under Article of War 50½.

3. The evidence for the prosecution:

On 2 September 1945 at about 2230 or 2300 Private Leonard F. Holley (accused) and Private First Class Robert C. Lloyd (deceased), with several other soldiers, were participating in a game of dice in a tent in the headquarters company area (R. 5-10). Although it was apparent from accused's voice and manner that he had been drinking, he was not drunk (R. 9, 10). He was making and collecting bets, making change (R. 6, 8) and talking intelligently (R. 8).

An argument arose between accused and Lloyd with respect to a bet (R. 5, 7). The amount involved was ten guilders which Lloyd gave the accused, saying, "I don t care about the ten guilders" (R. 7) or "here's your ten guilders" (R. 10). The accused called Lloyd a "nigger," adding, "I called you that for a fight" (R. 10). A fight between the two ensued (R. 5, 10) but the first sergeant came by and ordered the men back to their companies (R. 6-9). Accused, complaining that "all of them jumped on him" (R. 5), went toward his own tent (R. 5, 9). Some three (R. 10) or five (R. 9) minutes later a shot was heard (R. 5-10) somewhere in the medical area (R. 7). He had been seen loading a weapon and was heard to say, "I'll kill that son of a bitch" (R. 11). He returned to the tent where the dice game had been held (R. 5, 9), pointed a caliber .45 pistol at Lloyd, at a range of five or six feet (R. 7), and fired (R. 7, 9). Lloyd cried out, "I'm shot" (R. 7, 9). After a brief struggle for the pistol, which was again discharged when it dropped from the accused's grasp and hit the ground, accused was disarmed (R. 7-9). Lloyd was taken to the aid station (R. 9, 10) and thence to the station hospital but died en route. His death resulted from a .45 caliber bullet wound in the lower left abdomen (R. 4).

4. The evidence for the defense:

A report of a blood alcohol test to which accused was subjected on 2 September showed an ethyl alcohol content of 1.5 milligrams per cubic centimeter of blood (R. 11, Ex. A). Such a level indicates that the individual is "usually under the influence of liquor but not definitely intoxicated." The blood test finding by itself is not a certain indicator, since the amount of alcohol in the blood is only one of several variable factors in determining the relative alcoholic intoxication. A blood alcohol content of 1.5 milligrams per cubic centimeter of blood might denote drunkenness in some individual cases (R. 12).

The defense called three witnesses who testified that on the day of 2 September 1945 the accused had consumed a considerable quantity of intoxicating liquor, but that while he showed evidence of drinking to the extent that he was "pretty high," they could not say that he was drunk (R. 13-18). Sworn as a witness, accused maintained that he had drunk a copious amount of liquor during the afternoon and evening of 2 September and that he believed he fell while walking across a bank. He claimed to remember nothing that transpired thereafter until he awoke the evening of the next day in the hospital with a gunshot wound in his arm and a guard sitting on his bed (R. 18-20).

In rebuttal, Private Harold Miller testified for the prosecution that he was with the accused at the time of the alleged fall, that he did not see him fall in any way, and did not have to help him or carry him (R. 21).

5. The evidence establishes that on 2 September 1945, following a dice game which was interrupted by an altercation between accused and the deceased, the former left the scene, returning shortly thereafter with a .45 caliber pistol. On his way back he was heard to say, "I'll kill that son of a bitch." He approached the deceased, aimed and fired from a distance of five or six feet. The shot was fatal. Although accused had been drinking during the day, he was not drunk.

6. The record contains no suggestion that the accused did not fire the shot, or that the death of the deceased was not the result of his act. The facts leave no basis for any contention that death was inflicted in the heat of sudden passion, caused by adequate provocation. Malice was properly inferable from accused's acts in going to another tent, obtaining and loading a pistol and returning therewith to the tent wherein the dice game had been conducted, as well as from his spoken words uttered en route to the scene of the killing (CM 232400 (1943), 19 B.R. 67, II Bull. JAG 187; CM 231988 (1943), 18 B.R. 371, II Bull. JAG 188; CM P-951, Laws, 6 November 1945).

The only semblance of a defense was that of drunkenness. Although the accused had undoubtedly been drinking, there was substantial proof that he was so competent as to be able to speak intelligently, place and collect bets and make change with respect to the dice game. The defense's own witnesses refused to state that he was drunk. It is clear that the accused was not so intoxicated as to be unable to entertain the specific intent which constitutes a necessary element of the offense charged. Except with respect to such element, voluntary drunkenness constitutes no defense (MCM, 1928, par. 126a).

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

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

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Hart Snyder, Judge Advocate.
Major, J.A.G.D.

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

19 November 1945

Board of Review
CM P-945

UNITED STATES v. Private First Class WILBUR E. WILLIAMS (35827536), 900th Base Depot Company, APO 72.	Trial by G.C.M., convened at APO 72, 28 and 29 September 1945. Dishonorable discharge, total forfeiture and confinement at hard labor for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Wilbur E. Williams, 900th Base Depot Company, did, at APO 72, on or about 10 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Canoto Rosales, a human being, by stabbing him with a knife.

The accused pleaded not guilty to, but was found guilty of, the charge and specification, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that at about 2000 on 10 June 1945 Canoto Rosales (deceased) and Teopelo Lacasta paddled an outrigger canoe or banca from the shore to a barge operated by the Transportation Corps, anchored a short distance off shore in the vicinity of Barrio Anibong, Leyte, P. I. Rosales was in search of another banca belonging to him (R. 6-8, 19, 21, 29). At the barge he boarded a banca which he found there and, followed by Teopelo in the other boat, returned to shore (R. 8, 23, 28, 63). A few minutes later a soldier was seen swimming from the barge to the shore (R. 9, 17). Upon reaching the shore, the soldier, identified at the trial as the accused (R. 10), wearing only khaki trousers, approached Rosales and several other Filipinos who were standing in a group nearby, and said, "That is my banca" or "Who took my boat?" (R. 10, 33). Rosales, who held a paddle in his hand (R. 35, 72), replied that he, Rosales, was the owner of the boat, whereupon the soldier angrily said, "I bought that boat from a Filipino boy for 50 pesos" and, with the exclamation, "You goddam Filipino!" (R. 10) struck Rosales with his clenched fist on the left side of the chest (R. 10, 20, 22, 26, 29, 33, 35, 36, 70). Because of the darkness none of the witnesses to the incident were able to see if he had a weapon in his hand. Rosales fell, regained his feet, walked a short distance away and said in Visayan dialect, "I am wounded" and then fell to the ground (R. 11, 21, 26, 33, 36). Blood was seen flowing from his left chest (R. 12). The soldier meanwhile quickly walked away and then swam back to the barge (R. 11, 26, 36). One Filipino witness testified that as he walked by he said, "I kill everybody, goddam!" (R. 33, 36). Rosales was taken to a hospital but died before reaching there (R. 12, 38, 40). On 11 June an autopsy was performed on the body of deceased and a wound, two inches deep and an inch and a half wide penetrating into the heart, was found below the left nipple (R. 51-53).

At about 2130 the military police took the two Filipino girls who had witnessed the incident to the barge. They were confronted by members of the crew and identified accused as Rosales' assailant (R. 13, 27, 43). At that time accused appeared to be "pretty drunk" (R. 44) but walked and talked "all right" (R. 47) and when leaving the barge after his arrest walked along an eighteen inch wide board without help except that a sergeant had his hand on the back of accused's shoulder (R. 45). Accused's quarters were searched and a pair of wet trousers was found, in the pocket of which were his dog tags. A G-I issue knife, "kind of like a dagger" (R. 44), was discovered in a cabinet in accused's room but was not identified as belonging to him. A knife, identified only as one similar to that issued to the crew, was introduced in evidence as Prosecution's Exhibit No. 3 (R. 50). The physician who conducted the post mortem examination of the body of deceased testified that the fatal wound might have been inflicted by the latter knife which was exhibited to him in the court (R. 54).

In a pretrial statement received in evidence as a prosecution's exhibit, accused stated that when he discovered that a canoe he had just

purchased was missing, he stripped down to his trousers and proceeded to a group of Filipinos on the shore where he spoke only to the man who had sold him the canoe, and that he was chased back to the barge by the Filipinos. After he returned to the barge, he took his trousers off and drank a bottle of whiskey (R. 49, Pros. Ex. 2).

It was stipulated that the neuropsychiatrist who examined the accused on 17 August would testify that the accused at the time of the alleged offense was mentally capable of distinguishing right from wrong and adhering to the right and that he could intelligently conduct or cooperate in his defense (R. 57, Pros. Ex. 5).

Defense witnesses testified substantially to the same effect as to the incident on the beach as did the witnesses for the prosecution (R. 66-75). One testified that at that time she heard "a noise like a rock hitting the water" (R. 78). The defense further adduced testimony that accused had been drinking during the evening in question and that he had purchased an outrigger canoe from a native (R. 59-61, 91-93).

His rights having been explained to him, the accused elected to take the stand and testify in his own behalf. During the afternoon of 10 June, he testified, he drank a considerable amount of whiskey. Later he purchased both a boat and some native whiskey from a Filipino and tied the boat alongside his barge. A short time thereafter he saw two Filipinos making off with his boat. Removing his shirt and shoes, he started out for the shore in a raft, but the raft "got tangled up" and he swam the remaining distance. Seeing his boat on shore near a group of Filipinos, he approached the one who, he believed, had sold it to him and asked what he meant by coming back to get the boat. "They started jabbering in Filipino" and one of the natives who held a boat paddle struck at the person who had sold accused the boat. Accused walked off, the Filipinos threw rocks at him and he returned to his barge. He further testified that he owned a spring blade knife similar to the one introduced as Exhibit 3 but that he had lost it a few days before the occurrence in question. He stated that he had been drinking that evening but was not too drunk to know what happened. He denied that he had a weapon when he approached the Filipinos, that he had struck or touched anyone, and further denied that he had said "Goddam Filipino" or that he would kill everybody (R. 80-89).

4. The record contains substantial evidence that accused angrily approached a group of Filipinos, claimed that one had taken an outrigger canoe that he owned, cursed Canoto Rosales and hit him in the left breast with his clenched fist and left. Because of the darkness witnesses could not see whether he held a weapon in his hand. The native fell to the ground, arose, walked a short distance and again fell with blood coming from his chest, saying that he was wounded. He died shortly thereafter as a result of a stab wound which, from its nature, might have been inflicted by the type of knife issued to the crew of a barge anchored nearby and on which accused served. Accused admitted approaching

the natives in search of his boat but denied having cursed, struck, or touched anyone. From the circumstances the court could infer to the exclusion of every other reasonable hypothesis that accused inflicted the wound from which the Filipino died.

The surrounding facts, even in the light most favorable to accused furnished no justification or excuse for the stabbing (MCM, 1928, par. 148a). The circumstances indicate a wicked, depraved, and malignant spirit, from which his malice may be inferred (Evans v. U.S., 122 F.2d 461, 466). Accused is presumed to have intended the natural and probable consequences of his act and the court could infer as a presumption of fact that his blow was intended prior to the striking (Allen v. U.S., 164 U.S. 492, 17 S.C. 154). The record therefore contains substantial evidence which sustains the court's findings that accused, with malice aforethought, willfully, deliberately, unlawfully, and with premeditation killed Canoto Rosales.

A psychiatrist testified that accused was mentally responsible for his act and the record contains evidence from which it could be concluded that although he had been drinking on the evening in question he was not so drunk as not to be able to entertain the specific intent to take life.

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C.452, 455).

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

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

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Hart Snyder, Judge Advocate.
Major, J.A.G.D.

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

8 November 1945

Board of Review
CM P-947

UNITED STATES v. Private LENTON A. FREEMAN (34281454), Headquarters Company, Special Troops, United States Army Service Command "C".	Trial by G.C.M., convened at Headquarters, Base X, APO 75, 27 September 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for twenty-five years. United States Penitentiary, McNeil Island Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Lenton A. Freeman, Headquarters Company, Special Troops, United States Army Service Command C, did, at APO 75, on or about 28 August 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private Millard A. Reynolds, a human being by stabbing him with a knife.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The court considered three previous convictions, one by summary court and two by special courts-martial. The reviewing authority approved the sentence

but reduced the period of confinement to twenty-five years, designated the United States Penitentiary, McNeil Island, Washington as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. Evidence for the prosecution:

The accused and Private Millard A. Reynolds had been friends since leaving the United States. They played cards together on the boat from Leyte to Manila and after reaching Manila "ran around a good deal together and became very close buddies."

On 28 August 1945 the accused and Reynolds left camp together to go to town (Manila). They purchased a quart of gin, had some drinks, went to the Red Cross, had another drink and then proceeded to the Citadel Bar. Before leaving camp the accused, at Reynolds' suggestion, took his knife with him, intending to sell it to the Filipinos (R. 6, 28; Ex. A).

After entering the bar and seating themselves at a table, two Filipino girl hostesses who were employed at the place, joined them at their table. The accused was observed to have a knife in a scabbard at his belt, which at the suggestion of the military police he surrendered to the cashier, later reclaiming it (R. 27). The four of them remained at the table, the girls dancing with the men as well as with other men in the place. They were joking together and the two men seemed friendly (R. 19, 29, 30), like "good buddies" (R. 20). More liquor was consumed by the men, who had purchased another quart bottle of gin. Reynolds gradually became very drunk and profane, whereupon the girls left. The accused, however, was not greatly intoxicated. He was only moderately drunk (R. 20, 32), and had attempted to quiet his companion (R. 31).

Between 1700 and 1800 the Filipino floor manager heard a disturbance outside the bar and went to the men's latrine in the rear of the bar (R. 7). He went to the latrine, looked in the open doorway and saw a man sitting there with a wound in his neck, and another standing facing him with a hunting knife held horizontally in his hand (R. 7, 8). The witness observed the man replace the knife in the scabbard, whereupon the former hurried away, through the bar and into the street in search of the military police. The man followed him and was observed by the manager to accost a calesa driver (R. 10), ignore an attempt by Filipino military police to apprehend him and then to enter and depart from a Chinese store. As he left the store, he was arrested by American military police (R. 10). The floor manager went to the roof of the store, where he found a hunting knife in a scabbard (R. 11, 16). The accused was one of the men whom he had observed in the latrine (R. 15).

Another of the cafe's hostesses was about to enter the women's latrine when she heard a noise in the adjoining men's latrine (R. 24, 26).

Going over to the doorway she saw the accused, knife in hand, in the act of stabbing another man who had partially risen from the ground with his right hand on the ground bracing himself. Noting that the latter was bleeding on the left side, the witness closed her eyes and screamed as the accused left the latrine. The man on the ground had no knife (R. 22-24).

One of the girls who had been at the accused's table heard a noise at the back of the bar, followed by a woman's scream. Going back to investigate she met the accused coming from the direction of the latrine (R. 17, 21). He was very white and pale (R. 21).

Reynolds was immediately taken to an Army hospital where the following diagnosis was made:

> "1. Wounds, multiple, lacerated, transverse colon, second portion of duodeneum, severe, knife inflicted.
>
> "2. Wound, lacerated, moderate, left anterior cervical region, knife inflicted.
>
> "3. Wound, lacerated, moderate, post-cervical region, knife inflicted.
>
> "4. Alcoholism, acute.
>
> "5. Wound, lacerated, mild, posterior portion, helix, left ear."

His subsequent death on 31 August 1945 was caused by stab wounds of the intestines (R. 28, Pros. Ex. B).

In a pretrial statement voluntarily signed by the accused he admitted going into the latrine with Reynolds, where he said Reynolds tried to grab him around the neck as if to "wrastle" with him, but not in anger. The accused had his knife out, when Reynolds made a leap at him and the latter ran into the knife. Reynolds came at him with his fists as the accused tried to protect himself "by knocking" his blows off "with his arms", the knife still being in accused's hand. The accused claimed he was trying to get out the door. When he left the cafe he was scared and tried unsuccessfully to sell the knife to some Filipino, then threw it away. The accused remembered Reynolds jarring his arm, stating that was how he knew he hit the knife. He denied any intent to cut Reynolds (R. 6, 28; Pros. Ex. A).

4. The evidence for the defense:

The accused was sworn and testified in his own behalf as follows: He and Reynolds had first met at the Port of Embarkation. They

played cards together on the ship, ran around together on Leyte, and when they came to Manila, "got to running around . . . as buddies" (R. 34). They were close friends. On the morning of 28 August 1945 Reynolds came to accused's tent and asked him to go to town. At Reynolds' insistence, he took his knife with him for the purpose of selling it. They purchased a quart of gin, went around to several places having drinks, and finally went to the Citadel Bar (R. 35), by which time over half the gin was gone. They finished the bottle and bought another. There they were joined by two girls and the four sat at the table together, laughing and joking and having a good time. At no time were relations strained between the men (R. 36, 37). While at the Citadel the accused asked an MP if it would be all right to take the knife back to camp, and complied with the suggestion that it be left with the bartender until he was ready to leave. However, Reynolds went to the bartender a little later, got the knife, and gave it to the accused.

They went to the latrine together about four times (R. 37). The last time, as the accused was standing with his back to the wall and his knife in his hand, Reynolds tried to get him around the neck (R. 38). Both had been handling the knife, "acting the fool" with it (R. 43). The accused threw up his arms and pushed Reynolds back. When he came at the accused again, the latter felt his arm jar but "didn't know for sure that the knife hit him". There had been no argument and Reynolds "just acted like he always did" (R. 38, 43). He did not appear angry (R. 44). Reynolds ran at him the second time, trying to hit accused with his fists, the latter merely tried to ward off the blows with his arms. He did not see Reynolds fall to the ground (R. 39). He was not on the floor at any time while accused was in the latrine (R. 44).

Although Reynolds was "pretty well drunk," the accused was not so drunk that he did not know what he was doing. He did not intend to harm Reynolds and had "not a thing in the world" against him (R. 40). The accused then left the latrine because Reynolds had hit him and he did not want any more of a fight with him (R. 41). He walked through the bar to the street and tried to sell the knife to a Filipino, as he was scared and wanted to get rid of it. He then threw the knife away lest the military police find it on his person and charge him with carrying a concealed weapon. He did not know for sure that he had stabbed Reynolds (R. 41, 43, 44). Concluding his testimony, the accused denied that Reynolds had done or said anything to anger him (R. 45).

Reynolds and accused had been observed by a fellow soldier to be very good friends, who were together frequently and had never been heard to have an argument or disagreement of any kind. Reynolds that morning tried to persuade the accused to take his knife to town with him. They seemed to be very good friends that morning (R. 33; Def. Ex. 1).

While sitting at the table with the girls, Reynolds and the accused had two or three bottles of gin. When Reynolds unsuccessfully endeavored to persuade one of them to permit him to take her home, he became angry and started cursing the girls, whereupon they left. Reynolds was quite intoxicated. Although accused had been drinking, the witness who testified as to this point did not know if he was really very intoxicated (R. 32, 33).

5. The evidence establishes that Private Millard A. Reynolds died 31 August 1945 as the result of a knife wound inflicted 28 August 1945 at the hands of the accused and that the stabbing was with malice aforethought.

6. The record is bare of any contention that the knife wounds suffered by the deceased were sustained at the hands of other than the accused, or that his death did not result therefrom. It affirmatively appears by the accused's own testimony that their relations had been friendly to the last. Not even at the time of trial did the accused believe that Reynolds had been in an angry mood (R. 43). The accused testified he was seeking only to escape from the deceased's drunken efforts to wrestle and he denied any intent to harm the deceased. There remains no room for the theory that the stabbing occurred as the result of a sudden quarrel or in the heat of such passion as might reduce the offense to manslaughter.

While the record shows no expressed malice, this element and the specific intent may properly be inferred from the act itself, from the weapon used, the severity of the wounds and from the absence of proof of any legal excuse, justification or provocation and other attending circumstances (MCM, 1928, par. 126a; Winthrop, 1920 Reprint, p. 688; CM NATO 1123 (1944) 3 Bull. JAG 11; Vol. 1, Wharton's Criminal Law, 12th Edition, sec. 508).

The "malice" which constitutes a part of the offense charged does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life. The use of the word "aforethought" does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. It may exist when the act is unpremeditated and may consist merely of knowledge that the act which causes death will probably cause death or grievous bodily harm, even where such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused (MCM, 1928, par. 148a). The accused must have known that a knife wound in the abdominal region might well result in death.

That the injuries were caused in some unintentional or accidental manner or in self-defense was negatived by the testimony that the accused was observed in the act of stabbing the deceased while the latter was in a "partially rising" position, with his right hand on the floor bracing him-

self, as well as by the accused's attempt at flight and his effort to dispose of the weapon. The court was not compelled to accept the accused's explanation of these circumstances.

The court-martial and reviewing authority weighed the evidence and determined the existence of malice aforethought. Since such finding is supported by substantial evidence, it should be sustained (CM 274647 (1945) 4 Bull. JAG 279).

It appears that the charges were served on the accused only two days before trial. No inquiry was made as to whether he had been afforded an adequate opportunity to prepare his defense. However, no request for a continuance was made and the papers accompanying the record disclose that the accused was present at the pretrial investigation, at which time he signed the statement dated 4 September 1945 which was admitted in evidence as Exhibit A. His defense was fully and adequately presented. It cannot be said that accused's substantial rights were injuriously affected. While contrary to declared policy, such irregularity was not jurisdictional and need not vitiate the findings and sentence (Dig. Op. JAG, 1912-40, Sec. 428(15)).

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454). Reduction of the sentence to a definite period of years was within the power of the reviewing authority (SPJGK CM 241226 (1943), 2 Bull. JAG 379).

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

(Absent), Judge Advocate.
Colonel, JAGD

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, JAGD

Hart Hunter, Judge Advocate.
Major, JAGD

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

7 November 1945

Board of Review
CM P-948

UNITED STATES v. Private First Class THOMAS M. BRANTLEY (37054006), 3476th Quartermaster Truck Company and Private JAMES W. DAVIS (17019786), 293rd Port Company.	Trial by G.C.M., convened at APO 72, 14 September 1945. Sentence as to Brantley: Dishonorable discharge (suspended), total forfeitures and confinement for three years. Sentence as to Davis: Dishonorable discharge, total forfeitures and confinement for five years. Philippine Detention and Rehabilitation Center and United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification: In that Private First Class Thomas M. Brantley, 3476th Quartermaster Company, and Private James W. Davis, 293rd Port Company, did, acting jointly and in pursuance of a common intent, at APO 72, on or about 14 March 1945, wrongfully apply to their own use and benefit a 2½ ton 6 x 6 truck of a value in excess of $50.00, property of the United States.

CHARGE: Violation of the 94th Article of War.

Specification: In that Private First Class Thomas M. Brantley, 3476th Quartermaster Truck Company, and Private James W. Davis, 293rd Port Company, did, acting jointly and in pursuance of a common intent, at APO 72, on or about 14 March 1945, wrongfully and without proper authority sell to Flaviano Morano and Patricio Ballon, civilians, sixty-four sacks of rice of a value in excess of $50.00, property of the United States, furnished and intended for the military service thereof.

Each accused pleaded not guilty to, but was found guilty of, the specifications and charges. The accused Brantley was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for three years. The reviewing authority approved the sentence, suspended execution of the dishonorable discharge, ordered the remaining sentence executed and designated the Philippine Detention and Rehabilitation Center, APO 75, as the place of confinement as to Brantley. The accused Davis was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for ten years. The reviewing authority approved his sentence but reduced the period of confinement to five years, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution is as follows:

On 14 March 1945 accused Brantley secured a government two and one-half ton, six by six truck from the company dispatcher, 3476th Quartermaster Truck Company at approximately 0630. He was on duty until 1830. At 1400, he left the company motor pool alone driving the truck. His duty was to meet an officer at a road junction and deliver officers' personal belongings which were in the truck to a place near Tacloban. Brantley arrived at the destination at 1500, delivered his load and returned. The officer signed the trip ticket at 1630. At that time accused Davis appeared and requested Brantley to take him for another load. Neither of these colored soldiers was previously acquainted with the other. Brantley agreed. He said that Davis drove the truck the last part of the trip to the rice warehouse at Tacloban because Davis knew the way. There the truck was loaded with seventy bags of rice by Filipinos. Davis signed for the rice and drove the truck away. The two alternated driving, with Davis directing the route until they arrived at a barrio near Palo. They dismounted at a store or house near there and both of accused with the help of two Filipinos unloaded approximately sixty-four bags of rice, retaining six on the truck (Exs. 2 and 3, R. 8). When the rice was loaded at the government warehouse, the checker told Brantley to go to Dock 2, according to Davis' written statement introduced in evidence by the prosecution.

The Filipino (Ballon) who received the rice, paid Davis one thousand pesos in the presence of Brantley and agreed to pay him one thousand pesos additional the next day (R. 16). Morano, another Filipino, received part of the rice (R. 16). The soldiers left and during their return, still with the six bags of rice in the truck, they ran in the ditch and could not move the truck from there (Brantley driving). Brantley's written statement offered in evidence by the prosecution was that during the return trip he asked Davis how much money he had and then told Davis "you have fucked me up with this rice . . . ". Davis' written statement, offered in evidence, is to the effect that both he and Brantley were "in on the deal" and were to split the proceeds.

Ballon testifies inter alia that he sold the rice to other Filipinos at the time of its delivery and gave part of the proceeds to both of the accused. He says, "As soon as they receive the money, they went away," and "As soon as I collected the money from the Filipinos, then I paid to them; . . . " (R. 8), and: "Q You contracted to purchase 64 sacks of rice, is that correct? A They said it was 64. Q How many bags did they actually unload and deliver to you? A According to them, they unloaded 64, but I receive only 62" (R. 9). The money was actually handed to Davis.

Part of the rice was identified as government property by the markings on the bags (printed "one hundred pounds", with green dots), when it was retrieved the next day by the military police (R. 19-20). The purchasers also identified the restored bags as a portion of those they had bought 14 March 1945. The recovered rice was delivered to the quartermaster and accepted.

The truck was hauled from the ditch after Brantley had reported his accident about 2130, 14 March. The ditch was one and one-half to two miles from the company area.

The rice was valued at eight cents a pound. The truck was property of the United States, valued at over fifty dollars and was used in the motor pool.

Written statements of accused Brantley were introduced, admitting his presence on the trip and admitting having seen Davis and a Filipino counting money after the rice was unloaded, and in effect that he charged Davis afterward with involving him. He denied prior knowledge of Davis' intent to commit an offense. The court was not cautioned that Brantley's statement was not competent as to Davis.

Davis' written statement, in evidence, first denies guilt, though admitting the trip, and later admits guilt asserting Brantley's complicity.

Each of accused was identified as in the military service.

4. The evidence for the defense:

Each accused, after warning as to his rights, elected to remain silent. Brantley's company commander testified his military rating was very satisfactory on efficiency and very good on character.

5. The evidence supporting the findings and sentences is as follows:

Brantley was assigned a truck from his company motor pool on 14 March 1945 about 1400 with the mission of delivering officers' equipment to a place designated by an officer-passenger in the truck. He accomplished the mission and returned. Thereupon he met Davis (a new acquaintance) and at the latter's behest proceeded to a government rice warehouse where Davis procured seventy bags of government rice, which were solely for government use. The rice was loaded on the truck and both accused proceeded, alternating the driving and with Davis directing the route, to a house or store near a barrio named Palo. There both unloaded the rice in the presence of two Filipino civilians, one a fish peddler and the other a farmer-fisher. One of the civilians, Ballon, agreed to pay both the accused one thousand pesos down and an additional one thousand pesos the next day for the sixty-four bags of rice, which had been unloaded. The thousand pesos were paid to both of the accused, being handed to Davis. Six bags of rice were retained on the truck. While both of the accused were still there, Ballon resold part of the rice and a portion of the proceeds of the resale was used by Ballon to pay the thousand pesos to the accused (R. 8).

Both of the accused then drove away in the truck and ran into a ditch within one and one-half miles or so from the company area. Davis departed for his unit and Brantley reported the accident to the motor pool, securing assistance. When the truck was hauled out, the six bags of rice which accused had not sold had disappeared.

The next day the military police recovered seventeen bags from Ballon and returned them to the quartermaster.

On the way back from Palo, accused Brantley berated Davis for involving him in the matter of the rice. Davis, after warning, admits guilt in his statement, which was introduced by the prosecution. Brantley admits presence at the scene of the sale, participation in unloading and allowing Davis to drive the truck, but denies knowledge of the purpose of the trip until the time when the sale was consummated.

Ownership of the rice was established as in the United States Government and the value of that portion which was sold exceeded fifty dollars. Ownership of the truck by the United States Government was in evidence and its value fixed at over fifty dollars.

6. The evidence, taken as a whole, is sufficient to justify the court in its findings and sentences. Each of the necessary elements is proved. While the evidence as to guilty knowledge on the part of Brantley is largely circumstantial, yet it is strong and confirmed by his admission of guilty knowledge after the transaction and a failure to report the irregularities to the authorities. The circumstances shown are consistent with his guilt and inconsistent with his innocence (Dig. Op. JAG, 1912-40, sec. 395(9)). He may be presumed, as a government driver, to know that another colored soldier, unknown to him and without credentials, could not direct him and his truck to a government warehouse for government rice and then to a remote dwelling in a native barrio where civilian money was exchanged for the rice, unless a dishonest purpose attended the transaction. The resale in Brantley's presence to other Filipinos, by the civilian, the fact of a chance acquaintance directing him to the outlying civilian house, semi-clandestine passing of money to his companion, the departure of Davis after the accident, leaving the remaining rice undisposed of, all establish Brantley's guilty knowledge at the time of and following the transaction. There is no evidence that he reported it to authorities at any time before his arrest, although he had opportunity to do so. In considering the above facts as to Brantley, no weight is placed upon the written statement of Davis. This was properly introduced in evidence, but was not competent as to Brantley (MCM 1928, par. 114c, and Dig. Op. JAG, 1912-40, sec. 395(4)).

As to Davis, the corpus delicti is established to the same extent as it is with relation to Brantley. (Wharton's Criminal Evidence, Vol. II, pages 1071-73). In addition, Davis, by written admission, made after warning, convicts himself fully. In arriving at this decision, as to Davis, no weight is placed upon the facts set forth in the written statement of Brantley. It likewise was properly introduced in evidence but was incompetent as to Davis.

Both Davis and Brantley were liable as principals with respect to each offense (CM ETO 1453 (1944) 3 Bull. JAG 284).

Two questions are presented which require comment. Was admission of the foregoing statements such error as injuriously affects the substantial rights of either of the accused? Was the reading to the court under "data as to restraint" of the phrase "AWOL from Stockade" (R. 29) such error as injuriously affects the substantial rights of the accused Davis?

The answer to both questions must include a recognition that the matters mentioned were improper in the case. As to the improper admission of the respective statements, it cannot be held that the rights of either of the accused suffered substantial injury. While Davis' statement implicated Brantley and vice versa, the same facts were elsewhere properly and strongly shown by competent testimony and the matter improperly admitted was therefore purely a duplication. (Dig. Op. JAG, 1912-40, sec. 395(2); CM 210985, Bonner, Judd, Riley, 9 B.R. 383,394).

An examination of the full opinion referred to in the final paragraph of Section 395(4) of the Digest of Opinions of The Judge Advocate General, 1912-40, discloses that the confession of the one accused was the only evidence connecting the other with the offense (CM 202225, Leach, Staples, 6 B.R. 11).

As to the admission of improper evidence of AWOL as to Davis, it is held that, in view of the reduction of the sentence from ten to five years by the reviewing authority, the substantial rights of the accused Davis are not injuriously affected thereby.

All the legal elements of the offenses charged appear to have been proved properly without errors which injuriously affect the substantial rights of the accused. (MCM, 1928, par. 150i, p. 185).

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

(Absent) Judge Advocate
Colonel, JAGD

Allen R. Browne Judge Advocate
Lieutenant Colonel, JAGD

Hart Snyder Judge Advocate
Major, JAGD

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

6 November 1945

Board of Review
CM P-951

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 960, 28 September 1945.
Private ADAM LAWS (34562907),	)	Dishonorable discharge, total
Company E, 372nd Infantry.	)	forfeitures and confinement
	)	for life. United States
	)	Penitentiary, McNeil Island,
	)	Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Private Adam Laws, Company E 372d Infantry, did, at APO 960, on or about 2 July 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Lawrence McClain, a human being by shooting him with a rifle.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for the remainder of his natural life. The court considered one previous conviction by special court-martial. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

In the evening of 2 July 1945, the accused, a member of the military service, entered into a poker game already in progress in barracks building 79, at APO 960. The game was operated by a Private First Class Lawrence McClain who declared the winners, took "cuts" from the pots and otherwise functioned as a house man.

As the accused came to the table, one of the players observed that he was "walking as a drunk man would do" and smelled liquor on his breath (R. 34). Another noted the odor of alcohol, that accused seemed unable to handle the cards well, dropping them on the table when he shuffled them (R. 13) and that he made enormous bets (R. 14). He talked a little louder than the others (R. 26) and it appeared that he was under the influence of intoxicants (R. 13) or had been drinking (R. 25).

However, the attention of the witness, Stafford, had not been attracted to the accused until the latter had already joined the game (R. 13). Neither had the witness Roberts noticed the accused prior to the argument, the way he held or shuffled the cards, his breath (R. 25), or his eyes. His opinion that the accused had been drinking was based solely on the fact that he was talking louder than the others (R. 27). The defense witness, Barnes, who sat next to the accused in the game, did not notice the way he shuffled the cards (R. 56), nor did he smell his breath. The accused spoke coherently (R. 57) and there was no difficulty in understanding him (R. 58). He won a few pots (R. 14).

After participating in several hands over a period of 15 or 20 minutes, the accused demanded that the amount of his most recent wager, $5.00, be returned to him, claiming he had not made the bet. McClain had already named another player as the winner, but the latter, to avoid argument, paid to the accused the amount which he had demanded. The accused, still contending that they owed him $2.00 more, walked out of the barracks.

About five minutes later he was seen leaving a nearby barracks with an M1 rifle which had been cocked as he came down the stairs. He re-entered building 79 and called out to the poker players, "Who don't believe I shoot? Who don't believe I shoot?" (R. 8). The weapon was aimed in the direction of McClain who had jumped behind another man (R. 23). Placating answers were given as the players and onlookers dived under the beds, ran out the door, or jumped out the windows.

The accused fired three shots, then said, "Give me my money back." McClain, who had fallen near the doorway in his attempt to escape, replied, "Come and get your money" or "Please don't shoot. I'll give you my money." The accused answered, "I don't want the money. If you holler again I'll kill you" (R. 9, 18). The accused fired several more shots, then walked out of the barracks, leaving McClain lying on the floor, and backed towards the M.P. office covering building 79 with his rifle. He was taken into custody with the rifle in his hands, still warm, at which time he stated, "I'll kill that son-of-a-bitch" (R. 30).

McClain was found to have sustained a wound in the left abdominal area. He died at 2040 the same day, the cause of death being determined by autopsy as "severe shock resulting from a wound, gunshot, abdomen, severe, with intra-peritoneal hemorrhage" (R. 6; Ex. D).

4. The evidence for the defense:

The accused was sworn and testified in his own behalf. He had gone into town about 1330, 2 July 1945, where he started drinking intoxicants at "Mom's bar." He denied any recollection of events subsequent to returning to the bar from the cafe (R. 45) until about 0900 the next morning, at which time he found himself in confinement.

Witnesses on behalf of the defense testified as to his intoxication. The accused and his drinking companion had purchased about 13 drinks each. When accused first entered the barracks where the poker game was in progress he staggered, talked faster than usual and his eyes were red. He was drunk (R. 57, 58). When he first asked for a hand, one of the other players "told him, no, he was drunk" (R. 59) but he nevertheless joined the game. At 2030, as he was taken into the military police office after the shooting, he staggered, almost fell when he sat down, spoke incoherently, had a strong odor of alcohol about him and was intoxicated (R. 51, 53, 54). The next day he was still in a stuporous, "groggy" condition (R. 53, 55).

5. The evidence establishes that Private First Class Lawrence McClain, a human being, died 2 July 1945 at APO 960, as the result of a rifle shot wound inflicted by the accused on that date, and that the shooting was with malice aforethought.

6. The record contains no suggestion that the accused did not fire the shots, or that the death of the deceased was not the result of his act. The facts leave no basis for any contention that the death was inflicted in the heat of sudden passion, caused by adequate provocation. Malice was properly inferable from accused's acts in going to another barracks, obtaining and loading a rifle and returning therewith to the barracks wherein the poker game continued, as well as from his spoken words addressed to the deceased immediately prior to the killing (CM 232400 (1943), 2 Bull. JAG 187; CM 231988 (1943), 2 Bull. JAG 188). He could rightfully be held responsible for the natural result of his act (MCM, 1928, par. 126a).

The only defense presented was that the accused was so drunk as to be unable to entertain the specific intent which constitutes a necessary element of the offense. There was substantial proof that accused was so competent as to be able to walk about, speak coherently, play stud poker with some degree of initial success and effectively operate an M1 rifle. By its verdict of guilty, the court-martial determined the issue of malicious intent adversely to the accused. Its findings were approved by the reviewing authority. It is not the function of the Board of Review, in a case such as this, to weigh the evidence. If the findings are supported by substantial evidence they should be sustained (CM 274647 (1945), 4 Bull. JAG 279; CM 152797, cited in MCM, 1928, p. 216).

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

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

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Earl Snyder, Judge Advocate.
Major, J.A.G.D.

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

9 November 1945

Board of Review
CM P-976

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 565, 13 September 1945.
Second Lieutenant JEROME D.	)	Dismissal.
ENGEL (O-1113681), 350th	)	
Engineer General Service	)	
Regiment, APO 565.	)	

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

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

Specification: In that Second Lieutenant Jerome D. Engel, 350th Engineer General Service Regiment, was at APO 565, on or about 21 July 1945, drunk and disorderly in uniform in a public place, to wit 7th Fleet Officers' Club.

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

Specification: In that Second Lieutenant Jerome D. Engel, 350th Engineer General Service Regiment, was at APO 565, on or about 21 July 1945, drunk and disorderly in uniform in a public place, to wit 7th Fleet Officers' Club, under circumstances to bring discredit upon the military service.

The accused pleaded not guilty to, but was found guilty of, all charges and specifications and was sentenced to dismissal and a fine of $500.00. The court considered one previous conviction by general court-martial.

The reviewing authority approved the sentence but remitted the fine. The confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence for the prosecution:

At about 2000, 21 July 1945, the accused approached a naval lieutenant in the 7th Fleet Officers' Club, at APO 565, and asked him to get him a drink. His speech was not too coherent. The officer, not entirely understanding the request, asked the accused to repeat it, at the same time noting that the accused was not too steady on his feet and was staggering a bit. Upon the accused making his wants known, the officer referred him to the nearest bar and returned his attention to his companions with whom he had been conversing. The accused thereupon said in a voice loud enough to attract the lieutenant's attention, "You get me a drink or I will let this thing go." He had his fist clenched. The officer called the club manager, told him of the incident, and left the scene (R. 6). He had not observed that accused's clothing was disheveled, save that his shirt was wet with perspiration (R. 7).

The manager took the accused outside, told him to sit on a bench and stay there, and requested the shore patrol to watch him and see that he did not hurt himself. He did not know how much accused had drunk. He observed that he was "in a rather unsteady condition" but did not notice his clothing (R. 8).

The accused then accosted the enlisted guard at the door, saying, "If you don't watch yourself I will knock you on your ass" (R. 10). The guard walked off. The accused was wearing no headdress, his uniform was soiled, his speech incoherent, his breath smelled of alcohol and he was staggering (R. 10).

Shortly thereafter another shore patrolman, wearing an SP band, belt and white hat (R. 13), observed the accused leaning against the fence and proffered his assistance. The accused rejected the offer. Somewhat later the sailor again offered to help the accused. At the same time, the accused got into a parked navy jeep and started the motor. The guard, noting that the jeep had a chain and padlock on it, turned off the switch. The accused then made an attempt to strike the guard, who thereupon pulled him out of the jeep. The accused demanded that the guard show respect for him as an officer, and "made another pass" at him (R. 11). In the course of the incident, which lasted over a period of ten to fifteen minutes, the accused called the guard a "prick," a "son-of-a-bitch," the regular run of foul language a drunk would use, said, "You are an SP and I know what that stands for," and addressed the club manager, who was standing nearby, as a "four-eyed son-of-a-bitch." The accused's uniform was disheveled, dirty and unfastened (R. 12). He was completely out of hand and not able to take care of himself. He was intoxicated (R. 13). The scene was witnessed by the guard mentioned in the preceding paragraph (R. 10).

Later, in the shore patrol office, the accused was observed to be "very drunk" and continually used abusive language. He had no hat, his pants and shirt were dirty and his fly was partially open (R. 14). The military policeman who then came and took the accused to the guard operations room stated that he was unable to talk coherently, garbling his words. His hat was missing, his hair mussed up, his uniform was dirty and three buttons on his trouser fly were open. He was definitely under the influence of intoxicants (R. 15). His speech remained incoherent (R. 17), and he subsequently went to sleep in a chair (R. 16).

The 7th Fleet Officers' Club is open to the whole fleet and base officers. Army officers should come only as guests of naval officers (R. 7, 9). It is not a public club (R. 9).

4. The evidence for the defense:

It was stipulated that just previous to the incident the accused had been on duty 72 hours without rest (R. 6). In an unsworn statement, the accused said he had been employed over this period directing the loading of heavy engineering equipment in five LST's to make a convoy. The task being completed, two officers invited him to go to the navy officers' club. He took them there primarily because they had no transportation. The accused went in and had a few drinks. He was tired and out on his feet. His clothing may have been dirty because he had been working with heavy equipment. He had "almost blacked out" (R. 19, 20).

It was shown by medical testimony that a man who had been on duty, without rest, for 72 hours could show irritability, instability and "a general light headedness." His speech could be irregular and he could stutter if under tension for a period of time (R. 18). The same witness testified that a man could maintain a normal condition after going without sleep for 72 hours (R. 19).

5. The accused was drunk to the extent that his speech was incoherent and his gait staggering. While a guest at a naval officers' club, he threatened to strike an officer because the latter failed to get him a drink. After leaving the building at the manager's request, he abused a guard at the entrance, with obscene language and threats. He similarly reviled another shore patrolman, endeavored to hit him, attempted to drive away a locked navy jeep, and again "made a pass" at the guard when forcibly removed from the vehicle. He addressed a vulgar remark to the club manager. His clothing was dirty, his cap missing and his trousers partially unbuttoned. Without doubt he was both drunk and disorderly at the time and place alleged.

6. The question arises as to whether the facts warranted a finding of guilty under the 95th Article of War, as well as under the 96th, i.e., did they demonstrate "that moral unfitness in accused which is the essence of a violation of Article of War 95" (CM 228894 (1943), 16 B.R. 365, 2 Bull. JAG 64). An examination of the full opinion in the cited

case reveals no such verbal abuse of enlisted men endeavoring to perform their appointed functions, and no such demonstrations of attempted violence against an enlisted man as appear in the case now under consideration. Other cases, believed to be more factually similar to the present one, have held conduct similar to that in the instant case to constitute a violation of the 95th Article of War (CM 229228, Griffin, 17 B.R. 85, 2 Bull. JAG 63; CM 242082, Reid, 26 B.R. 391).

It was seriously contended by the defense that the 7th Fleet Officers' Club was not a public place. The argument was not well taken (CM 231232, Albee, 18 B.R. 161, 163; CM 249525, Brooks, 32 B.R. 129, 133).

Dismissal is mandatory upon conviction under Article of War 95 and authorized by Article of War 96.

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

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

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Hart Snyder, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75.
10 November 1945.

To: Commander-in-Chief, United States Army Forces Pacific, APO 500.

1. In the case of Second Lieutenant Jerome D. Engel (1113681), 350th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally ssufficient to support the sentence, which holding is hereby approved. Under the provision of Article of War 50½. You now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of thispublished order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-976).

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

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(Sentence Ordered executed. GCMO 39, USAFP, 12 Nov 1945.)

ARMY SERVICE FORCES
In the Branch Office Of The Judge Advocate General
With the United States Army Forces
In the Pacific

19 December 1945

Board of Review
CM P-982

UNITED STATES v. Technician Fifth Grade JOSEPH K. BOWIE (33790993), Privates First Class WILLIAM B. GOLDEN (33790693) and CHARLES T. PEREZ (32983421), and Private LEROY JACKSON (33790983), all of 312th Port Company, Transportation Corps.	Trial by G.C.M., convened at Headquarters Western Pacific Base Command, Saipan, Marianas Islands, 9 October 1945. Sentence as to each: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two years. The Post Stockade, APO 957.

OPINION of the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

1. The record of trial in the case of the soldiers named above has been examined in the Branch Office of The Judge Advocate General and there found legally sufficient to support the findings and sentences as to accused Bowie and Perez, but legally insufficient to support the findings and sentence as to accused Golden. The record has now been examined by the Board of Review, and the Board submits this, its opinion, to the Assistant Judge Advocate General.

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

CHARGE: Violation of the 93rd Article of War.

Specification: In that Private First Class Charles T. Perez, 312th Port Company, Technician Fifth Grade Joseph K. Bowie, 312th Port Company, Private First Class William B. Golden, 312th Port Company, and Private Leroy Jackson, 312th Port Company, acting jointly and in pursuance of a common intent, did, at APO 244, on or about 8 August 1945, feloniously take, steal, and carry away a case of twenty-five (25) pistols, value about One Thousand dollars ($1,000.00) the property of the United States Government.

Each accused pleaded not guilty to, but was found guilty of, the specification and charge, and was sentenced to dishonorable discharge, total forfeitures, and confinement at hard labor for two years. The reviewing authority disapproved the findings and sentence as to accused Private Leroy Jackson, approved only so much of the findings as to the others as involves larceny of twenty-two pistols of a value of eight hundred and eighty dollars, approved the sentences but suspended the execution of the dishonorable discharge as to each accused, and designated the Post Stockade, APO 957, as their place of confinement. The sentence was promulgated by General Court-Martial Orders No. 38, Headquarters Western Pacific Base Command, 30 October 1945.

3. The evidence reveals that on 8 August 1945 at about 0300 or 0400 Marine Private First Class Roosevelt McCullough was hauling seven or eight boxes by truck from a pier at Saipan (R. 7). He signed the cargo slip and drove out to the gate, where the guard signed him out. When he had driven about fifty or one hundred feet (R. 18), he heard somebody on the truck "messing with the boxes," looked back and saw three soldiers on the truck and one on the running board, one of whom had "the box" (R. 7, 12). He asked the latter what he was doing with it and stopped the truck. The "man" threw the box off. "Some guys grabbed ahold" of the box and one was holding a small box which had been contained in the large one (R. 7, 17). McCullough retrieved and replaced the large container upon the truck and started off again. A man jumped aboard and McCullough ordered him off, but without result. McCullough stopped once more, informing him that if he did not get down he would knock him down. The man then complied (R. 7).

About that time, Marine Private First Class Joe Johnson, the driver following McCullough, drove up (R. 19, 23). The latter told him someone was trying to rob his truck. As he was pointing out the four men, three of them ran in one direction and one in another. Johnson gave chase, catching accused Perez crouched behind a drum (R. 8, 10, 14, 23, 25, 30), and returned him to the truck by force. He at first denied knowledge of the incident, stating he was hiding because he had left work early and did not want to be seen by his officers (R. 27). When something was observed to be missing from the box which had been opened, he said, "If you'll take me up to my camp, I'll get you what's in the box . . . " (R. 8, 15, 24, 27). This met with refusal. Johnson then inquired of Perez, "Where was the rest of them at? Where were the other guys?" Perez replied, "I ain't going to tell you. If you want them, you can take me up to my camp" (R. 24). Johnson took Perez by force to the military police and officer of the day, thence to the Port Command office, despite the latter's efforts to dissuade him en route (R. 24-25).

Accused Bowie was identified by Johnson by his face, clothes, and complexion (observed as he passed the lights of the truck) as being "involved that night" (R. 22, 26, 28).

The box which the four men had been handling (containing smaller

boxes inside) and which was taken off at the Provost Marshal's office (R. 9), was present in court but not introduced in evidence (R. 25). It was the only broken one on the truck (R. 15).

It was stipulated "that the case of pistols, apparently broken at the top, containing in the court room twenty-two pistols, and which have been previously referred to by other witnesses, are the same pistols removed from the truck by the military police after the alleged attempted larceny" (R. 57), that they were government property and valued at forty dollars each (R. 32).

Each of the accused made a signed pretrial confession. At the trial, however, after objection by the defense the written statements were not received in evidence, but the investigating officer related what each of the accused had told him.

In connection with his interrogation of Perez (then under guard) at about 0600, 8 August 1945, the Marine investigating officer attached to the Island Provost Marshal's office testified that he gave the customary warning under Article of War 24 followed by the suggestion that since Perez was apprehended practically in the act "probably it would be to his advantage to give a signed statement," that "if he gave a statement it would probably get a great deal of consideration in the event of a court-martial," and "that a confession might lessen the amount of punishment that he might receive." The investigator testified that he made no promises to Perez and stated that he told him that his function was solely to investigate, not to prosecute (R. 36, 38, 40). Accused thereupon related the following to this officer: It was planned that a soldier was to load a box of pistols from a pier to a truck. Another would board the vehicle and at a dark spot push the box off. Perez, waiting by the roadside, was to secure the box, load it on a detail truck and transport it to their camp. His intention was to steal a .45 caliber pistol. The driver discovered the man on his truck, stopped and retrieved the box which had been thrown off. Perez boarded the truck as it started again, but the driver once more stopped. At that time another truck drew alongside, and the first driver informed its occupants of the affair, asserting that the men were trying to rob his truck. A driver jumped out thereafter, caught Perez and returned him to the scene, notwithstanding the latter's efforts at dissuasion. Perez offered to secure what had been in the box, if he were taken to his camp, but instead he was delivered to the military police (R. 35, 36, 40).

Golden's interrogation occurred two days later according to the testimony (R. 42), although the date of his signed statement in the allied papers is 9 August 1945. He was warned that if he signed a statement it could be used against him and that he was not obligated to do so. At first he was reticent and denied knowledge of the affair. Then the investigating officer indicated that he had enough evidence to implicate him without a statement. He said, "as in the case of the other accused, " that if Golden made a statement "it would be taken more into consideration

in the result of a court-martial" (R. 43). A statement was finally procured. Coincidentally, Golden stated that his reason for thus breaking his silence was to prevent an innocent man (not one of the accused) from taking punishment for something for which Golden was responsible (R. 43, 49). He admitted in the statement the matters related by Perez (R. 42).

Jackson received a similar warning wherein he was told "it might be to his benefit" to make a statement, and his confession was to the same effect as that of Golden (R. 46-47).

Bowie was questioned on 10 August 1945. Among other things, the investigating officer told him that it was his opinion that a statement from him would probably "have a great deal of consideration as to the punishment imposed" (R. 52). Bowie thereupon gave virtually the same account of the events as did the other accused (R. 50, 51).

No evidence was offered by the defense.

4. Disregarding the confessions of Perez and Bowie for the moment, there still remains in the case compelling evidence convicting them. A man, assisted by three others, without authority or the driver's consent, clandestinely removed a box of pistols, owned by the Government, from a truck. Upon discovery and pursuit, one, Perez, was captured and another, Bowie, was later identified in court as being involved in the occurrence.

The intent permanently to deprive the Government of the pistols may be inferred from the secret abstraction of the box from the truck in the dark, while it was en route, coupled with the flight of those engaging in the enterprise (MCM, 1928, par. 149g; CM 192825 (1930), Dig. Op. JAG, 1912-40, sec. 451(40).

The defense raised the issue that the larceny was not completed and that the offense amounted only to an attempt, if anything, because of the lack of a showing of asportation. The evidence was that the box was removed from the truck by one of the accused and was in the possession of four men, two of whom were identified as Perez and Bowie. It is true that the box was immediately recaptured by the driver. Nevertheless, the taking was from the actual possession of the Government by a movement, "however slight, from the precise place where it was at the time it was seized" (MCM, 1928, par. 149g, p. 172). The thieves had the box completely in their possession, although momentarily only, and the larceny was completed.

Each of the accused confessed to the larceny in a pretrial statement to a Marine investigating officer. The statements were made following a warning to each of the accused which included a misstatement by the officer to the effect that in the event of a confession, a court-martial would impose a lighter sentence. He further declared that he was not the prosecutor and could make no promises.

In view of the peculiar conditions in which accused persons are often placed when making confessions, evidence of confessions is in general to be received with caution. No hard and fast rules for determining whether or not a confession was voluntary are prescribed. The matter depends largely on the special circumstances of each case (MCM, 1928, par. 114a). Where a confession is made to a military superior, "it should be subjected to close scrutiny and should not be admitted unless clearly shown to be voluntary . . . " (TM 27-255, par. 96a). The voluntary or involuntary character of a confession is a question of law to be determined from the facts in the particular case (CM 252086, Kissell, 33 B.R. 331, 342; 2 Wharton's Criminal Evidence, 11th ed., sec. 594; Rossi v. United States (C.C.A.), 278 F. 349, 353). The burden is upon the prosecution to establish its voluntary nature (CM 233543, McFarland, 20 B.R. 15, 22).

In this case, the investigating officer must have appeared to the several accused, because of his official position in charge of the investigation, to be correctly informed and to speak authoritatively as to the probable favorable action of a court-martial in the event statements were given. A soldier is justified in relying upon the belief that an officer of the armed forces will not misinform or deceive him to induce his confession to a criminal act. Resort to such an artifice is not looked upon with favor in military law and the several confessions cannot be considered voluntary.

The Board of Review stated in CM 230377, Wilson, (17 B.R. 361, 366, 2 Bull. JAG 96), "Any act or practice * * * such as the procuring of a confession by trick, promise or false statement, which would tend to destroy the confidence of the soldier in his superior officer, would be detrimental to the basic purpose which military justice is designed to serve." It held inadmissible the confession of a private made following the statement of his sergeant that "If you have taken money from anyone else you might as well admit it. The penalty won't be any more severe." (See also Bram v. U.S., 168 U.S. 532, 18 S. Ct. 183, 193-5, and Dig. Op. JAG 1912-40, sec. 395(10)).

The evidence reveals that the accused Golden when confessing stated that he was admitting his participation in the affair to prevent an innocent man from being punished for doing something for which he (Golden) was responsible. That statement was made after the accused had been improperly induced to make his confession and it cannot reasonably be said that without such inducement he would have evidenced such a high-minded purpose, nor that the hope of a lesser punishment did not persuade him to admit his responsibility.

It was held in CM ETO 1486 (1944), 3 Bull. JAG 227-8, that the taint or influence of a prior improper inducement may continue where an otherwise valid confession is made. The accused in that case confessed under threats. One week later, an investigating officer secured another confession after proper warning but did not advise the accused that the prior confession could not be used against him. Both were held to be involuntary, the latter because of the continuing inducement (See also CM 206090, Koehler, Skillin, 8 B.R. 249, 252, Dig. Op. JAG, 1912-40, sec. 395(10)).

Golden's inadmissible confession therefore stands in no different light than those of the other accused. Being inadmissible, an isolated portion taken therefrom, namely, his statement that he desired to save an innocent man from punishment for something for which he, Golden, was responsible, was likewise incompetent (CM 187610, Williams, 1 B.R. 67, 74, Dig. Op. JAG, 1912-40, sec. 395(3)).

Although the Board of Review may be convinced of an accused's guilt, it must look alone to the evidence as it appears in the record of trial and ascertain whether under the rules of law his confession can be sustained (CM 197408, McCrimon, 3 B.R. 111, 115; CM A-501 Lyons; CM A-1925 Knapp).

As there is no evidence other than his self-implication which connects accused Golden with the larceny, the record of trial is considered legally insufficient to support the findings and sentence with reference to him.

The elements of larceny were fully proved as to accused Perez and Bowie by proper substantial evidence in the case, and no error appears which injuriously affected the substantial rights of these accused (MCM, 1928, par. 149g, p. 173).

5. For the reasons stated above, the Board of Review is of the opinion that the record of trial is legally insufficient to support the findings and sentence as to accused, Private First Class William B. Golden, and legally sufficient to support the findings and sentences as approved as to accused, Private First Class Charles T. Perez and Technician Fifth Grade Joseph K. Bowie.

(Disqualified), Judge Advocate.

Allan R. Browne, Judge Advocate.

Hart Hagaley, Judge Advocate.

(Dissenting), Judge Advocate.

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

19 December 1945

Board of Review
CM P-982

UNITED STATES v. Technician Fifth Grade JOSEPH K. BOWIE (33790993), Privates First Class WILLIAM B. GOLDEN (33790693) and CHARLES T. PEREZ (32983421), and Private LEROY JACKSON (33790983), all of 312th Port Company, Transportation Corps.	Trial by G.C.M., convened at Headquarters Western Pacific Base Command, Saipan, Marianas Islands, 9 October 1945. Sentence as to each: Dishonorable discharge (suspended), total forfeitures and confinement at hard labor for two years. The Post Stockade, APO 957.

DISSENTING OPINION
KING, Judge Advocate.

1. I am unable to agree with the opinion of the majority of the Board of Review as to Technician Fifth Grade Joseph K. Bowie.

The majority opinion correctly holds that the confessions of the four accused were improperly admitted in evidence because not voluntarily made. In order to hold a record legally sufficient when evidence of this nature has been erroneously admitted, the Board of Review must find something more than substantial evidence other than the confession to support the findings and sentence. The proof which remains after the improper portion has been disregarded must be "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty" (CM ETO 3213 (1944), 3 Bull. JAG 417; CM 192609 (1930), 2 B.R. 1, 18; CM 237711 (1943), 24 B.R. 89, 99). The Board must thus weigh the remaining evidence to determine whether it is "compelling," rather than merely substantial.

The only witness who identified Bowie as one of the four soldiers involved in the larceny was Private First Class Johnson, who

noticed three men down "by the water" as he drove up in his truck (R. 23). The man whom Johnson identified as Bowie "was around there off the docks around the poles, bending down," when Johnson saw him (R. 30). Apparently the lights of the truck shone on him (R. 31) but nowhere in the record does it appear how closely Johnson approached. The three men apparently left shortly after Johnson arrived (R. 24). The time was about 0300, on the 8th of August, and although Johnson testified that it was between dark and light, "just coming early dawn" (R. 28), Private First Class McCullough said that when he first saw the four men on his truck, it was "kind of dark," he could not tell exactly whether they were white or colored and he could not see their faces, although he could tell they were soldiers and not marines by their clothing (R. 12). Of the four, he could only identify Perez, the one who was caught, and said that if Perez had gotten away, he would not have been able to identify him later even though Perez did run in front of the headlights (R. 10, 13, 14). He identified Perez, brought back after a chase by Johnson, as the one of the four who had run away, because of the clothes he was wearing and by his height (R. 15).

Johnson was asked a number of times whether he could identify any of the three men whom he had seen by the water with the accused:

> (Questions by prosecution)
>
> "Q: Do you know any of the accused?
>
> "A: Two of them.
>
> "Q: Can you give their names?
>
> "A: I don't know them by their names, Sir.
>
> "President: Will you point out the two men whom you do know?
>
> "A: I caught this fellow. I identify this fellow (Indicating Bowie)--this short fellow--by what he was wearing" (R. 22).
>
> ---
>
> (Question by prosecution)
>
> "Q: Can you identify any of the other men that were involved that night?
>
> "A: The only way I can identify the short fellow (indicating Bowie) was by what he was wearing. He was a light-complected, brown-skinned fellow. As I came around, the light flashed right on him, see. I know for sure this other fellow 'cause I caught him. I don't know how these other guys got here" (R. 26).

(Questions by defense)

"Q: You could identify Corporal Bowie here by his face, by his clothes and by his complexion?

"A: Yes, Sir.

"Q: Were there any other men there with the same complexion?

"A: Several of them" (R. 28).

(Questions by the president)

"Q: When did you see that other man you identified?

"A: Out of the three I could identify one by the way he was wearing his clothes.

"Q: When did you actually see him to make the identification?

"A: Sir, he was around there off the docks around the poles, bending down.

"Q: That's when you saw him well enough to identify him?

"A: Yes, Sir" (R. 30).

(Questions by defense)

"Q: Johnson, were you ever able to identify Corporal Bowie by his face?

"A: I just told you about the way I identified him.

"Q: I want to get that clear.

"A: I'm trying to tell you that now.

"Q: You can answer that question yes or no, can't you? Were you able to identify this man by his face?

"A: Right now?

"Q: At any time before today, could you identify him by his face? Could you say that is the same face you saw before?

"A: I'm quite sure I could, Sir.

"Q: Was it light enough for you to do that?

"A: I told you that my light was on him as he was going like that" (R. 31).

From the foregoing excerpts, it is clear that Johnson's testimony is self-contradictory. Although he says in one instance, "The only way I can identify the short fellow (indicating Bowie) was by what he was wearing" (R. 26), in another he is "quite sure" he can identify him by his face (R. 31). That in fact he may not have been too sure about Bowie may be inferred from his statement: "I know for sure this other fellow [Perez] 'cause I caught him" (R. 26). Further confusion arises when McCullough says that Perez was wearing a white "skivvy" shirt, whereas Johnson states that the one he identified as Bowie was wearing a "skivvy" shirt but that Perez was wearing "Full Army dungarees" (R. 14, 26).

Winthrop, under the heading, "Proof of the agency and identity of the accused," states:

> "This, as an independent fact, is especially material to be clearly shown where the offence was committed secretly or in the night time, or where the accused was a stranger to the witnesses, or was one of a number of persons associated together, or, (by reason of their similar dress or otherwise,) not readily distinguished from each other" (Winthrop, 1920 Reprint, p. 314).

It is a fair conclusion from the evidence that Johnson's identification of Bowie is not free from reasonable doubt. He saw the thieves only briefly, from what may have been a substantial distance, during the nighttime, and even with the aid of the truck's headlights, what principally impressed him as he saw the figure he identified as Bowie bending over near the water was the clothes he was wearing. A single white shirt might stand out under such circumstances, but it is doubtful whether a man's face would appear clearly enough to enable recognition at a later date by a man who had never seen him before. Taking all of Johnson's testimony as a whole and bearing in mind that it is the only evidence in the record, other than the inadmissible confession, to identify Bowie with the offense, it cannot be said that the proof is "of such quantity and quality as practically to compel in the minds of conscientious and reasonable men the finding of guilty."

2. For the foregoing reason, it is my opinion that the record is legally insufficient to support the findings and sentence as to Technician Fifth Grade Joseph K. Bowie.

Albert A. King, Judge Advocate.

Wrapper
1st Indorsement.

Army Service Forces, Branch Office of The Judge Advocate General, APO 75,
26 December 1945.

TO: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. The record of trial and accompanying papers in the case of Technician Fifth Grade Joseph K. Bowie, 33790993, Privates First Class William B. Golden, 33790693, and Charles T. Perez, 32983421, and Private Leroy Jackson, 33790983, all of 312th Port Company, Transportation Corps, together with the opinion thereon of the Board of Review in this office, are transmitted herewith pursuant to Article of War 50½, as amended, for your action.

2. The opinion of the Board of Review that the record is legally insufficient to support the findings of guilty or the sentence with reference to accused Private First Class William B. Golden is concurred in, and it is recommended that the appropriate vacation be accomplished and that all rights, privileges and property of which that accused may have been deprived by reason of such findings and sentence be restored. A suggested draft of action to this end is inclosed.

3. When the inclosed record of trial has served its purpose it is requested that the record, together with the original holding of the Board of Review, and this indorsement, and seven copies of the general court-martial orders promulgating the vacation of the findings and sentence, if such be your action, be transmitted to this office.

NATHAN J. ROBERTS,
Colonel, J.A.G.D.
Acting Assistant Judge Advocate General.

3 Incls:
Incl. 1 - Record of trial.
Incl. 2 - Opinion of Board of Review.
Incl. 3 - Draft of action.

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

15 November 1945

Board of Review
CM P-987

UNITED STATES v. Private LANGSTON T. STALLWORTH (34622551), 125th Port Company, Transportation Corps, APO 75.	Trial by G.C.M., convened at Headquarters Base X, AFWESPAC, APO 75, 21 September 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Langston T. Stallworth, 125th Port Company, did at APO 75, on or about 6 August 45, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Technician Fifth Grade Doss Manley, a human being, by stabbing him in the left side with a knife.

The accused pleaded not guilty to, but was found guilty of, the specification and charge and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The court considered one previous conviction by summary court-martial. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record to this office for action under Article of War 50½.

3. The evidence for the prosecution:

On the afternoon of 6 August 1945 Technician Fifth Grade Doss Manley (deceased) was seated on a cot in his tent playing checkers with another soldier (R. 7). A Filipino girl, talking Tagalog in a loud voice, approached and said something, pointing to Private Langston T. Stallworth (accused), who was then walking up to them (R. 11, 13, 14). The accused said, "some Filipino people make a fool out of us" (R. 14, 17) and reached for the girl (R. 14). Manley jumped up, stepped out of the tent, and addressed accused: "Why don't you go away and leave the girl alone" (R. 7, 10, 11, 14). "You know you wouldn't treat girls like that in the States" (R. 11). "She told you to let her alone awhile ago" (R. 14). An argument developed. Said Manley, "Some of you sons-of-bitches come here and just because these people have peculiar ways you want to mistreat the people" (R. 14). Accused protested that he did not want anyone to call him a "son-of-a-bitch." Manley replied that he had already done so. This exchange of remarks was repeated several times (R. 14-15, 18). At this juncture the pair were standing several feet apart, face to face (R. 8, 15). Accused, who was carrying a poncho in one hand, withdrew his free hand from beneath the poncho and drove it against Manley's body with a short, thrusting motion (R. 7, 8, 15). Manley felt his left chest and then, as the blood gushed out, exclaimed that he had been cut (R. 9, 15, 16).

Manley was unarmed (R. 8, 17) and made no threats or attempts to strike or fight with accused (R. 10, 12, 17, 19). He was not so tall as accused, but was slightly heavier (R. 12). Accused had been drinking at the time of the offense, but was not drunk (R. 19).

After striking Manley, accused ran to his orderly room where he announced that "he was getting tired of messing with him, that he was going to kill somebody" (R. 15-17). Manley in the meantime was assisted to the orderly room and from there was taken to the dispensary.

A medical officer testified that on 8 August 1945 he conducted an autopsy on Manley's body and found evidence of a stab wound piercing the upper left portion of the diaphragm and the upper end of the stomach, made by a "blade or sharp instrument." The stab wound was the cause of Manley's death (R. 20-21).

4. Accused elected to remain silent. The defense introduced no evidence (R. 23).

5. The undisputed evidence shows that deceased confronted accused and rebuked him for his conduct with a girl, calling him a "son-of-a bitch," that when deceased not only refused to retract the statement, but rather re-emphasized it, accused stabbed him, causing his death. The deceased made no threatening motions or statements. There is evidence that accused had been drinking but that he was not drunk.

Insulting and abusive words are not sufficient provocation to reduce the offense to manslaughter (MCM, 1928, par. 149a; CM POA 190

Cheatham, 23 Mar 45). Each essential element of the offense of murder is clearly established (MCM, 1928, par. 148a).

Malice and specific intent may properly be inferred from the act itself, the weapon apparently used, the severity of the wound and the absence of proof of any legal excuse, justification or provocation (MCM, 1928, par. 126a; Winthrop, 1920 Reprint, p. 688; CM NATO 1123 (1944) 3 Bull. JAG 11).

The specification alleges that the act was committed with a knife. The evidence shows only that the wound was inflicted with a blade or sharp instrument. The variance, if it be a variance, was not prejudicial (CM 144295 (1921), CM 155377 (1923), Dig. Op. JAG 1912-40, sec. 451(11)).

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

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

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Hart Snyder, Judge Advocate.
Major, J.A.G.D.

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

27 November 1945

Board of Review
CM P-1030

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at Headquarters Base X, AFWESPAC, APO 75, 12 September 1945. Dismissal.
	)	
First Lieutenant WALLACE W. GERWELL (0-1109950), Corps of Engineers, 2750th Engineer Light Equipment Company.	)	

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

2. The accused was arraigned upon the following charge and specifications:

CHARGE: Violation of the 96th Article of War.

Specification 1: In that First Lieutenant Wallace W. Gerwell, CE, 2750th Engineer Light Equipment Company, was aboard the USS Troop Transport General William Mitchell, on or about 3 July 1945, drunk and disorderly.

Specification 2: In that First Lieutenant Wallace W. Gerwell, CE, 2750th Engineer Light Equipment Company, did, aboard the USS Troop Transport General William Mitchell, on or about 3 July 1945, wrongfully strike Private First Class George W. Abrams on the face with his hand.

The accused pleaded not guilty to, but was found guilty of, the specifications and charge and was sentenced to dismissal. The reviewing authority, deeming the sentence too severe, returned the record for

reconsideration of the sentence, but the court, having reconvened, adhered to its original sentence. The reviewing authority then approved the sentence. The confirming authority confirmed it and forwarded the record of trial for action under Article of War 50½.

3. The evidence establishes that at about 1800 in the evening of 3 July 1945 Private First Class George W. Abrams was, with other soldiers, standing in a mess line aboard the USS Transport General William Mitchell. Accused approached and asked the soldiers their names, said that he was making them all non-commissioned officers and that he was in charge because he was a lieutenant. He asked Abrams what he was thinking about, and the latter replied, "I am still thinking about eating." Accused then said, "I am going to hit you in the face, the funny thing about it, you can't do anything about it because I am an officer," and attempted to hit Abrams in the face but the latter blocked the blow. The soldier "backed away" and accused followed and twice more struck at him, the last time hitting him in the face (R. 7, 8, 9, 10). Several soldiers who witnessed the incident testified that they were of the opinion that accused was drunk (R. 7, 8, 10). A marine guard was called and accused was placed in arrest. He was examined by a medical officer who determined that accused was suffering from "acute alcoholism," had him restrained in a strait jacket, removed to a locked cell for the protection of himself, the crew, and the passengers, and given a sedative. The accused was discharged from the sick bay on the morning of 5 July (R. 10; Ex. 1). He was examined by a neuropsychiatrist on 3 September and found to be sane and responsible for his actions (R. 11; Ex. 2).

The accused chose to be sworn as a witness and testified that on the afternoon of 3 July he "was feeling rather low, rather physically low," thought that he was getting seasick, and in company with other officers drank some Sardi's cognac. He did not remember anything that transpired thereafter until he awoke in the cell (R. 11, 12). It was stipulated that Captain James W. Copeland, if present, would testify that he had known accused for approximately two years and that in his opinion accused was an excellent officer of excellent character (R. 12).

4. The evidence is undisputed that accused was drunk and disorderly aboard the U. S. Army Transport General William Mitchell, in that, while in such condition, without excuse, he struck an enlisted man in the face. Such actions may properly be alleged as an offense under the 96th Article of War and upon conviction thereof a sentence to dismissal is permissible. It is noted that the disorder referred to generally in Specification 1 of the Charge comprised and included the striking of the enlisted man alleged in Specification 2. As both specifications were laid under the same article of war and the sentence imposed was permissible for either offense, no prejudice resulted to accused from the multiplicity of the pleading and findings (CM 233763, Lowther, 20 B.R. 111, 117).

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

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

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

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

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 29 November 1945.

TO: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of First Lieutenant Wallace W. Gerwell, O-1109950, Corps of Engineers, 2750th Engineer Light Equipment Company, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Before final action is taken in this case it is recommended that further consideration be given the question whether the offense committed, considered in conjunction with this officer's military record, necessarily requires that his sentence be ordered executed as distinct from being commuted or the execution of the sentence being suspended. The accused has had about 4 years of continuous military service, sixteen months of which occurred in Italy. He has been a commissioned officer since 3 February 1943." The following excerpt from a review of the case is pertinent:

> "The accused, 1st Lt. Wallace W. Gerwell, 2750th Engineer Light Equipment Company, while a passenger on the USS Troop Transport 'General Mitchell' (R 8, 9), approached a group of enlisted men waiting in the 'chow line' in the ship's corridor, in the late afternoon of 3 July 1945, asked the names and ranks of some of the men, and talked to them about leadership (R 7-10). He stated to Pfc George W. Abrams, who was wearing glasses and

standing in the chow line, 'I am making you non-coms and I will be in charge because I am a Lieutenant,' and inquired, 'Now that we are leaders, what are we going to do?', to which Abrams jokingly replied, 'Let's eat chow'. Accused then said 'I am a Lieutenant, I will tell you when to eat,' and asked Abrams what he was thinking; whereupon Abrams stated, 'I am still thinking about eating.' To this accused rejoined, 'I am going to hit you in the face. The funny thing about it you can't do anything about it because I am an officer,' (R 7). He then made two unsuccessful attempts to strike Abrams, who backed away, but on a third attempt struck him under the right eye (R 7, 8, 9), after which Abrams escaped into a nearby room (R 7, 9) and called the Marine guard, who placed accused in arrest (R 7) and forcibly restrained his attempts to escape."

Under all of the circumstances and pertinent considerations I concur in the view held by Lieutenant General Styer, the reviewing authority, that dismissal of this officer would constitute an unnecessarily severe punishment."

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-1030).

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

(Sentence ordered executed. GCMO 45, USAFP, 21 Dec 1945.)

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

21 November 1945

Board of Review
CM P-1032

UNITED STATES	
v.	Trial by G.C.M., convened at APO 70, 22 September 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.
Private JAMES O. HASSEL (34711963), 404th Port Company, Transportation Corps.	

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE and SNYDER
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private James O. Hassel, 404th Port Company, then Technician Fourth Grade James O. Hassel, 404th Port Company, did, at APO 70, on or about 2 September 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Technician Fourth Grade Charles K. Isbell, 205th Ordnance Company, a human being by shooting him in the head with a carbine.

Specification 2: In that Private James O. Hassel, 404th Port Company, then Technician Fourth Grade James O. Hassel, 404th Port Company, did, at APO 70, on or about 2 September 1945 with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one, Technician Fifth Grade Wilbert R. Bobst, 495th Engineer Heavy Shop Company, a human being by shooting him in the head with a carbine.

The accused pleaded not guilty to, but was found guilty of, both specifications and the charge and was sentenced to be hanged by the neck until dead. The reviewing authority approved the sentence. The confirming authority confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due and to become due and confinement at hard labor for life, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that at about 1130 or 1200, 2 September 1945, Private James O. Hassel, the accused, was sitting at a table in the Civilian Restaurant on Highway 3, north of San Fernando, La Union, when Technicians Fourth Grade Isbell and Molder and Technicians Fifth Grade Bobst and Green entered. Observing the accused, they "told him that the place was theirs and told him to get out" (R. 8, 18, 19, 21). One said something like, "Nigger, get out of here" (R. 11). The latter arose from the table and put his hands in his pocket, whereupon Molder drew a pistol and ordered him to take his hand out of his pocket. The accused was backed up against the wall and searched but no weapon was found. He requested and was granted permission to take with him his bottle of whiskey (R. 8, 11, 19, 21, 22). He claimed in a pretrial statement that as he left, one of the soldiers threw in his face his unfinished glass of whiskey (R. 34; Ex. A).

The accused went to his company area and obtained a carbine with the intent to "go back and settle the score with those white EM" (Ex. A). He had a clip of ammunition with him and carried the weapon under his raincoat. He returned to the vicinity of the restaurant, "looking for the white boys who had kicked me out of the cafe" (Ex. A). He asked the proprietor of the restaurant where they went but she did not know (R. 19, 20, Ex. A). The accused then walked toward the nearby Allied Cafe.

The evidence further discloses that after ejecting the accused from the Civilian Restaurant the four white soldiers departed, later regathering at Benny's Place where they talked and drank for a period variously estimated to have been from 45 minutes to an hour and 45 minutes (R. 8, 9, 25). Upon leaving Benny's Place they walked around town and back toward Highway No. 3, Isbell borrowing a pistol en route (R. 9, 12, 25). They "seemed to be hunting somebody" and Isbell inquired at one house "Is there any Nigger here?" (R. 12).

About two hours after leaving the Civilian Restaurant (R. 13), they approached the Allied Cafe. Isbell was in front with Molder to his left rear. Bobst and Green were behind Molder (R. 22, 28). They were in a group which extended over a distance of about twelve feet (R. 30). As they neared the cafe they were confronted by the accused. He aimed his carbine at them from a distance of fifteen or twenty feet, said "You mother fuckers, I got you where I want you" (R. 22), and ordered them to drop their guns (R. 10, 22). When they failed to comply and denied having any guns, the accused commenced firing (R. 10, 11, 22). He shot and felled Isbell (R. 10, 14, 26). The witness Green turned and ran (R. 10). The witness Molder "ducked" around the corner of the Civilian Restaurant but was hit four times, in the shoulder, leg and head. He heard seven shots (R. 23).

The accused, in a pretrial statement, gave the following version of the shooting:

> "The boys were about 30 feet from me and I hollered at them and said, 'I would like those guns that you

put on me.' One of them replied, 'I don't have a gun, Oh yes I do and your going to get it.' At the same time he said this, he pulled the gun out of his pocket. I then pulled my carbine up and aimed at his head and shot him. When I shot the first one, I saw one other boy with him (there were about six of them) pull a pistol out also and he aimed at me. I shot him without aiming and fired three or four more times into the group of them. Two of the boys fell and the others ran around the side of the building to the north. I rushed over to one of those who I had shot and took the .45 Pistol from him. I then ran to the corner of the building and saw one of the white EM going around the back of the building. I fired at him twice, I think, and he fell right there. I then ran to the back of the (Allied Cafe) building looking for the others as I wanted to get everyone of them. When I got back there though, they were gone so I looked around out there and not finding them I started back to camp. . . . I definitely was not drunk. . . . The reason I wanted to shoot all those white EM was that I was afraid if any of them got away they would try to get me" (Ex. A).

Autopsies were performed 2 September 1945 on the bodies of Wilbert R. Bobst and Charles K. Isbell. Each had been killed by a bullet through the head (R. 31, 32).

The accused elected to remain silent. By the stipulated testimony of his company commander he had been an ideal soldier. He had received no company punishment, was sober in his habits and was neither argumentative nor quarrelsome. He was awarded the Good Conduct Medal 1 May 1945 (R. 34, 35).

4. The record contains evidence to sustain the findings of the court in all particulars. That the accused shot and killed the deceased, Isbell, appears by direct testimony. While no witness testified that he saw accused shoot the deceased, Bobst, it was shown that he was one of the four soldiers who mistreated the accused in the Civilian Restaurant and whom the latter accosted in the vicinity of the Allied Cafe. The accused admitted that two men fell to the ground when first he fired. Isbell was shot down when the firing commenced, while Green succeeded in running away. Witness Molder was obviously the soldier whom the accused shot as he ran behind a building. The court could reasonably infer that Bobst must have been the other soldier who, by accused's admission, fell when the shooting began.

Murder is the unlawful killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse (MCM, 1928, par. 148a). The record contains no evidence that the killings were other than unlawful.

Malice was inferable from accused's acts in returning to his company area, obtaining a carbine and ammunition, seeking out the persons who had abused him at the Civilian Restaurant, and firing at them, as well as from his spoken words addressed to the group immediately prior to the killing (MCM, 1928, par. 148a; CM 232400, Thomas, 19 B.R. 67, 78, 2 Bull. JAG 187).

There is substantial evidence in the record to support the finding that the accused was guilty of murder rather than of voluntary manslaughter. "When sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists" (MCM, 1928, par. 149a; Collins v. United States, 150 U. S. 62). The period of an hour or two between the affair at the Civilian Restaurant and the shooting was such a cooling time (CM 246101, Nickles, 29 B.R. 381, 387, 3 Bull. JAG 343).

The witnesses to the shooting referred to the decedents by grades and surnames only. The medical officer who made the autopsies two hours later described them by their full names but omitted their grades. Such deficiencies are not fatal. "Where the surname of the person killed is established, his identity with the person named in the indictment may be shown by proof of his occupation" (41 C.J.S. 24). The decedents were referred to by accused as "EM" and were described in the specifications and testimony by grade, thus establishing them as members of the military establishment. That the decedents named in the charges were identical with those shown by the proof to have been killed, was thus proved. In any event it could not properly be said that the accused was misled or that his substantial rights were injuriously affected by the seeming failure of proof (CM 227747, Wescott, 15 B.R. 345, 349).

A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275 of the Criminal Code of the United States (18 U.S.C. 452, 454).

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

Marlan X Lobuts, Judge Advocate.
Colonel, J.A.G.D.

Allan R. Browne, Judge Advocate.
Lieutenant Colonel, J.A.G.D.

Hart Smyly, Judge Advocate.
Major, J.A.G.D.

1st Indorsement

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 23 November 1945.

To: Commander-in-Chief, United States Army Forces, Pacific, APO 500

1. In the case of Private James O. Hassel (34711963), 404th Port Company, Transportation Corps, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-1032).

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

(Sentence as commuted ordered executed). GCMO 42, USAFP, 26 NOv 1945.)

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

* P 1057 FLEWELLEN, RUFUS

5 December 1945

Board of Review
CM P-1057

UNITED STATES v. Private First Class RUFUS FLEWELLEN (38287946), 739th Medical Sanitary Company, APO 235.	Trial by G.C.M., convened at APO 72, 23 October 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for twenty-two years. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

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

CHARGE: Violation of the 93rd Article of War.

Specification 1: In that Private First Class Rufus Flewellen, 739th Medical Sanitary Company, APO 235, did at APO 235, on or about 23 December 1944, with intent to do him bodily harm, commit an assault upon Private Joseph M. Edwards, Battery "B", 145th Field Artillery Battalion, by shooting him in the side with a dangerous weapon, to wit, a carbine.

Specification 2: In that Private First Class Rufus Flewellen, 739th Medical Sanitary Company, APO 235, did at APO 235, on or about 23 December 1944, with intent to commit a felony, viz, murder, commit an assault upon Private Richard L. Walker, Battery, "B", 145th Field Artillery Battalion, by willfully and feloniously shooting the said Private Richard L. Walker in the stomach with a dangerous weapon, to wit: a carbine.

The accused pleaded not guilty to, but was found guilty of, the charge and specifications and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty-two years. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence in the case reveals the following:

About 1600 on 23 December 1944, the accused and two other colored soldiers were at a small wine shop in Abuyog, Leyte, P. I. (R. 6, 7). Private Joseph M. Edwards and Private Walker, white soldiers, both of the 145th Field Artillery Battalion, were also in the establishment (R. 7, 18, 19). All were drinking together and enjoying themselves. Edwards endeavored to be sociable, but had displeased the accused because of impersonation of one of the "Ink Spots." The accused had asked him to desist, but he (Edwards) declined. Walker commenced an Indian dance which further irritated the accused. He demanded "Stop that dance, man, and God damn it, I mean stop it" (R. 19, 20). During the course of the evening, he had kept his carbine in hand (R. 7, 20), and as he made the foregoing remark, he pointed it in the general direction of Walker who was unarmed (R. 12, 21). The accused then started to leave through the door, walking along the porch and reaching a window. Edwards asked him to remain and continue to drink with them. Accused rejoined, "Don't you fuck with me, you white mother fucker, or I will kill you" (R. 21). His carbine was pointed through the window at the time, at "chest height." Edwards, not armed (R. 10, 21, 22), attempted by argument to dissuade him from shooting. However, accused said, "Take one more step and you are dead, you mother fucker" (R. 22). Edwards announced that he was accepting the challenge, made no threats but took the step, and while between three and three and a half yards away was shot through the right hip by the accused (R. 22, 23, 24). The latter ran, went to his tent, laid his rifle on his bed, and attended a formation (R. 18; Ex. 3, R. 22).

Walker, who was standing in back of Edwards, at the same time that Edwards was hit (R. 8), was shot in the stomach and was observed by Edwards lying on the floor with blood on his shirt. There was evidence that all other occupants of the room except Walker and Edwards had departed just before the carbine was fired (R. 10, 11, 22, 23). Walker had been in good health until the moment of the shooting. No one had struck or assaulted him before that time (R. 27). Edwards was present at the trial, but Walker was not, it appearing in the allied papers that he had died.

The accused was very much under the influence of liquor and his actions were abnormal (R. 27).

He did not testify at the trial but in his pretrial statement said:

He went to a house to drink. While accused was thus engaged by himself, two white men came in and also started drinking. One came over to the accused and discussed the way colored soldiers were treated down south. Flewellen told him he did not want to hear about it. The other replied "You are trying to be a damn smart nigger. I'm going to get you when you leave here." After some argument about a girl, one of the white soldiers "talked about hitting me." The accused decided to leave but the man barred the door with his arm and told him to remain until the others left. After disputing further with regard to the girl, Flewellen got up, taking his carbine, and preparing to leave. One of the men stood up with a bottle in his hand and was "going to hit" him (accused). "Then about that time, both of them was coming at me." The accused fired his rifle from in front of the door on the porch and jumped over a rail. He fired three or more times into the air, went to his company, put his weapon on his bed, and "fell in" for a formation. He says that he left after firing the first shot because he did not wish to fight both men with his bare hands (Ex. 3).

In a second statement made twenty-five days later accused denied any recollection of the shooting, saying, "If they was shot with my rifle, I was drunk" (R. 18; Ex. 2).

4. There is direct evidence fully supporting the allegations of Specification 1 to the effect that on 23 December 1944, the accused committed an assault with a dangerous weapon, a carbine, upon Private Joseph M. Edwards, by shooting him, with the intention of doing him bodily harm.

As to Specification 2, there is sufficient circumstantial evidence to support the allegations that on the date charged, Flewellen willfully and feloniously shot Private Richard L. Walker in the stomach with a dangerous weapon, a carbine, with the intention of committing murder. The shot directed through a window at Edwards, struck him, passed through his right hip and immediately thereafter Walker, who had been standing in back of Edwards, was observed lying on the floor with his head to the wall and feet to the center of the room, shot in the stomach and with blood on his shirt. Before the shot was fired, Walker was in good health, no one had struck or assaulted him and, in fact, he had been doing an Indian dance. No one else was present in the room except Edwards, who was unarmed. The court could properly find that the shot fired by Flewellen passed through Edwards' hip and struck Walker.

Malice was shown by the threatening and pugnacious words and actions of the accused toward both Edwards and Walker. Accused's carbine was variously pointed at both Walker and Edwards. Malice may further be inferred from the act of accused in firing the shot without legal justification and the other circumstances mentioned above, inasmuch as they indicate a wicked, depraved and malignant spirit (Evans v. United States, 122 F. 2d 461, 466; CM P-945 Williams, 12 November 1945; CM P-947 Freeman, 8 November 1945). The accused is presumed to have intended the natural and probable consequences of his act and the court could infer therefore, as a presumption of fact, that the shot was intended to strike both Edwards and Walker (Allen v. United States, 164 U.S. 492, 17 S. Ct. 154; CM 248102, Roberts, 31 B.R. 121, 135, 3 Bull. JAG 286; CM ETO 7815 (1945), 4 Bull. JAG 179). Therefore, although as to the assault on Edwards the court was limited by the allegations to a finding of guilty of assault with intent to do bodily harm with a dangerous weapon, the proof was actually sufficient to have supported charges of assault with intent to murder both Walker and Edwards.

The evidence contains no reference to the first name and middle initial of the Private Richard L. Walker described in Specification 2. Such deficiency is not fatal. "Where the surname of the person killed is established, his identity with the person named in the indictment may be shown by proof of his occupation" (41 C.J.S. 24). Walker's occupation was proved by the witness Edwards' testimony describing him as "Private Walker, out of the same organization as myself . . . the 145th Field Artillery Battalion" (R. 19). In any event, it could not properly be said that the accused was misled or that his substantial rights were injuriously affected by such a seeming failure of proof (CM 227747, Wescott, 15 B.R. 345, 349).

The record contains ample evidence to support the court in determining adversely to the accused the issue of self-defense raised in his pretrial statement.

It is true that the accused was drinking. Nevertheless, he remembered and afterwards related in detail the events surrounding the assault. He was able to talk intelligently, move about, fire a gun with accuracy, jump over a rail and later join a formation. There was substantial evidence that the accused was not too drunk to entertain the specific intent to do murder when he pointed the carbine, and the surrounding actions showed such a malignant and purposeful design. The court and reviewing authority considered that the weight of evidence established his guilt (CM NATO 774 (1943), 2 Bull. JAG 427, 428).

The sentence of the court included twenty-two years' confinement. While five years' confinement is authorized for the offense described in Specification 1, and twenty years for that set forth in Specification 2, it appears that they were but parts of a single occurrence. Accordingly, the maximum authorized confinement for the offenses committed is twenty years (CM 231710, Bearden, et al, 18 B.R. 277, 284, 2 Bull. JAG 187; CM MTO 6166 (1945), 4 Bull. JAG 177). Confinement in a penitentiary is authorized by Article of War 42 for either offense, both of which are recognized as offenses of a civil nature and punishable by penitentiary confinement by section 276 of the Criminal Code of the United States (18 U.S.C. 455).

5. For the reasons stated above, the Board of Review holds the record of trial legally sufficient to support the findings of guilty and legally sufficient to support only so much of the sentence as provides for dishonorable discharge, total forfeitures and confinement at hard labor for twenty years.

(Disqualified), Judge Advocate.

Allan R. Browne, Judge Advocate.

Hal Snyder, Judge Advocate.

Albert O. King, Judge Advocate.

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

3 December 1945

Board of Review
CM P-1076

UNITED STATES v. Second Lieutenant STANLEY W. ZAMONSKY, JR. (0-818504), AC, 4th Reconnaissance Squadron, Long Range, Photo.	Trial by G.C.M., convened at APO 710, 11 October 1945. Dismissal.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Second Lieutenant Stanley W. Zamonsky, 4th Reconnaissance Squadron, Long Range, Photo, did, at APO 565, on or about 22 May 1945, unlawfully write and deposit in the Army Postal Service for mailing and delivery to Miss Martha Gillespie, in the United States, an obscene, lewd and lascivious letter containing two lewd and lascivious drawings and obscene, lewd and lascivious statements as follows:

> " * * All I'd have you wear on your body would be just the strings of your hair. I bet you'd look like a million Darling in the nude with just your hair falling over the front of your shoulders, down over your brests and down to your waist - from there on the hair below would cover the rest * * I haven't been too free with my pen today, but even so the generals been up there stiff as always and crying for his baby - together this morning we done a few sketches for you and her, just as a reminder that we are thinking of you -

hope you'll like them. Guess that 'long time no see' is what we'll be like after we pull the tease on each other - I bet he's got it in as far as he'd go * * I wouldn't be able to put it in cause the second I would touch you it would blow up. But on the two way strech seems to be more life to it, that is the way I want to spend the rest of my life inside of you Honey and everything you'd say was 'Fuck me Darling, Fuck me Hard'".

Specification 2: In that Second Lieutenant Stanley W. Zamonsky, 4th Reconnaissance Squadron, Long Range, Photo, did, at APO 565, on or about 21 May 1945, unlawfully write and deposit in the Army Postal Service for mailing and delivery to Miss Martha Gillespie, in the United States, an obscene, lewd and lascivious letter containing obscene, lewd and lascivious statements as follows:

"I bet it wouldn't be long before I felt a hand go up and down the side of my leg and the next thing I'd know the buttons would be undone and the general would pop out of breath and beating fast enough to beat the drum * * Darling I and he were happy too after all the days of hunger and sorrow and cried he did, for I hurried to the tent, all by my lonesome and as I read the latter part of your letter I just let him cry his poor head off and Honey it did feel ever so good to beat it again * * I can play with you and make love to you just as I wish * * I could feel myself eating you all up - I kiss you all over and suck you dry and weak. And I could feel you do the same to me - I can feel your warm lips kissing mine while you play with the general - then I could feel your kisses hotter and faster as you work down and you stop awhile and suck my nipples * * Than the general rest against your warm cheeck, ever so warm and soft, I can feel him as you pet and play with him so snug and it feels so heavenly and you kiss him, working him up and down all along until he too is sucked hi and dry * * Than we'd do it all over again only this time together, you eating me up and me eating you up, sucking harder and harder until there wouldn't be any of that precious stuff left in either of us. * * we wouldn't waste any of that good stuff - we'll both want to feel it shoot off inside us and feel us throub as we blasted. I * * can feel your snapper, ever so warm and inviting as it seemed to curle around him and swallow him up until the nuts rest on your lips in a kiss of burning passion and desire and with each push and pull the nuts could hear the lips keep repeating: 'Fuck me, fuck me, fuck me harder, harder, harder, fuck me faster, faster, faster, Oh, sweetnuts * * kiss me again and again, cause I can't hold on any farter, I've just got to come - Ohhhh: * * I know how over flowie she

must be at this minute and how she cries for him to slide in long and strong and hard, just so she could take him in and hold on tight and suck and pull harder and harder upon his big round head as he works his way round and round * * And he's dieing to come with both barrels wide open until it hurts with heavenlyness. * * I can feel her and he fuck to their hearts delight like they've never fucked before, each crying and begging the other to hold on longer - I can feel you suck me hard with devotion and passionate love, and get as much of me inside you - Oh Darling turn over on your side and spread your legs cause I too want to give you, I want to suck you dry for your pussy is the dish of my delight as much as my Dick is your prize banana. * * I just had to play with him until he came and Honey with you so much on my mind, it felt almost as good as if I came inside of you, both barrels and all."

Specification 3: In that Second Lieutenant Stanley W. Zamonsky, 4th Reconnaissance Squadron, Long Range, Photo, did, at APO 565, on or about 9 June 1945, unlawfully write and deposit in the Army Postal Service for mailing and delivery to Miss Martha Gillespie, in the United States, an obscene, lewd and lascivious letter containing obscene, lewd and lascivious statements as follows:

"* * We'd fuck until it did reach up to your navel, and some more to spare, I'd have him tickle your tonsils * * it seemed ever so good, having you take your panties off since you were crying so hard wish I was there to pick up the drips - can just see your legs spread ever so wide and your pussy beating to beat the drum as you play with it - what do you use, your right index finger or is that candle still holding out. I imagine that by now if you have, it used it up, it's most likely that it'll melt from your hot box * * guess what you need is just what I've got in hand * * its crying too for its baby and it feels so good as I play with him. * * to have your breasts and sucking hard until you could feel the suction way down below and it feels as if the heavens are falling about you and you cry for more for me to hold on tight to curl about each other and you pushing up against me breathing so hard and your pussy, * * as you spread your legs * * and try to shove all my hair, balls and everything else you could get of me inside you. Then faster and faster, each time driving my big dick down deeper and faster into your cunt, * * and all we could

hear is your lips, cuped so tightly around the head of my proud fighting cock, telling him to 'Come on Honey, faster, Oh, Darling fuck me hard, fuck me faster, I love it, I love - oh. Darling give it to me - I'm ready - Oh Darling I'm coming, Ohhh * * have you got a towel at hand * * I'd have you spread your legs and I'd help you clean yourself and you could do the same for me. * * to baby my soldier along, * * to cuddle him gentle between your brests * * he'd love to have you look after him * * and it feels ever so good when he knows that it's your fingers carressing him and that it's your brests that are so warm and soft * * I'd or we'd fuck so hard, we both would drop of a hundred pounds the first week * * give me as good a fucking as I possibly can from you by mail - do it to me Honey, I love it."

The accused pleaded guilty to, and was found guilty of, all specifications and the charge. He was sentenced to be dismissed the service, to pay to the United States a fine of five hundred dollars and to be confined at hard labor until such fine is paid. The reviewing authority approved the sentence, but limited the period of confinement to not to exceed six months. The confirming authority confirmed the sentence, as modified, but remitted the fine and confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence disclosed that accused wrote three letters dated respectively 23 May 1945, 27 May 1945 and 9 June 1945. Each letter was inclosed in an envelope addressed to a Miss Martha Gillespie at a point in the United States and was deposited by accused in the United States mails through the Army Postal Service at APO 565. The letters included the language set forth in the three specifications. With the letter of 23 May 1945 there were inclosed two sketches of a nude man and woman engaged in sexual practices (R. 9-13; Ex. 1, 1A, 1B, 1C, 1D; Ex. 2, 2A, 2B; Ex. 3, 3A, 3B).

The accused took the stand and testified that he and the addressee had experienced a brief intimacy, terminated by his transfer to another station. A mutual exchange of letters ensued, the contents of which included candid expressions on sex matters. Each secured sexual satisfaction from the other's letters, and accused considered that the matter was strictly personal and private. He did not know of any postal regulations against writing such letters (R. 15).

A psychiatrist testified that accused's sexual urge, emotions and reactions were of more than average intensity. He stated that the writing of letters such as those in evidence was a matter of sexual gratification to an individual of Lieutenant Zamonsky's type, similar to the satisfaction received by others from visits to houses of

prostitution or from other socially unacceptable conduct. It was his opinion that accused had no intent to demoralize anyone else, but was merely seeking sexual stimulation (R. 19-20).

4. Notwithstanding the plea of guilty, in accordance with proper practice the prosecution introduced evidence to make a prima facie case (CM 236359, Tindell, 22 B.R. 389, 2 Bull. JAG 270).

"Obscene" is defined as "offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be exposed" (Webster's New Int. Dict., 2d ed, unabridged) or, "Something which is offensive to chastity; something that is foul and filthy, and for that reason is offensive to a pure-minded person" (U.S. v. Clarke (D.C. E.D. Mo. E.D.), 38 F. 732, 733; Bouvier's Law Dict., Rawle's 3d rev., p. 2396). "Lewd" means lustful, and is synonymous with licentious, debauched, and pornographic. "Lascivious" has the same meaning as lewd (Webster, supra).

That the material authored by the accused was obscene, lewd and lascivious as alleged, cannot reasonably be disputed. The evidence was ample to sustain the finding that accused was guilty of conduct of a nature to bring discredit upon the military service, in violation of Article of War 96 (CM 253900, Kent, 35 B.R. 131, 134, 3 Bull. JAG 291; CM 259912, Porter, 39 B.R. 49, 55).

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

(Disqualified), Judge Advocate.

Allan R. Browne, Judge Advocate.

Hart Snyder, Judge Advocate.

Clement A. King, Judge Advocate.

1st Indorsement.

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 10 December 1945.

TO: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of Second Lieutenant Stanley W. Zamonsky, Jr., 0818504, AC, 4th Reconnaissance Squadron, Long Range, Photo, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-1076).

NATHAN J. ROBERTS,
Colonel, J.A.G.D.
Acting Assistant Judge Advocate General.

(Sentence ordered executed, GCMO 44, USAFP, 14Dec 1945.)

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

17 December 1945

Board of Review
CM P-1086

UNITED STATES	
v.	Trial by G.C.M., convened at APO 903, 24 and 25 October and 1 November 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for thirty-five years.
Private First Class GEORGE W. DALY (34265228), 344th Station Complement Squadron, APO 903.	

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class George W. Daly, 344th Station Complement Squadron, did, at Operations Building, Machinato Airdrome, APO 903, on or about 20 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class William M. Skwarek, 344th Station Complement Squadron, a human being by shooting him in the head with a sub-machine gun calibre 45 M3.

The accused pleaded not guilty to, but was found guilty of, the charge and specification, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence but remitted so much thereof as provides for confinement at hard labor in excess of thirty-five years, and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on the evening of 19 September 1945 Privates First Class George W. Daly (accused), William M. Skwarek (deceased) and several other soldiers were in the Base Operations Building at Machinato Air Field, Okinawa, talking, playing poker, and drinking beer (R. 5, 11, 16). About 2200 they were invited by an officer to go to the officer's club for a drink (R. 5). They each had something to drink there and then returned to the Operations Building. No one appeared to be under the influence of liquor (R. 15, 17). Skwarek suggested that they go back to the officer's club for "some turkey and biscuits" (R. 5). Daly at first demurred but joined the others and they rode there in the ambulance that Skwarek was driving that evening (R. 5). They got some food and again returned to the Operations Building, arriving about 2330 (R. 6, 23). Daly berated Skwarek for "overworking his welcome" (R. 23, 36), and during the exchange of words, in effect, challenged Skwarek, a much larger man than himself (R. 12, 29, 42), to fight (R. 6, 15). Daly jumped up, grabbed a metal folding chair (R. 6, 23) and swung it at the other's head. Skwarek seized the chair in midair and wrested it from the accused's hands (R. 6, 23, 36), hit him two or three times and knocked him to the floor. He "picked him [Daly] up by the scruff of the neck" (R. 6), asked him why he struck him with the chair and said, "I could kill you if I wanted to" (R. 42). Others intervened and told Skwarek to leave because "he didn't belong there" (R. 23). Skwarek released Daly and they separated, but in a few minutes the argument started again. Skwarek again hit the accused and said that their friendship was over (R. 6). After the other soldiers intervened, he again released Daly (R. 24, 50), who had sustained no noticeable injuries (R. 44). After the incident Daly appeared to be nervous. He asked one of the other soldiers for a cigarette, left the building and departed from the area in a jeep for the purpose of securing his gun (R. 6, 7, 57, 67). He lived in the squadron area about a mile and one-half away (R. 32). Skwarek left about four minutes later and entered the ambulance (R. 24, 55).

Some five or ten minutes thereafter a jeep drove up (R. 25, 32, 37, 53, 57). "Yelling" and two bursts of fire were heard (R. 7, 13, 51), and Daly was seen, an M3 submachine gun in his hands, about twenty feet from the ambulance in front of and walking toward it. He then was observed "running back and forth" (R. 26) about five feet from its left side (R. 7, 13, 18, 25, 38). He fired a burst under the vehicle, yelled hysterically for Skwarek "to come out" (R. 7, 8), cursed him and said, "You're not so tough now" (R. 8, 26).

Corporal Richard Leonard and Sergeant Arthur L. Dubowy, who had come out of the Operations Building upon hearing the shooting, tried to take the gun from Daly but without success (R. 8). They returned to the Operations Building and telephoned for the military police and a doctor (R. 8, 27). While they were phoning, Daly, carrying the gun, re-entered the building but immediately left (R. 8, 52). Leonard again went

out, asked accused for the weapon (R. 20), took it from him, opened the door of the ambulance and saw Skwarek lying across the seat. He was bleeding from the head (R. 10, 27, 40), "moaning and groaning" (R. 10, 27). Leonard said to Daly, "you shot him." The latter answered, "no, I didn't shoot him . . . I hit him," and later added, "I had to do it" (R. 9, 14, 28). The gun was handed to an officer (R. 10) and Skwarek was driven to the hospital where he died a few hours later as the result of a bullet having entered the left side of his forehead (R. 46). Upon post-mortem examination a .45 caliber bullet was found after the removal of the dome of the skull (R. 48). When the ambulance arrived at the hospital it was noticed that there was a hole in the windshield (R. 10, 60). Earlier in the evening, no such hole had been observed (R. 5, 59).

Later that morning, the ambulance in which the deceased had been sitting was examined. There were no holes in the cab other than the one through the windshield (R. 61). Splintered parts of a .45 caliber projectile were found (R. 60).

The accused chose to be sworn as a witness. At about 1745 that evening he complained to the first sergeant when Skwarek refused to go to work on time. Deceased called him a "squealer" and was "kind of mad" (R. 63, 64). Accused took three or more drinks of whiskey at the officer's club and approximately eight beers at the Operations Building (R. 66). Although he had been drinking, he knew what he was doing (R. 80). Skwarek and he argued several times "about me and my pride and being too good to drink with officers" (R. 65, 66). His version of the subsequent fight follows:

> "Skwarek was sitting on a bunk and I was sitting on one of those metal folding chairs and the argument got rougher and rougher and I don't remember what was said or anything, and he started up and I knew he was ready to fight and I hit him with the chair. He took the chair away from me and grabbed me around the neck and he knocked me down. Pfc Dashiell came over to break the fight up and he yelled to him or something. Well it appeared to me that the boys were afraid of him so he reached down on the floor and grabbed me up again and shook me really good . . . He said at first, 'what made you hit me with the chair, we have been together with each other for nineteen months. I could kill you and break your back,' and he shook me around and then let me go. I went on back to the telephone operator's desk and a couple of minutes later he came back and jumped on me again. I never even spoke a word. He grabbed me around the throat and hit me a couple of more times. I just laid there and was afraid to get up. Then they got him and took him around the front end of the building" (R. 66).

Intending "to throw a scare into" Skwarek, accused went to his quarters, secured his submachine gun, tested it by shooting a few rounds, and then

returned to the Operations Building. He walked to within twenty-five or thirty feet of the ambulance in which Skwarek was sitting and fired a burst over it (R. 67, 73).

> "I was trying to scare him. I was trying to make him beg like he had me . . . I advanced towards the ambulance and I got about three feet of the ambulance and I yelled to him to come out . . . I peeped in over and saw him on the seat of the ambulance . . . I went around to the other side. He didn't offer to come out and I opened the door then and I fired into the ground and yelled for him to come out again. He still didn't make any effort to come out. I thought he was playing possum, so I reached in and hit him with the gun barrel" (R. 67).

The accused stated that at no time did he intend to shoot Skwarek. "I could hit him if I shot at him," he testified, "I am an expert with a gun" (R. 70, 72). No other shots were heard in that area (R. 73).

Evidence presented by a ballistics expert indicated that empty cartridges found in the vicinity of the killing had been fired from Daly's submachine gun. However, neither the lethal bullet nor the bullet of which fragments were found in the ambulance were fired through the barrel with which the weapon was equipped at the time of the ballistics tests (R. 77; Ex. A; R. 96-97). During the intervening period the gun had passed through many hands, had twice been disassembled and cleaned, and the barrel could have been changed in the process (R. 83-94).

4. It was shown by undisputed evidence that deceased and the accused had quarreled several times during the evening. Accused struck at deceased with a chair and was twice beaten by him. He left the scene, drove a mile and a half to his squadron area, obtained a submachine gun, tested it and five or ten minutes later returned again to seek out the deceased. Knowing, as he must have, that his hand might be unsteadied by drink, accused fired from his hip toward the ambulance in which he knew deceased was sitting, in such a manner that a bullet pierced the windshield and lodged in deceased's brain. No semblance of justification or excuse was presented.

Such testimony fully sustains the findings of the court that accused, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation killed Private First Class William M. Skwarek by shooting him in the head with a .45 caliber submachine gun (MCM, 1928, par. 148a; CM 232400 (1943), 19 B.R. 67, 78, 2 Bull. JAG 187; CM P-1032 (1945)).

Malice was inferrable from the evidence. Every person is presumed to intend the natural and probable consequences of his act, and the use of a deadly weapon resulting in a homicide by one having no right

to use it at that time and place, and in the absence of any mitigating circumstances, is always regarded as evidence of the existence of malice aforethought (Allen v. United States, 164 U.S. 492, 17 S. Ct. 154; CM P-943; MCM, 1928, par. 112).

It will not suffice to say that accused intended only to frighten his victim for " . . . if an unlawful act, dangerous to, and indicating disregard of, human life, causes the death of another, the perpetrator is guilty of murder, although he did not intend to kill" (40 C.J.S., Homicide, sec. 20).

As stated in the Manual for Courts-Martial, 1928, paragraph 148a:

> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: . . . knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused."

The accused did not contend that he had acted under the influence of uncontrollable passion. His acts were deliberate, with the expressed intent so to frighten the deceased as to prevent further assaults upon accused. Apart from these facts, the court could properly have determined that a sufficient cooling period had elapsed between the fights in the operations room, and the time of the shooting (Collins v. United States, 150 U.S. 62, 14 S. Ct. 9; CM 251546 (1944), 33 B.R. 287, 293).

The court was not compelled to acquit the accused because of the evidence indicating that the bullet which killed deceased was not fired through the submachine gun barrel with which ballistic tests were made. Obviously, an exchange of barrels could have been made when the weapon was twice taken down and cleaned prior to making the tests. In any event, the court was not bound by the expert testimony, since opinion evidence is not conclusive, but must be considered with the other evidence adduced in the case (CM 199465 (1933), 4 B.R. 81, 141; CM 204790 (1936), 8 B.R. 57, 73, Dig. Op. JAG, 1912-40, sec. 395(36); CM NATO 2047 (1944), 3 Bull. JAG 228).

5. A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary

confinement by sections 275 and 330 of the Criminal Code of the United States (18 U.S.C. 454,567). Reduction of the sentence to a definite period of years was within the power of the reviewing authority (CM 241226 (1943), 2 Bull. JAG 379).

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

(Disqualified), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Snyder, Judge Advocate

Albert A. King, Judge Advocate

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

Board of Review
CM P-1104

31 December 1945.

UNITED STATES v. Privates First Class STANLEY O. CHURCH (12003077), OSCAR J. NELSON (37316742) and KENNETH V. SMITH (38300106), all of Headquarters Company, 2nd Battalion, 383rd Infantry.	Trial by G.C.M., convened at APO 96, 28 and 29 May 1945. Sentence as to accused Smith and Church: Dishonorable discharge, total forfeitures and confinement at hard labor for life. Sentence as to accused Nelson: Dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

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

(As to accused Church)

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Stanley O. Church, Headquarters Company 2nd Battalion, 383rd Infantry, did, at or near APO 96, c/o Postmaster, San Francisco, California, on or about 28 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Taminato Nae.

(As to accused Nelson)

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Oscar J. Nelson, Headquarters Company 2nd Battalion, 383rd Infantry, did,

at or near APO 96, c/o Postmaster, San Francisco, California, on or about 28 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Taminato Nae.

(As to accused Smith)

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Kenneth V. Smith, Headquarters Company 2nd Battalion, 383rd Infantry, did, at or near APO 96, c/o Postmaster, San Francisco, California, on or about 28 April 1945, forcibly and feloniously, against her will, have carnal knowledge of Taminato Nae.

The accused Smith and Church pleaded not guilty to, but were found guilty of, the charge and specification. The accused Nelson pleaded not guilty to the specification and charge. He was found guilty of the specification except the words, "forcibly and feloniously, against her will, have carnal knowledge of Taminato Nae," substituting therefor the words "willfully and feloniously commit an assault upon Taminato Nae, with intent to commit a felony, namely rape," of the excepted words not guilty; not guilty of a violation of the 92nd Article of War, but guilty of a violation of the 93rd Article of War. The accused Smith and Church were sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The accused Nelson was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The reviewing authority approved the sentence as to each accused, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence showed that the accused Church was driving a truck near Shimabuku, Okinawa, on the afternoon of 28 April 1945, accompanied by the accused Smith, when they encountered three Okinawan girls: Taminato Nae, 20; Medoruma Haruko, 13; and Medoruma Yashiko, 12 (R. 9-11, 40, 46). The soldiers told the girls to get into the truck and then drove them to a place called Ashi, near the beach. Church, the driver, took the two younger girls off some distance from the truck (R. 10, 11). Taminato Nae attempted to go with them but was held there by Smith, who seized her by the hands (R. 11, 12). She cried out in fear to the other girls and said to them, "Don't go, don't go" (R. 40, 41). Although she attempted to prevent it, Smith loosened her lower garments, allowing them to fall to her ankles. The girl meanwhile pleaded in her native language, "No, please send me back to Goya; please send me back to Goya" (R. 13, 28). Smith nevertheless knocked her to the ground and lay on her (R. 13, 14). She placed both hands

against his chest, pushed hard, tried to keep her legs together and said, "No, no" (R. 15). Nevertheless, he forced her to submit to sexual intercourse from which act she experienced pain (R. 13-16). As soon as he had finished he called Church (R. 17). The girl tried to put on her clothes but was prevented by Smith. Church seized her and "jumped on" her (R. 18, 19). She resisted him by pushing against him, "with hand signal . . . told him, 'please don't do that'" (R. 19), and when at one stage he forced her to hold his penis in her hand, she pushed it to one side, rather than inserting it as he directed. Nevertheless, he accomplished sexual intercourse with her, the occurrence again causing her pain (R. 20, 37, 38).

The soldiers then put the girls in the back of the truck, covering them with a tarpaulin, and drove to a house in a nearby village (R. 21). Smith seized Taminato Nae by the wrists and despite her objections pulled her into the house. She thought he was going to kill her (R. 22, 36). He forced her to sit down and removed her lower garments as she protested in Japanese, "No, no . . . . Please send me to Goya quickly" (R. 23). He again forced her to submit to intercourse, this time while she was on her hands and knees (R. 23, 32). When he was through, Nelson arrived. He "knocked" her to the floor and pulled off her underwear even though she was holding it and objecting "No, no" (R. 24). Whether he was able to accomplish penetration is not clear; she stated first that she was too tired at the time to know what was going on, but later in her testimony said positively that Nelson's penis penetrated into her vagina, once more hurting her (R. 26, 33). At this point the military police, summoned by the younger girls, who had succeeded in getting away, arrived and found Taminato Nae running from the house, naked from the waist down (R. 26, 45, 46). She was sobbing and crying and appeared hysterical (R. 46, 47).

Both Smith and Church were armed with submachine guns at the time of their arrest (R. 46) and at least one weapon was in evidence during the attacks in the house (R. 36).

Captain Saul Bernstein, Medical Corps, examined the girl that same day. She was extremely distressed and was being supported by the military police and the interpreter when she arrived for the examination. He found that the tissues at the entrance of the vagina were painfully swollen, that blood was oozing from it and that the hymen had been torn within a few hours before the examination by forceful entry into the vagina, a "recent hymenal defloration" (R. 48, 49). He concluded that the extent of the injuries made it doubtful that she had consented to the contact (R. 55).

Each of the accused testified under oath in his own behalf. Smith, after relating the circumstances of picking up the girls, said that he rode with them in the back of the truck while Church was driving. He put his arm around Taminato Nae without objection and, concluding that he could "make" her, had Church drive down to the beach.

While his companion went off with the smaller girls, Smith conveyed by motions that he wanted the girl to remove her clothes and to lie down. She did this willingly and he proceeded to have intercourse with her. She not only did not resist but acted as though she were enjoying herself (R. 64, 65), and "hugged like an average girl would do" (R. 66). He then called Church and when the latter had finished with the girl, all three of the Okinawans got willingly into the truck and the party drove to a nearby village. Smith then took Taminato Nae into a house and had intercourse with her "dog fashion." Again, she disrobed voluntarily and in assuming a position on her hands and knees in response to his signs "she acted like she knew all about it" (R. 66). When Smith had completed the act, he relinquished the girl to Nelson, went outside, and was walking about when he was arrested by the military police (R. 66, 67). He had no weapon with him during his adventures but Church had a submachine gun. He testified that he untruthfully told the military police that he was souvenir hunting in the village to avoid disclosure that civilians had ridden in the truck (R. 67, 68).

Church's testimony was in agreement with that of Smith. After the latter had finished his first act of intercourse with the girl, Church was called over and found her sitting naked on the ground. He had intercourse with her and was not resisted in any way (R. 73). Later, while Smith and the girl were in the house at the village, he found Nelson and "told him there was a whore in the village with Smith" (R. 74). Nelson went in to the girl and was later observed by Church lying by her side in a position in which it was not possible to have intercourse (R. 74, 75). Church concluded from his own relations with the girl that she was a prostitute because "she was acting disinterested and bored" (R. 75). He said that he had denied to the investigating officer that he had driven the truck, been to the beach or seen Nelson with the girl, and that he told him he had been hunting souvenirs (R. 76, 77).

Nelson testified that Church told him that Smith was with a prostitute and asked him if he "wanted to go down there" (R. 78) for the purpose of intercourse. He had been drinking (R. 78). He went to the girl and attempted intercourse but could not accomplish an erection. He held her hand over his penis but was not able to engage in sexual relations. She did not resist (R. 79-81). Church, recalled to the stand, stated that Nelson was drunk from wine and was staggering at the time (R. 85).

The accused declared that while they were required to carry weapons with them at all times in accordance with regimental orders, none were used to frighten the girl or to compel her to submit (R. 82-85).

The defense introduced Captain Robert A. Demo, Medical Corps, who testified that while he had not examined Taminato Nae, in his experience, a woman's genital organs could become tender through normal and willing intercourse, and that even if the hymen had been previously ruptured, such intercourse could cause blood to flow (R. 61, 62). The amount of tissue damage would not depend upon whether intercourse was voluntary (R. 63).

4. As to Smith and Church, there was no dispute that complete sexual penetration did in fact take place. The issue as to whether the act was voluntary on the victim's part was in sharp conflict. The court and reviewing authority chose to believe the prosecution's witnesses and their conclusion was supported by substantial evidence.

The alleged victim, Taminato Nae, was evidently a native Okinawan girl of no great intelligence, but her testimony displays a consistent story of unceasing resistance to the advances of the three soldiers. The resistance that she exhibited was as much as could be reasonably expected under the circumstances. Her assailants were armed. They were members of the army of a conqueror. She was a peasant farm girl with no effective help at hand and quite incapable of fighting off her attackers. The violence of war was still raging on the island and she was in fear of her life. Such a state of mind would account for the fact that one of the soldiers was able to complete intercourse while she was on her hands and knees.

The girl's story is corroborated by the medical officer, Captain Bernstein, who examined her, who testified that it was probable that she had been subject to unwilling penetration and that she had suffered recent defloration. The military policeman who first saw her after the last of the attacks, observed that she was crying and appeared hysterical. Captain Bernstein also found her to be in evident distress. One of the younger girls testified that Taminato Nae did not go willingly with Smith when the group got out of the truck, but attempted to stay with her younger companions, was forcibly detained and afterwards cried for help.

Additional evidence that accused Smith and Church possessed guilty minds is found in their attempt to cover up the nature of their acts by telling an investigating officer that they had been merely hunting souvenirs and by denying that they had carried the girls in their truck.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148b). Smith and Church both admitted the intercourse. Lack of consent is found in the girl's protests and repeated efforts to free herself from the advances of her attackers. That the carnal knowledge was effected by force appears from her testimony that she was knocked down, disrobed and subjected to sexual intercourse against her will and over her protests, and that accused were armed. Moreover, "the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b).

Accepting Taminato Nae's testimony as true, the court could properly find that Nelson committed an assault by knocking her to the

floor and forcibly removing her clothing. That he intended intercourse he himself has admitted. His actions are sufficient to support a conclusion that his intent was to accomplish his purpose whether the girl consented or not. No claim was made by the defense that Nelson was too drunk to harbor an intent.

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92; a sentence of twenty years confinement at hard labor is authorized for conviction of assault with intent to commit rape in violation of Article of War 93. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of rape and of assault with intent to commit rape, recognized as offenses of a civil nature and punishable by penitentiary confinement by sections 276, 278 and 330 of the Criminal Code of the United States (18 U.S.C. 455, 457, 567).

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

(Disqualified), Judge Advocate.

Allan R. Browne, Judge Advocate.

Hart Snyder, Judge Advocate.

Albert A. Ling, Judge Advocate.

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

21 December 1945

Board of Review
CM P-1135

UNITED STATES v. First Lieutenant THOMAS V. KELSHAW (0-1054282), CAC, Battery C, 950th Antiaircraft Artillery Battalion (Air Warning).	Trial by G.C.M., convened at APO 358, 31 October 1945. Dismissal and confinement at hard labor for two years.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

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

CHARGE: Violation of the 94th Article of War.

Specification: In that First Lieutenant THOMAS V KELSHAW, CAC, Battery C, 950th AAA Battalion (AW), did, at APO 75, on or about 6 October 1945, wrongfully and without proper authority dispose of by sale to First Lieutenant T C LAWRENCE, Headquarters, AFPAC, APO 500, one (1) ¼-ton 4 x 4 truck, of a value of over fifty dollars ($50.00), property of the United States, furnished and intended for the military service thereof.

The accused pleaded not guilty to, but was found guilty of, the charge and specification, and was sentenced to dismissal and confinement at hard labor for five years. The reviewing authority approved only so much of the sentence as provides for dismissal and confinement at hard labor for two years. The confirming authority confirmed the sentence, as modified, and forwarded the record of trial for action under Article of War 50½.

3. The evidence in the case discloses the following:

On 14 September 1945 First Lieutenant Thompson C. Lawrence was visiting a private home when the accused entered, was introduced, and engaged in small talk with the various parties there. He and Lieutenant Lawrence had not previously been acquainted. During the course of the conversation, the latter "got to bemoaning the fact" (R. 7) that he was without transportation. The accused then volunteered that he knew a man who "had furnished or would furnish jeeps to officers, would sell jeeps to officers for three to four hundred pesos" (R. 7). He added that in the previous week he had procured four jeeps for officers from this party. Lieutenant Lawrence evinced interest but objected that his remaining time was limited. To this the accused rejoined that he could always sell the jeep at a good price. He added that the "only danger was that the thing a person having such a jeep would have to watch was that the numbers - in case I got into trouble - that a person got in trouble with the MPs or got into an accident, that the numbers would not check because they had been changed" (R. 7). The lieutenant asked whether a cursory examination would reveal incorrect numbers, to which the accused replied that he knew the right numbers of the current series, used them and avoided trouble (R. 7). Lieutenant Lawrence inquired how he could contact the one who was selling jeeps. The accused replied that he was "protecting" the man (R. 10).

That night Lieutenant Lawrence considered the possibility of going through with the deal, but planned to report the accused. The next day, he procured the assistance of the Criminal Investigation Division and telephoned the accused with a member of that organization listening in. Lawrence inquired whether Lieutenant Kelshaw could still "fix me up with a jeep" (R. 7, 10, 11). The accused replied in the affirmative, but demurred that he would need a day or so to get in touch with a sergeant, later identified as employed on an ordnance assembly line for jeeps, who would make arrangements for securing one (R. 8, 9).

On 17 September, Lieutenant Lawrence again called the accused. The latter had previously suggested a call on that date. He stated that he had been unable to reach the "purveyor of jeeps" but would call back when the vehicle was ready. Later, the prospective purchaser called again. The accused related that he had been sick, had not yet been able to reach the individual mentioned, but would return the call when matters were arranged. He did so on 4 October, advising Lieutenant Lawrence that he had the jeep and that it could be picked up the next day, preferably in the afternoon so that there would be adequate time for the paint to dry.

On 5 October, Lieutenant Lawrence received a message and in company with a member of the CID, disguised as a mechanic, secured the vehicle. The painting of its numbers was smeared and fresh paint was sprayed all over the "windows" except where it had been cleaned by the

windshield wipers. The clerk at the point of delivery exhibited another jeep fixed in the same manner, furnished Lieutenant Lawrence with a trip ticket and he and his companion left in the truck (R. 8, 9).

The accused telephoned the Lieutenant on the 5th of October, and said he would be in and receive payment. It was arranged that Lieutenant Lawrence would pay him the next day. At the appointed time the lieutenant, accompanied by a member of the CID who posed as a prospective buyer, met the accused at the motor pool and said, "It is four hundred I owe you for the jeep, isn't it?", to which accused replied, "That is right." (R. 9). Lieutenant Lawrence inquired if his companion might secure a jeep. The accused replied that he had none at that time. He did not know when he would again see the sergeant from whom he got them, but he might have one around the first of the month (R. 15). He was paid four hundred pesos by the lieutenant and was thereafter arrested by the CID officer.

The latter then told the accused to return the money. He complied. The numbers were checked and found to be those of the currency paid by Lieutenant Lawrence (R. 9).

Throughout the transaction with the accused, Lieutenant Lawrence worked in collaboration with the Criminal Investigation Department, making suggestions to them. Lieutenant Lawrence testified that though he desired a jeep for recreational purposes, he did not decide to buy one for his own private purposes, but was going through with the deal in order to "close the case" (R. 11, 13).

It was stipulated that the jeep in the transaction was the property of the United States, furnished and intended for the military service thereof, valued at over fifty dollars (R. 16).

The accused, after being advised as to his rights, elected to remain silent. Testimony was offered on his behalf that he bore an excellent reputation for honesty and integrity (R. 21, 22).

4. There was sufficient substantial evidence to justify a finding of guilty. It was shown that the accused on the date charged, wrongfully and without proper authority disposed of a $\frac{1}{4}$ ton 4x4 truck, referred to in evidence as a "jeep," by sale to First Lieutenant T. C. Lawrence, and that the vehicle was property of the United States, furnished and intended for the military service thereof, valued at over fifty dollars (MCM, 1928, par. 150i).

The defense contended that the offense should have been charged under Article of War 96 instead of Article of War 94, citing CM P-710. In that case, the accused was charged under the 94th Article of War with wrongful disposition of "confiscated Japanese cloth, property of the United States." As the property was not furnished or intended for the

military service, the offense was held a violation of Article of War 96. Manifestly, the act involved in the present case was a violation of Article of War 94 (CM 249998 (1944), 32 B.R. 265, 273).

In support of a motion for findings of not guilty it was contended that accused was entrapped. The elements of this defense are that the intent to commit the crime must be implanted by the agent of the government. If the accused is engaged in an unlawful business and the government merely supplies an opportunity and facilities for commission of an offense connected therewith and even if it encourages the accused in his original idea, there is no entrapment (Zucker v. U.S., 288 F. 12 (C.C.A.) cert. den. 262 U.S. 756, 43 S. Ct. 703; CM 211557 (1939), 10 B.R. 71, 92-96; CM 239845 (1943), 25 B.R. 279, 286, 287, 3 Bull. JAG 55).

The idea of committing the offense originated with the accused. He suggested it and the fact that the prospective purchaser fell in with the proposal in order to secure the conviction of accused and with no idea of participating in the crime except as it might further that aim does not establish the defense of entrapment.

In support of its motion the defense further argued that the transaction "was not a sale of a jeep. Both parties knew they couldn't transfer any title or sell this vehicle. They both knew it was illegal. They both knew that the jeep would remain the property of the United States . . . . What it actually amounted to was an offer to permit him to use the jeep wrongfully" (R. 17).

To accept counsel's theory would, in effect, read out of the 94th Article of War the word "sell" and would eliminate all wrongful dispositions by sale. Such an interpretation is not required. Perhaps the most effective answer to the argument is found in accused's own version of the transaction, as recounted by the witness Lawrence:

> "Lt. Kelshaw then stated that he knew a man who . . . would sell jeeps to officers for three to four hundred pesos . . . Lt Kelshaw said that I could always sell it at a good price (R. 7) . . . When he told me that this individual had been selling jeeps to officers I asked how I could get in touch with him" (R. 10).

It is stated at 57 Corpus Juris, page 110:

> "In common parlance, the term /sell/ has been defined variously as meaning to assign; to barter; to close a bargain; to exchange; to have traffic; to make, to negotiate, or arrange for a sale; to offer to sell; to vend. It does not convey the idea that delivery has been made or title passed . . ."

In footnote 32 on that page it is stated:

"'The word "sell," in section 722 of the Penal Code of 1910 (which makes it a misdemeanor for one to sell or incumber personal property held by him under a conditional purchase and sale, . . . "when such selling or incumbering the property tends to the injury of the vendor") is to be construed in its broad sense, and therefore includes what is commonly known as barter and exchange.' McDuffie v. State, 19 Ga. A. 39, 40, 90 SE 740."

It is the opinion of the Board of Review that the word is used in its broad, popular sense regardless of any question of title. If the argument of the defense were sound, there could be no offense of wrongful selling or wrongful disposal by sale under Article of War 94. It has often been held that it is an offense unlawfully to sell military property belonging to the United States (CM 249998 (1944), 32 B.R. 265,273; Horowitz v. United States (C.C.A.), 262 F. 48, 50, cert. den. 252 U.S. 586, 40 S. Ct. 396).

Again it was urged by the defense that the admission of evidence of other offenses similar to the one charged was improper. With respect to the defense of entrapment, however, it is proper to show that the instance in question is not an isolated affair but that it is part of a course of conduct revealing intent on the part of the accused (MCM, 1928, par. 112b). In that connection, in fact, the volume of such business done is pertinent as going to the intent (CM 192973 (1930), Dig. Op. JAG, 1912-40, sec. 395(7); Simmons v. U.S., 300 F. 321 (C.C.A.)).

Accused was tried only four days after the charges were served upon him. No inquiry was made as to whether he had been afforded an opportunity adequately to prepare a defense. However, he made no request for a continuance and it appears that he had been apprised of the nature of the charges against him at the time of the investigation some twenty days before trial. No prejudice appears from this irregularity (CM 135290 (1919), Dig. Op. JAG, 1912-40, sec. 428(15); CM P-942 (1945)).

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

(Disqualified), Judge Advocate.

Allan R. Browne, Judge Advocate.

Hart Smith, Judge Advocate.

Albert A. Ling, Judge Advocate.

1st Indorsement.

Army Service Forces, Branch Office of The Judge Advocate General, APO 75.
26 December 1945.

TO: Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. In the case of First Lieutenant Thomas V. Kelshaw, O-1054282, CAC, Battery C, 950th Antiaircraft Artillery Battalion (Air Warning), attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. It is noted that the action failed to designate the place of accused's confinement. A Federal penitentiary may be designated as the place of confinement if you deem it appropriate.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-1135).

NATHAN J. ROBERTS,
Colonel, J.A.G.D.
Acting Assistant Judge Advocate General.

(Sentence ordered executed. GCMO 46, USAFP, 29 Dec 1945.)

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

Board of Review
CM P-1136

11 January 1946

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at Fort Shafter, Territory of Hawaii, 1, 2, 3 November 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. United States Penitentiary, McNeil Island, Washington.
Private GEORGE M. McCLUNG (18180591), 1934th Engineer Aviation Utilities Company, APO 951	)	

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private George M. McClung, then Sergeant, 1934th Engineer Aviation Utilities Company, did, on Kalanianaole Highway, County of Honolulu, Oahu, Territory of Hawaii, on or about 9 August 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one John Leonard Barnes, a human being, by cutting him with a knife and striking him with a hammer.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island,

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

3. The competent evidence disclosed by the record connects the accused with a series of events which began during the evening of 9 August 1945 when he entered The Bungalow, a restaurant in Kailua on the island of Oahu, Territory of Hawaii, between the hours of 1930 and 2030 (R. 12, 13, 24, 29, 88), and culminated with the discovery about 2200 of the lifeless body of a male civilian on a side road about 60 feet off the highway between Waimanalo and Bellows Field (R. 44-46).

While at The Bungalow accused became engaged in conversation with a civilian who was sitting at the same table. An argument arose between them and the civilian became noisy. Accused was asked to leave, which he did by way of the kitchen, and the civilian was ushered out the front door (R. 13, 14, 19). Between 15 and 30 minutes later accused returned, entered the kitchen, and picked up a boning knife (R. 30, 89). He appeared annoyed, but not excited or angry (R. 26, 28). He said that he wanted to keep a civilian quiet and "would do away with him" or "kill" him "if he didn't keep quiet" (R. 32). The proprietor's husband was able to take the knife peaceably from accused, who apologized and walked out (R. 15, 26, 31). The civilian who previously had been with accused in the restaurant was observed sitting behind the wheel of an army vehicle. He was boisterous and at first refused to move. However, he was finally "pushed over" by accused, who got in and drove off with him. (R. 15, 21-23, 89).

Between 2100 and 2130 that same evening, the accused entered The Snack Shack, another restaurant in Kailua, and attempted to purchase a knife (R. 33, 35), saying that he "wanted to get a knife to kill somebody with" (R. 37). Having been refused, he went back into the kitchen, picked one up from a drawer, wrapped it in paper and put it inside his shirt (R. 34, 35, 87; Ex. 17, p. 2). A knife which was found close to the scene of the killing was identified by a waitress in The Snack Shack as similar to a knife she saw him pick up in the kitchen (R. 34, 77; Ex. 2).

About 2145, Lieutenant Albert J. Cardoni noticed a body along the right side of the highway as he was driving towards Waimanalo. He did not stop but proceeded to Waimanalo to get a policeman. There he located a policeman and they drove back to the scene. When they arrived the body was gone but one was found about sixty feet from the highway along a side road (R. 44-47). Examination revealed multiple contusions and abrasions about the head, a crescent-shaped cut two inches above the ear, a stab wound of the left side of the neck and an extensive fracture of the skull (R. 9, 45). Apparently it had been dragged, with feet trailing, from the highway to its resting point along the side road (R. 76, 77). It was identified as that of John L. Barnes (R. 43; Ex. 1; 87, 88, 95; Ex. 18), the civilian who had been seen at The Bungalow with the accused and who

had driven away with him from the restaurant (R. 12, 13, 18, Ex. 1). A knife and a glassine paper bag spotted with human blood were found the next morning alongside the road (R. 76, 77; Ex. 3, R. 118). The bag "had the shape of a sort of V, which appeared to be the manner in which some object such as a knife blade would make if passed through the paper" (R. 77).

An autopsy revealed the cause of death to be a marked contusion of the brain, secondary to a comminuted fracture of the skull which probably was caused by a blow from a blunt object (R. 10, 11).

A truck had been dispatched to accused at 1730 that evening and returned by him to the motor pool about 2200. The dispatcher noticed what appeared to be blood on accused's hand and overheard him say, "I'll learn these civilians to fuck with me" (R. 50; Ex. 13, R. 92). About 15 or 20 minutes later, the dispatcher noticed him carrying a sledge hammer which earlier in the day had been seen lying in the truck (R. 51, 54, 57). Accused said "he was going to wash the sledge hammer and put it away with the heavy equipment" (R. 52). The following morning it was found near the welding shop from which it had been borrowed (R. 104, 105). It had been partly washed but still showed a strand of hair and some dried blood (R. 97, 101, 105, 119). There was blood on accused's trousers (R. 56, 93; Ex. 16, R. 120). Spots and traces of blood were later found upon his shoes (R. 115; Ex. 19, R. 119), and shirt (R. 115; Ex. 20, R. 119).

Within the next few hours following his return to the motor pool on the evening of the killing, accused told various persons that he was forced at the point of a knife to accompany two civilians, was stopped on the side road where the body was eventually found and was compelled to attack both of them in self-defense. The larger of the two eventually ran away, but the smaller was vanquished by him and probably killed (R. 51, 52, 56, 94, 112, 113). He had in his possession a wallet which he had removed from the body of the civilian and which contained papers and other items identifying its owner as John Leonard Barnes (R. 95, 100; Ex. 18).

On 15 August 1945 the accused, in the presence of his company commander, Captain Leslie G. Bucklew, and his older brother, a Seaman First Class, confessed to Captain Bruce T. Scoggins, provost marshal of Bellows Field. Accused was warned of his rights prior to making the statement which was freely and voluntarily given (R. 67, 68). Seaman McClung testified that he urged his brother to "tell the truth", that accused was warned that anything he said could be used against him and that the atmosphere during the questioning was one of "just trying to find out something" (R. 83, 84).

In his confession (Ex. 17) accused described the events of the evening of 9 August during which he encountered at The Bungalow a civilian whom he had never seen before and who turned out to be drunk,

quarrelsome and rowdy. They became involved in an argument and the civilian, turning belligerent, wanted to fight. They left The Bungalow and drove to The Snack Shack, where accused left his companion seated in the vehicle while he went inside, secured a knife, wrapped it in a napkin and hid it inside his shirt. The two then drove away, looking for a place to fight where they would not be disturbed. As they were driving, the civilian "appeared to be getting madder and madder and started cursing" accused (Ex. 17, p. 2).

"By this time we were on the road leading to Bellows Field. I saw a side road on the right and pulled into it whereupon Barnes remarked 'This is it. Is it?' I hesitated a moment and said, 'Are you sure you want to fight?' He said, 'Yes.' I got out and pulled off my hat, walked around to the back of the vehicle where he met me, striking at me. I struck back with my fist, hitting him. Both of us fell to the ground. I got up first, waited until he got up, and as he drew back to strike, I hit him again with my fist, knocking him to the ground. When he got up this time, he dived at me grabbing me around the waist. I tried to push him off, finally succeeding. I seemed to go crazy as a bat, and the next thing I knew, I had him down on the ground working on him with the knife that I had gotten earlier in the evening. I do not remember taking the knife out of my shirt. When I came to my senses, I jumped up and looked down seeing the knife in my hand. My right hand felt sticky with blood. I became frightened and seemed to go to pieces and then flew into a rage. I jumped up into the back of the vehicle and picked up something which later turned out to be a sledge hammer. I jumped out of the vehicle, the next thing I knew I had bumped myself on the side of the head with the hammer. I guess it was as I was bringing it up to strike him. This blow brought me to my senses and I fell back against the truck realizing that my heart was beating very fast. I stood there for what seemed like four or five minutes trying to get a hold of myself. I first figured I'd put Barnes in the vehicle and take him to Bellows Field and tell just what I had done. Then I decided I'd leave him where he was and see if he had any identification on him. I turned him over on his stomach, felt for his billfold and found it. I jumped into the vehicle driving to the motor pool at Bellows Field as fast as I could."

After being advised of his rights as a witness, accused elected to make an unsworn statement through his counsel in the course of which he stated:

"Counsel for defense have gone over my statement to Captain Scoggins with me quite thoroughly and have questioned me at length about each and every transaction. I have laid awake nights trying to piece together what happened that evening. I cannot add anything to the statement; in fact, some of the statement is hazy and confused to me at this time. I am not certain that everything set forth in the statement did occur. In some instances I pieced together information that I received from questioning prior to the making of the statement and

assumed that it must have happened, if they said so. The events of the Thursday night in question are almost a blank to me. I remember in flashes some of the things that happened in my dazed condition." (R. 126).

A test made at about 0100, 10 August 1945, disclosed that accused's blood contained about 0.1% milligrams of alcohol, which would be sufficient to make a normal individual, not a habitual alcoholic, mildly intoxicated (R. 128, 129, 131). Witnesses who observed accused during the evening testified variously that it was apparent he had been drinking but "he walked out all right" (R. 21); "I could see in his face that he had been drinking" (R. 26); he was "pretty drunk" (R. 32); he was too drunk to know what he was doing and "wasn't walking too straight" (R. 36); "I think he had a drink or two, but he wasn't drunk" (R. 52); "he wasn't drunk" (R. 57).

Three photographs of the body of deceased, taken immediately after the killing, were offered by the prosecution as evidence of the nature of the lethal wounds and of the position of the body in relation to its surroundings, and were admitted over the objection of the defense that they were inflammatory in nature and not necessary to the case (R. 40-42; Ex. 7, 8, 9).

4. The photographs were useful for the purpose for which they were introduced.

> "Admissibility of photographs does not depend upon whether the objects they portray could be described in words, but rather on whether it would be useful to enable the witness better to describe, and the jury better to understand, the testimony concerned. Where they are otherwise properly admitted, it is not a valid objection to the admissibility of photographs that they tend to prejudice the jury." (2 Wharton's Criminal Evidence, 11th edition, sec. 773, p. 1320).

The defense objected to the admission of accused's confession on the ground that it was made in response to an improper exercise by his commanding officer of the latter's peculiar position of influence in that it was said that it would be to accused's benefit if he should make a statement. The only evidence which could be argued as a promise of benefit is contained in the testimony of accused's brother, that Captain Bucklew told accused "that they was just up to find out and do him what good they could." Aside from the fact that something more than vague, casual statements are required before it will be found that a confession was improperly induced (MCM, 1928, par. 114a, p. 116), there is the positive testimony of Captain Scoggins that no promises of reward or immunity were made. The confession was voluntarily made and properly admitted in evidence.

The testimony on the point of accused's intoxication was conflicting. However, there was substantial evidence from which the court could find that he was not so intoxicated that his mind was deprived of reason (CM P-1146 (1945)).

Although accused and deceased had been quarreling with each other earlier in the evening, there is no evidence, other than accused's assertion, that deceased provoked the fatal blows. It appears that the two decided to settle their difference by a fight and that accused, unknown to deceased, secured a knife and concealed it on his person. A fight ensued in an isolated spot, in the course of which deceased was stabbed and his skull crushed with a sledge hammer. The evidence indicates that accused got the better of the fight, knocked deceased down with his fists, cut him with a knife and then inflicted the lethal injuries.

> "If a party, under color of fighting upon equal terms, . . . at the beginning of the contest . . . prepare a deadly weapon, so as to have the power of using it in some part of the contest, and use it accordingly in the course of the combat, and kill the other party with the weapon,--the killing in both these cases will be murder." (1 Wharton's Criminal Law, 12th ed., sec. 603, pp. 816, 817).

> "Where the mortal blow is deliberately given after the deceased is helpless, [the] offense is murder." (Ibid., sec. 604, p. 817).

There was abundant evidence from which the court could find that the provocation necessary to reduce murder to manslaughter did not exist in this case.

The malice which is an essential element of murder could properly be found from the evidence that accused threatened to kill deceased, concealed a knife on his person and inflicted blows, knowing that such blows would result in death or grievous bodily harm (MCM, 1928, par. 148a; CM P-947 (1945)).

It is thus clear that there was substantial evidence from which the court could properly find that accused, unlawfully and with malice aforethought, killed John Leonard Barnes, as charged.

5. A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 275 and 330 of the Criminal Code of the United States (18 U.S.C. 454,567).

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

(Disqualified), Judge Advocate.

Allan R. Browne, Judge Advocate.

Hart Smyly, Judge Advocate.

Albert A. King, Judge Advocate.

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

Board of Review
CM P-1145

9 January 1946

UNITED STATES v. Privates First Class ALBERT K. LEONG (30106815) and MANUEL SOUZA (20015102), both of 4098th Quartermaster Railhead Company, APO 901.	Trial by G.C.M., convened at Pusan Detachment, Army Service Command 24, APO 901, 9-11 November 1945. As to Private First Class Albert K. Leong: Dishonorable discharge, total forfeitures, confinement at hard labor for life. As to Private First Class Manuel Souza: Dishonorable discharge, total forfeitures, confinement at hard labor for twenty years. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

2. The accused were tried in a common trial upon the following charges and specifications:

(As to accused Leong)

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

Specification: In that Pfc. Albert K. Leong, 4098th Quartermaster Railhead Company, APO 901, did without proper leave, absent himself from his company at Pusan, Korea, from about 2300 hours 4 October 1945 to about 1830 hours 5 October 1945.

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

Specification: In that Pfc. Albert K. Leong, 4098th Quartermaster

Railhead Company, APO 901, having been duly placed in confinement in North Pusan Police Station on or about 5 October 1945 did at North Pusan Police Station on or about 5 October 1945 escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 92 Article of War.

Specification: In that Pfc. Albert K. Leong, 4098th Quartermaster Railhead Company, APO 901, did at Pusan, Korea on or about 4 October 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Park Pockay.

CHARGE IV: Violation of the 96 Article of War.

Specification: In that Pfc. Albert K. Leong, 4098th Quartermaster Railhead Company, APO 901, was at Pusan, Korea on or about 4 October 1945 drunk and disorderly in the presence of civilians at 84 Akasaki St.,Pusan, Korea

(As to accused Souza)

CHARGE I: Violation of the 92 Article of War.

Specification: In that Pfc. Manuel Souza, 4098th Quartermaster Railhead Company, APO 901, did at Pusan, Korea, on or about 4 October 1945, forcibly and feloniously, against her will, have carnal knowledge of Mrs. Park Pockay.

CHARGE II: Violation of the 69 Article of War.

Specification: In that Pfc. Manuel Souza, 4098th Quartermaster Railhead Company, APO 901, having been duly placed under arrest in Pusan, Korea, on or about 5 October 1945, did on or about 5 October 1945 break his said arrest before he was set at liberty by proper authority.

CHARGE III: Violation of the 61 Article of War.

Specification: In that Pfc. Manuel Souza, 4098th Quartermaster Railhead Company, APO 901, did without proper leave, absent himself from his company at Pusan, Korea, from about 2300 hours 4 October 1945 to about 0630 hours 5 October 1945.

CHARGE IV: Violation of the 96 Article of War.

Specification: In that Pfc. Manuel Souza, 4098th Quartermaster Railhead Company, APO 901, was at Pusan, Korea on or about 4 October 1945 drunk and disorderly in the presence of civilians at 84 Akasaki St., Pusan, Korea

Each accused pleaded not guilty to all charges and specifications, was found guilty as charged and sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentences but in the case of the accused Private First Class Manuel Souza reduced the period of confinement to twenty years, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial pursuant to Article of War 50½.

3. At the time of arraignment the defense moved to strike all charges save rape as prejudicial and unworthy of trial by a general court-martial (R. 5). The motion was denied (R. 6).

Park Pockay and her husband, Cheun Kil Kim, resided at 84 Akasaki Street, Pusan, Korea with their 23-year-old son, his wife, and three other sons, 15, 8, and 5 years old respectively (R. 16, 17, 63). At about 2330, 4 October 1945, the eldest son's cries of "Some robber come" awoke the household (R. 17, 49, 50). The intruder was the accused Leong, asleep in a bed and clad only in a sweat shirt (R. 18, 28, 45, 50).

Cheun Kil Kim and the eldest son, assisted by a relative, removed Leong from the room and tied him to a post (R. 18, 50, 56). Shortly thereafter five or six soldiers, led by the accused Souza, arrived at the scene and in compliance with their demands the Koreans untied Leong. When set free Leong struck Cheun Kil Kim about the head and face and in the stomach, knocked him down, kicked him and struck Park Pockay (R. 18, 19, 51, 98). Both of the accused and the other soldiers then left the house (R. 20, 52).

When Leong and Souza returned ten (R. 64) to thirty minutes later (R. 20), Cheun Kil Kim ran and hid about three meters from the house (R. 52). Only the mother, the eldest son and the five-year-old remained in the house (R. 21). The accused requested sake which the son served on instructions from his frightened mother, Park Pockay (R. 20, 30). After they drank the sake, the mother then gestured that accused should leave. Instead of complying, Leong took her by the hand, twisted her arm and pulled her into another room (R. 21, 22, 65). She testified through the interpreter, "He pushed and pulled so much I was upside down so he pulled me into the room" (R. 31). There he pushed her down and despite her struggles, removed her clothing, tearing it in the process (R. 22, 32, 33, 40-43). "He pushed up my hair or sometimes struck my head" (R. 24). He choked her when she cried out to her son, "This man killing me, I shall be die" (R. 23, 36, 69). She was compelled to assist in the disrobing when Leong twisted her hand and breast and threatened her with what she believed was a pistol (R. 31-33). Leong removed his clothes, lay on her and had intercourse with her (R. 23, 36, 38).

After Leong had finished and as Park Pockay was dressing, Souza entered the room. He pushed her down and removed her clothing. She tried to crawl away but was tired, had no power and was "like a dead man." Twice she called to her son, "At last tonight I must be die so please help me" (R. 24, 38). Souza had intercourse with her but did not strike her.

When released, she escaped to a relative's house. She returned when her son called, "Never mine, come home" (R. 24, 25, 39), because she thought "both of them had intercourse so perhaps they would not have intercourse again" (R. 25). Nevertheless, Leong again forced her into the room and removed her clothes. Although she cried out and struggled he had intercourse with her a second time. Souza then returned to the room and had connection with her per anum, although she struggled and tried to crawl away from him (R. 25, 26, 40).

Throughout these events the son heard his mother's cries for assistance but was prevented by the accused from going to her aid. He could only call to her, "Mother, don't worry, if you don't let them do as he says, you will be dangerous so don't worry" (R. 66, 70). Cheun Kil Kim from his hiding place also heard his wife's cries for help (R. 54, 59, 61). "I would like to help her but I was afraid because of the two soldiers and thought that I would be killed and I have three children that they would be sad if I was killed so I ran out and called for help" (R. 59). He went to a nearby house where he stayed while his neighbor went to the police station (R. 54).

Two American soldiers, detailed to assist the Korean police, arrived at the house at about 0215. Park Pockay was sitting or squatting on the floor near Leong (R. 73, 75-78). The soldiers took the accused into custody and started to leave the house. As they reached the door Souza ran. He was ordered to halt and shots were fired in the direction in which he departed but he did not stop (R. 74, 77). Leong was taken to the station, questioned, booked and confined in a cell. The following morning he was missing from the cell without authority. An iron bar had been removed from the window (R. 82, 83, 89, 91).

When the accused first came to the house they were "a little drunk" (R. 71). While there they drank "a lot of sake" and "got red in the face" (R. 71).

Both accused were absent when a check of their company area was made about 2000, 4 October 1945 (R. 12, 14). Extract copies of the morning report for 4 October 1945 showed the status of each as "Dy to AWOL 2300" (R. 15; Ex. P-4, P-5).

Each accused elected to make an unsworn statement (R. 94, 104). Leong stated that when he entered the house he was looking for a latrine. He had previously removed his pants in preparation for a bowel movement and either went to sleep or "passed out" in the house (R. 96). After having been freed by the other soldiers Leong went outside, found his trousers and returned for revenge, followed by Souza. The old man fled when Leong hit him, but the woman produced a bottle of sake (R. 98) and motioned to them to drink. Leong indicated that it was time for her to go to sleep (R. 99), and when she apparently failed to understand he pulled her into her room, put his hand on her shoulder and made her sit down. When

she struggled up he started to push her down again but she backed away, "The next thing I realized her dress came down" (R. 100). When she removed the rest of her garments, "I realized she was giving her consent to lay her . . . So I undressed and then she was still taking off her pants and I helped her take it off" (R. 100, 101). Sexual intercourse followed, characterized by the full cooperation of both parties.

When finished, Leong dressed and left the room. He was "really intoxicated . . . pretty well loaded" (R. 100). When the woman later came out Leong passed her a drink which she accepted. Although she shook her head when he offered her a 100 yen note, nevertheless he placed it in her hand "for the sake and for being nice to us after I had started that trouble" (R. 102).

At that point two soldiers appeared and said, "We're taking you down" (R. 102). Leong accompanied them to the police station where, after being struck and told he had raped a woman, he was placed in a cell. Fearing further mistreatment by the military police he went through a window and eventually returned to his organization.

The accused Souza's story substantially paralleled Leong's. When they returned to the house " . . . this young kid filled my cup up and we started drinking again . . . The faster I drank so fast did he pour it in . . . I started taking another shot and felt pretty bad to my stomach . . . I . . . vomited" (R. 107). Souza at first demurred when Leong suggested that he have intercourse with the woman but then "I thought I may as well . . . She smiled . . . she motions for me to close the door " (R. 108). Again it appeared that the woman actively participated in the enterprise (R. 108).

He stated that when the two other soldiers appeared they had guns on their shoulders, said they had come because they understood there was some trouble there (R. 108) and that the accused must go to the station. When momentarily left unguarded, Souza ran, believing that he should "try to keep from any MPs or from any trouble" (R. 109). He later returned to his company (R. 109).

4. While the prosecution, defense and both interpreters repeatedly violated the principles governing the use of interpreters (MCM, 1928, par. 47b), it does not appear that such irregularities adversely affected the accused's substantial rights.

The inclusion of three minor offenses with a charge of rape, was a gross violation of the rule that "Where charges are preferred for serious offenses, there should not be joined with them charges for minor derelictions unless the latter serve to explain the circumstances of the former" (MCM, 1928, par. 27). "The possible additional punishment for the minor offense is inconsequential, and the additional charge is a nuisance at the

trial and detracts from the important charge" (TM 27-255, par. 24c). Nevertheless, neither the court nor trial judge advocate could take corrective action in the absence of instructions from the convening authority and the defense's motion to strike was rightly denied. Such a motion is proper only if a specification states no offense whatever or because of some other substantial defect actually prevents the accused from making a proper plea or defense (MCM, 1928, par. 71c; CM 235407 (1943), 22 B.R. 1, 32).

The record contains substantial evidence in support of the court's findings as to each of these lesser delinquencies. However, the Board of Review will not here decide whether the offenses laid under the 69th Article of War should properly have been alleged as violations of the 96th. Both were trivial when compared with rape and the accused's substantial rights could in no event have been prejudiced.

Rape is defined as "the unlawful carnal knowledge of a woman by force and without her consent . . . Force and want of consent are indispensable in rape; but the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b).

That each of the accused engaged in sexual intercourse with Park Pockay at the time and place alleged was admitted, leaving consent as the only issue. The woman testified that she was forcibly taken to the room, pushed to the floor and disrobed by the accused Leong. She recounted in detail the means by which Leong accomplished his purpose and the efforts she made to prevent it. While she herself removed one garment, she did so only because of the pain sustained when he continued to twist her hand. Although Souza did not strike her, it appeared from her story of the night's events that he, too, accomplished sexual intercourse by force and without her consent.

The evidence disclosed acts of violence which could well explain the fear exhibited by the father and son and their consequent failure to render assistance. It was for the court and reviewing authority to weigh the evidence and determine which version of the night's events was the more credible (CM 152797, cited in MCM, 1928, p. 216; CM 274647 (1945), 4 Bull. JAG 279, 280). There was substantial evidence to sustain the findings of guilty of rape.

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457 and 567). Reduction of the sentence to a definite period of years was within the power of the reviewing authority (CM 241226 (1943), 26 B.R. 239, 242, 2 Bull. JAG 379), as to accused Souza.

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

(Disqualified), Judge Advocate.

Allan R. Browne, Judge Advocate.

Hart Seyler, Judge Advocate.

Albert A. King, Judge Advocate.

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

Board of Review
CM P-1164

5 January 1946

UNITED STATES	)	
	)	
v.	)	Trial by G.C.M., convened at
	)	APO 73, 5 and 6 November 1945.
Privates HARRY WILSON (33854116)	)	Sentences as to each: Dishonor-
and LEVI WILLIAMS (34750313),	)	able discharge, total forfeitures
both of Company B, 25th Signal	)	and confinement at hard labor for
Heavy Construction Battalion.	)	life. The United States Penitentiary,
	)	McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates.

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

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

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

Specification 1: In that, Private Harry Wilson and Private Levi Williams, both of Company B, 25th Signal Heavy Construction Battalion acting jointly, and in pursuance of a common intent, did, at San Luis, Batangas, Philippine Islands on or about 2300, 17 September 1945 forcibly and feloniously, against her will, have carnal knowledge of Victoria Hernandez.

Specification 2: In that Private Harry Wilson and Private Levi Williams, both of Company B, 25th Signal Heavy Construction Battalion acting jointly, and in pursuance of a common intent, did, at San Luis, Batangas, Philippine Islands on or about 0330, 18 September 1945 forcibly and feloniously, against her will, have carnal knowledge of Victoria Hernandez.

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

Specification: In that Private Harry Wilson and Private Levi Williams, both of Company B, 25th Signal Heavy Construction Battalion acting jointly, and in pursuance of a common intent, did, at San Luis, Batangas, Philippine Islands on or about 0400, 18 September 1945 with intent to do him bodily harm, commit an assault upon Francisco Piol, by striking him on the Head and Shoulders with a dangerous weapon, to wit; a Caliber 30 MI Carbine.

Each accused pleaded not guilty to all charges and specifications. The accused Wilson was found guilty of Specification 1 of Charge I and Charge I, but not guilty of Specification 2 of Charge I and not guilty of the Specification of Charge II and Charge II. The accused Williams was found guilty of Specification 1 of Charge I and Charge I, guilty of Specification 2 of Charge I except the words "Private Harry Wilson and," "both" and "acting jointly, and in pursuance of a common intent," of the excepted words not guilty; guilty of the Specification of Charge II except the words "Private Harry Wilson and," "both" and "acting jointly, and in pursuance of a common intent," of the excepted words not guilty, and guilty of Charge II. The court sentenced each accused to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. On the night of 17 September 1945 after an evening of drinking with companions in the village of San Luis, Batangas, Philippine Islands (R. 7, 9, 55, 65; Ex. B), the two accused, armed with carbines, entered the home of Victoria Hernandez where she, her family and a soldier named Wright were sleeping (R. 17, 20, 25, 28, 31). Williams seized her by the hair, forced her to get up, struck her, knocking her down when her compliance was slow, called her a "bitch", (R. 19), threatened to kill her and throw her baby out of the window and offered threats to others of the household. He carried a knife as well as the carbine. The husband was sick and Wright was frightened so that no effort was made to protect the woman (R. 19, 20, 22, 26, 29). After Williams had struck Mrs. Hernandez, Wilson said, "Levi, get the woman and let's go" (R. 19). Williams forced her out of the room with his hand around her neck, at the point of his carbine, to a bar she operated in a nearby building (R. 22, 26). There he pushed her down on a bench, covered her face with a sack and had sexual intercourse with her (R. 26, 27, 34, 38, 64; Ex. A). In the meanwhile, Wilson stood nearby with his weapon. When Williams had completed the act, Wilson likewise engaged in sexual intercourse with the woman. Williams then directed her to return home and as she, weeping, complied, fired a shot, the record being silent as to whether it was directed at her (R. 28, 29, 31, 37).

Later the same night, the two accused, still armed, again entered her room. There Williams "abused" her a second time (R. 29, 32).

At no time did she fight, resist or shout, testifying that she was too frightened and weak to do so (R. 27, 31, 33).

At about 0400 the same night, both of the accused went to the house of Francisco Piol in the village about one hundred yards from the Hernandez house (R. 45, 55). Williams, with carbine and flashlight in hand, entered the house and demanded to see Piol's daughter. When her presence was denied, he inspected those in the house with his flashlight and discovered her (R. 45, 49, 53). Her mother seized the end of the carbine and grappled with Williams. Piol joined the fray and all three fell to the floor where Williams fired five shots. During the fight, the latter struck Piol on the head with his carbine, broke free and left the scene (R. 45, 46, 47, 53).

Accused Williams, on 21 September 1945, stated in writing, after warning, that at some time after 0100, 18 September 1945, Wilson woke him and asked him to go with him. Wilson produced a carbine and ammunition for each. They proceeded to the house of Victoria Hernandez where Wilson entered, Williams remaining on the porch. The former touched the girl, she looked up, he pointed his carbine at her, ordered her to accompany him. While all then proceeded to "the bar", Wilson kept his carbine pointed at her. She did not resist, being "afraid of her life". At the bar, Wilson had intercourse with her, keeping his carbine within easy reach. He then asked Williams what he was going to do. The latter had intercourse with the girl while Wilson stood by with carbine pointed at her, causing her to be "very afraid for her life". She cried and Williams arose and allowed her to return home. The two soldiers started for camp, turned back, heard four or five shots, ran past a sugar cane field and there hid their carbines. Neither had fired a shot. They arrived in camp where Williams drank some whiskey, went to sleep and did not awake until morning. He was arrested, interrogated, first admitted nothing, then decided to tell the truth. The court was cautioned that the statement was pertinent only as to Williams (R. 63, 64; Ex. A).

On 23 September 1945, Wilson gave a statement, after warning, in which he admitted that he accompanied Williams, saw him strike the girl, and had intercourse with her on the bench near the bar. He stated she was Williams' girl, and that Williams gave his consent to the act (Ex. B). The effect of this statement was limited by the law member to the charge against Wilson (R. 66).

4. The confession of each of the accused was not admissible as to the other. However, in view of the caution by the law member, limiting the effect of each statement to the person who signed it, and the strong proof elsewhere in the case of the facts therein contained, the substantial rights of the accused were not injuriously affected by the admission of this evidence. (CM 177400 (1927) Dig. Op. JAG 1912-40, sec. 395 (2); CM 210985 (1939), 9 B. R. 383, 394; CM P-948 (1945); MCM, 1928, par. 114c; CM 239239 (1943), 25 B. R. 93, 114).

There was sufficient substantial evidence from which the court could find that Wilson was guilty of Specification 1 of Charge I (CM P-1104 (1945)). The surrounding circumstances in connection with the first act of intercourse with the victim, including, among other things, the uninvited entry in the dead of night into her home of two armed men, the pointing of the gun, the striking of the woman, her weeping, the threats and the use of vulgar epithets toward her by Williams, must have indicated to Wilson that her participation was the result of fear. Notwithstanding her failure actively to fight and struggle with her utmost strength, the evidence shows that she was at all times complying solely because of fear for her life (CM 227809 (1942), 1 Bull. JAG 363, 364).

As to Williams, the same proof applies. Charging the accused jointly is authorized in a rape case where, as here, both were principals in that they were present, aiding and abetting each other in commission of the crime (CM NATO 643 (1943), 3 Bull. JAG 61, 62). In addition, there is sufficient substantial evidence from which the court could find Williams guilty of Specification 2, Charge I and the Specification of Charge II (CM P-1104 (1945) supra; MCM, 1928, par. 148b). With reference to the latter specification, although Piol's wife seized the carbine and grappled with Williams before he struck her husband, yet Williams was the original aggressor in that he entered another's home unannounced in the early morning hours, armed, and demanded the production of the daughter of the house. The householders were justified in the assumption that his intentions were evil and in employing reasonable efforts to defeat them. Under such circumstances he may not assert a plea of self-defense (4 Am. Jur., Assault and Battery, sec. 45; CM ETO 1177 (1944), 4 (ETO) B.R. 59, 63; 3 Bull. JAG 147, 148).

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized under Article of War 42 for the offense of rape, recognized as one of a civil nature and punishable by penitentiary confinement by section 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457, 567).

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

(Disqualified), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Snyder, Judge Advocate

Albert A. King, Judge Advocate

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

1 February 1946

Board of Review
CM P-1192

UNITED STATES v. Private EDWARD E. MITCHELL, (39137361), Company M, 136th Infantry, and Private JOSEPH A. DAVIS, (34249402), Headquarters Company, 136th Infantry	Trial by G.C.M., convened at APO 33, 29 and 30 November 1945. As to accused Mitchell: Dishonorable discharge, total forfeitures and confinement at hard labor for seventeen years. As to accused Davis: Dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. As to both: The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

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

Specification 1: In that Private Edward E. Mitchell, Company "M", 136th Infantry, and Private Joseph A. Davis, Headquarters Company, 136th Infantry, acting jointly and in pursuance of a common intent, having received a lawful command from 1st Lt. Dale R. Quinn, 136th Infantry, their superior officer, to "put on your shoes and get out of the building at once" did, at Otsu, Honshu, Japan, on or about 1 November 1945, willfully disobey the same.

Specification 2: In that Private Edward E. Mitchell, Company "M", 136th Infantry, did, at Otsu, Honshu, Japan, on or about November 1 1945, wrongfully lift up a dangerous weapon, to wit--a cal. .45 automatic pistol, against 1st Lt. Dale R. Quinn, and 2nd Lt. Harold G. Ponder, his superior officers, who were then in the execution of their office.

Specification 3: In that Private Joseph A. Davis, Headquarters Company, 136th Infantry, did, at Otsu, Honshu, Japan, on or about November 1 1945, wrongfully lift up a dangerous weapon, to wit-- a cal. .45 automatic pistol, against 1st Lt. Dale R. Quinn, and 2nd Lt. Harold G. Ponder, his superior officers, who were then in the execution of their office.

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

Specification 1: In that Private Edward E. Mitchell, Company "M", 136th Infantry,and Private Joseph A. Davis, Headquarters Company, 136th Infantry, acting jointly and in pursuance of a common intent, did, at Otsu, Honshu, Japan, on or about 2 November 1945, with intent to do them bodily harm, commit an assault upon Sgt Charles Stroyny, and Private Louis Posner, by shooting at them with a dangerous weapon, to wit--a cal. .45 automatic pistol.

Specification 2: In that Private Edward E. Mitchell, Company "M", 136th Infantry, and Private Joseph A. Davis, Headquarters Company, 136th Infantry, acting jointly and in pursuance of a common intent, did, at Otsu, Honshu, Japan, on or about 2 November 1945, by force and violence, and by putting him in fear, feloniously take, steal, and carry away from the person of Pfc Joseph A. Parcell, Headquarters Company, Second Battalion, 136th Infantry, one cal. .45 automatic pistol, the property of said Pfc Joseph A. Parcell, value about thirty-five dollars ($35.00).

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

Specification: In that Private Edward E. Mitchell, Company "M", 136th Infantry and Private Joseph A. Davis, Headquarters Company, 136th Infantry, acting jointly and in pursuance of a common intent, did, at Otsu, Honshu, Japan, on or about 2 November 1945, commit an assault upon Private Hyrum Michelson, Company "L", 136th Infantry, by wrongfully placing the muzzle of a dangerous weapon, to wit--a cal. .45 automatic pistol against his body.

ADDITIONAL CHARGES

CHARGE: Violation of the 61st Article of War.

Specification 1: In that Private Joseph A. Davis, Headquarters Company, 136th Infantry, did, without proper leave, absent himself from his organization at Otsu, Honshu, Japan, from about 24 October 1945 to about 26 October 1945.

Specification 2: In that Private Joseph A. Davis, Headquarters Company, 136th Infantry, did, without proper leave, absent himself from his organization at Otsu, Honshu, Japan, from about 29 October 1945 to about 2 November 1945.

Specification 3: In that Private Edward E. Mitchell, Company "M", 136th Infantry, did, without proper leave, absent himself from his organization at Otsu, Honshu, Japan, from about 24 October 1945 to about 27 October 1945.

Specification 4: In that Private Edward E. Mitchell, Company "M", 136th Infantry, did, without proper leave, absent himself from his organization at Otsu, Honshu, Japan, from about 27 October 1945 to about 2 November 1945.

ADDITIONAL CHARGES

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

Specification 1: In that Private Edward E. Mitchell, Company "M", 136th Infantry, having been duly placed in confinement, in the 33d Division Stockade, on or about 8 November 1945, did, at Kobe, Honshu, Japan, on or about 13 November 1945, escape from said confinement, before he was set at liberty by proper authority.

Specification 2: In that Private Joseph A. Davis, Headquarters Company, 136th Infantry, having been duly placed in confinement, in the 33d Division Stockade, on or about 8 November 1945, did, at Kobe, Honshu, Japan, on or about 13 November 1945, escape from said confinement, before he was set at liberty by proper authority.

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

Specification: In that Private Edward E. Mitchell, Company "M", 136th Infantry, and Private Joseph A. Davis, Headquarters Company, 136th Infantry, acting jointly and in pursuance of a common intent, did, at Kobe, Honshu,

Japan, on or about 13 November 1945, by force and violence, and by putting them in fear, feloniously take, steal, and carry away from the presence of Private Alfred Adair, Jr., one field jacket, value about ten dollars and fifty cents ($10.50), and one carbine, value about thirty-one dollars and seventy-five cents ($31.75), both the property of the United States, and from the presence of Private James T. Allums, one wristwatch, value about ten dollars ($10.00), the property of said James T. Allums, and one carbine, value about thirty-one dollars and seventy-five cents ($31.75), the property of the United States, and from the presence of Private Merlin Pengelly, one carbine, value about thirty-one dollars and seventy-five cents ($31.75), the property of the United States, and from the person of Gerhard Kahner, a watch and a ring, each of some value, the property of said Gerhard Kahner.

The accused pleaded not guilty to all applicable charges and specifications, but during the course of the trial withdrew such pleas with respect to Charge III and its specification, and Charge I (Additional Charges, Article of War 69) and its specifications, and entered pleas of guilty thereto (R. 150-153). The court found each accused guilty of all applicable specifications and charges except that as to Specification 2 of Charge II it found both guilty except the words, "value about thirty-five dollars," substituting therefor the words, "of some value" --of the excepted words, not guilty, of the substituted words, guilty; as to Specification 4 of the Charge (Additional Charges, Article of War 61) it found accused Mitchell guilty except the words, "27 October 1945," substituting therefor the words, "29 October 1945"--of the excepted words, not guilty, of the substituted words, guilty; and as to the specification of Charge II (Additional Charges, Article of War 93) it found both guilty, except the words, "value about ten dollars," substituting therefor the words, "of some value"--of the excepted words, not guilty, and of the substituted words, guilty. Each accused was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. The court considered four previous convictions as to accused Mitchell, three by summary courts and one by special court-martial. As to him, the reviewing authority disapproved the finding of guilty of Specification 2 of Charge II and approved only so much of the finding of guilty of Specification 3 of the Charge (Additional Charges, Violation of the 61st Article of War) as included a finding that the accused absented himself without proper leave from his organization from 25 October 1945 to 27 October 1945. The reviewing authority approved the sentences but remitted three years of the confinement imposed upon accused Mitchell and designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as the Secretary of War may direct, as the place of confinement. Execution of

the sentences was withheld and the record of trial was forwarded for action pursuant to Article of War 50½.

3. The competent evidence of record discloses that during the evening of 1 November 1945, Lieutenant Harold G. Ponder, Provost Marshal of the 136th Regimental Combat Team Military Police, and Lieutenant Dale R. Quinn, Assistant Adjutant of the 136th Infantry, in response to a report of a disturbance, received at about 2230, entered a joro house (a house of assignation) in Otsu, Japan, accompanied by six military policemen, and found therein both of the accused and another soldier named Johnson (R. 8, 9, 32, 33, 162). Accused were at the time reportedly absent without leave from their organizations (R. 42). The officers were wearing their insignia of rank and were standing in a well-lighted entranceway (R. 11). Lieutenant Quinn told the soldiers: "Get on your shoes and get out of the building at once" (R. 10). Accused Davis replied "that no one was leaving the building and that if [they] took them out [they] would have to carry them out feet first" (R. 10). Accused Mitchell also stated that they would not leave. Lieutenant Quinn thereupon raised his pistol and at about the same instant Mitchell pulled a pistol from the front of his shirt and waved it back and forth in front of the two officers, stating that if they wanted to start something the soldiers were ready. To show that the weapon was loaded, Mitchell fired a shot through the ceiling (R. 10, 11). Lieutenant Quinn put his pistol away. Davis then threw several bottles of beer at the officers' feet and took the pistol from Mitchell, saying, "Lieutenant, I am ready to shoot. If some of your men start, we are ready for it" (R. 12). After trying for 25 or 30 minutes to persuade the men to leave, the officers retired from the building (R. 12).

At some time after daylight the next morning, 2 November 1945, Private Hyrum Michelson, a guard posted near the house to prevent accused and Johnson from escaping from the building, was covered by Mitchell and Davis with pistols, forced to drop his rifle, and, with a weapon thrust against his back, was made to walk a distance of several blocks. A nearby soldier, also guarding the house, was told by Mitchell not to move his gun or Michelson would be shot (R. 84, 85, 89-91).

About an hour and a half later, Sergeant Charles Stroyny and Private Louis Posner, two of the guards detailed to watch the house, saw Johnson, Davis and Mitchell some distance down the street coming toward them (R. 73, 74, 85, 86). Posner called to Johnson to give himself up. "They yelled back that they weren't going to give up and that they had a .45 out and they were coming up" (R. 86). Posner then fired into the air to attract other guards and at least two shots, apparently from a pistol, were discharged at Posner and Stroyny from the direction of the three men, although which of the three actually fired could not be determined. Sergeant Stroyny replied with bursts from his submachine gun (R. 74, 77, 86, 87).

Between 1030 and 1100, Private Joseph A. Parcell, armed with a pistol, met the three soldiers in the street. Johnson pointed a gun at him as they stood about him in a semi-circle and demanded that he surrender the weapon (R. 67, 68, 70, 73). Mitchell interposed, "Don't take it, he is a mail clerk and he needs it" (R. 71). Nevertheless, Johnson took it away, despite Parcell's objection, and handed it to Davis, who retained it (R. 71) and told Parcell "to take off" (R. 72).

The accused were captured at about 1100 in the courtyard of a temple after an exchange of shots in the course of which Johnson was mortally wounded (R. 15, 35, 36, 94). They were confined in the 33d Division stockade pursuant to the written order of the commanding officer of the 136th Infantry (R. 16, 150; Ex. 12) and were still confined on 13 November 1945 when a guard, Private R. Pengally, entered the inner, barbed-wire enclosure to count the prisoners, leaving his carbine on a desk just outside the door. Davis, who had been sitting just inside the door on a cot, picked up the weapon and ordered the remaining two guards, Privates Alfred Adair, Jr., and James T. Allums, into the enclosure. He called to Mitchell and another prisoner and the three, covering the guards with their own carbines (R. 120, 136, 141), took a field jacket issued to Adair which was hanging on the wall, a watch belonging to Allums which was lying on the desk, and a watch and ring which Davis took at gun's point from the person of Gerhard Kahner, a civilian prisoner. With these articles and the rifles in their possession, they left the stockade, locking the door behind them (R. 139, 142, 143, 146).

Both of the accused had been drinking beer throughout the afternoon and evening of 1 November (R. 22, 157, 165). Witnesses characterized their condition variously as: Slightly drunk but not too drunk to know what they were doing or talking about (R. 39, 45); "pretty well intoxicated" (R. 55); "happy" but not intoxicated (R. 59); intoxicated but not drunk (R. 60); "pretty drunk" (R. 61); and "not too drunk" (R. 166). There was testimony that their conversation was coherent, rational, clear, understandable and moderate in tone, and that they did not stagger or shuffle on their feet (R. 21, 28, 52, 63). There was also evidence that their voices were loud, their conversation profane, and their steps unsteady and staggering (R. 39, 40, 61).

Mitchell was absent without leave from his organization from 25 October to 27 October and from 29 October to 2 November 1945 (R. 99; Ex. 2-4, R. 101; Ex. 5). Davis was absent without leave from his organization from 24 October to 26 October and from 29 October to 2 November 1945 (R. 15, 16, 107; Ex. 6-8).

The accused made an unsworn statement through counsel to the effect that on the night of 1 November they had been drinking very heavily and that although they had recollections of lucid moments here and there throughout the evening they were unable to recall any definite sequence of events which would explain what had taken place (R. 170).

4. With respect to Specifications 1 and 2 of Charge II, the question arises whether each accused was responsible for the particular offenses therein alleged. The assault on Sergeant Stroyny and Private Posner occurred while they were attempting to take accused and Johnson into custody. Although it was shown that the shots were fired, it was not shown which of the three did the shooting. The robbery of Private Parcell was actively accomplished only by Johnson; Mitchell dissented verbally and was absolved by the reviewing authority of responsibility for that offense. The only evidence of Davis' participation is found in the fact that he stood by while the robbery took place, accepted the proceeds and then ordered the victim to "take off."

However, the acts of accused in resisting the authority of Lieutenants Quinn and Ponder and their common efforts to escape apprehension are sufficient evidence to justify a finding that they were acting jointly and in pursuance of a common intent throughout the subsequent events of the evening of 1 November and morning of 2 November.

> "In order to show a community of unlawful purpose it is not necessary to show an express agreement or an understanding between the parties; nor is it necessary that the conspiracy or common purpose shall be shown by positive evidence; its existence may be inferred from all the circumstances accompanying the doing of the act, and from conduct of defendant subsequent to the criminal act; in other words, preconcert or a community of purpose may be shown by circumstances as well as by direct evidence." (22 C.J.S. 156).

> "Where one's presence is by preconcert he may be guilty as an aider and abettor, although neither by word nor by act does he encourage or discourage the commission of the felony" (22 C.J.S. 161; see also CM ETO 1453 (1944), 4 B.R. (ETO) 337, 348, 3 Bull. JAG 284, 285).

If two persons jointly commit a crime, each of them is not only guilty of the principal offense, but is also guilty of any additional crime committed by the other in pursuance of the common purpose or which is committed as a natural or probable consequence of that purpose (22 C.J.S. 156).

> "There can be no doubt of the general rule of law, that a person engaged in the commission of an unlawful act is legally responsible for all the consequences which may naturally or necessarily flow from it, and that, if he combines and confederates with others to accomplish an illegal purpose, he is liable criminaliter for everything done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the

original design or common plan. * * * This rule of criminal responsibility for the acts of others is subject to the reasonable limitation that the particular act of one of a party, for which his associates and confederates are to be held liable, must be shown to have been done for the furtherance or in prosecution of the common object and design for which they combined together" (1 R.C.L. 133, as quoted in Breaz v. State (Ind.), 13 N.E. 2d 952, 953).

Since both of the accused and Johnson were engaged in the common unlawful act of resisting arrest, any offense committed by one of them in furtherance of their common purpose must be imputed to all. Accordingly it becomes immaterial which of the three fired at Stroyny and Posner or whether Davis actively participated in the robbery of Parcell. All were equally guilty of the assault and Davis was equally guilty with Johnson of the robbery. Both offenses were calculated to further their resistance.

There is therefore substantial, competent evidence of record that the accused committed the series of offenses of which they were found guilty, as approved by the reviewing authority.

The relatively minor charges of absence without leave should not have been joined with the serious offenses of robbery and defiance of superior authority (MCM, 1928, par. 27), but this was not a matter of which the accused could be heard to complain (CM P-1145 (1946)).

5. The sentences as approved are authorized upon conviction of a violation of Articles of War 61, 64, 69 and 93. Confinement in a penitentiary is authorized under Article of War 42 for the offense of robbery, recognized as one of a civil nature and punishable by penitentiary confinement by section 284 of the Criminal Code of the United States (18 U.S.C. 463).

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

(Absent), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Snyder, Judge Advocate

Clement A. King, Judge Advocate

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

15 January 1946

Board of Review
CM P-1208

UNITED STATES v. Private KIRBY WILLIS, (39433588), Company C, 808th Engineer Aviation Battalion.	Trial by G.C.M. convened at APO 404, 10 December 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for twenty years. United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Kirby Willis, Company C, 808 Engineer Aviation Battalion, did, at the Air Corps Cantonment Area, Haneda, Tokyo, Japan, on or about 8 November, 1945, forcibly and feloniously against her will, have carnal knowledge of Miss Kiyoko Suzuki, 774 Moto Haneda, No. 4 Chome, Kamata-Ko-Tokyo-To.

The accused pleaded not guilty to, but was found guilty of the specification and the charge and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence but remitted so much of the confinement as exceeded confinement at hard labor for twenty years, designated the United States Penitentiary, McNeil Island, Washington, or elsewhere as

the Secretary of War may direct, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence revealed that at about 0730 on 8 November 1945, Kiyoko Suzuki, a 17 year old Japanese girl, was walking to work from her home in Haneda (R. 6, 9). As she reached a school, the accused appeared, seized her hand and pulled her between some caterpillar tractors which were parked in a field a few feet apart and about 30 feet from the road (R. 6, 7, 15, 16, 19). She resisted but he pulled her to a place near a fire. The girl thought he intended that she warm her hands there and tried to sit down. He seized her hands again, placed a bench-like object between the machines and told her to sit down. She objected and attempted to leave, endeavoring to explain to him that she was on her way to the office. The accused appeared not to understand and motioned her to lie on the bench. She commenced to cry, tried to yell, screamed and fought back, but because of his superior strength was forced down on the bench. The accused thereupon started to remove her slacks. The girl endeavored to stand up but he pointed a gun at her. She said through the interpreter:

> "I won't want to die and so after he pointed the gun at me I had no other way of thinking and so I released my belt but I still had my hand on my belt, but he just took my hand away and he started to unloosen my belt." (R. 7)

She continued to scream, telling him "No! No!" in Japanese, but he removed her slacks nevertheless. Another attempt to arise was made but he pushed her back, got on top of her and although she continued her efforts to rise, trying to resist him, he pushed her shoulders down. The bench was small and her head hung over and kept hitting the ground. She attempted to slide her body from the bench but he pulled her back and caressed her. Her crying and screaming continued but he made no reply and had sexual intercourse with her, following which he arose and left. The total time during which the two were together was from 12 to 15 minutes.

The girl was ashamed of her condition and afraid passersby would see her. She located the slacks and donned the three pairs of nether garments which he had removed. A truck drove up at the conclusion of the incident, she "yelled twice" (R. 11) and ran to her home. There she reported the occurrence to her father and brother. Her slacks were dirty and muddy. She then went to the office and to the Japanese police station, reporting the incident but asking that mercy be shown the accused. The military police were called and she went with them first to the scene of the occurrence and then to the Haneda factory where she identified the accused (R. 7-9).

The following remark was made by the accused to the truck driver who appeared as the girl was running "very fast" down the road:

"I didn't make it, I just got it."

Accused was arrested and on 8 November 1945 admitted after warning that he had engaged in sexual intercourse with the girl, but stated that she had agreed to the act for a consideration of 50 yen. Payment was not made because someone appeared and she ran away (R. 17, 18).

At the trial the accused testified under oath that at about 0630 while he was posted as a guard a Japanese girl came by and when he motioned to her she came over. He indicated what he wanted and she voluntarily acquiesced. He denied that she screamed or that he pointed a weapon at her (R. 22). The act occurred near a fire and upon two cushions from the "cats". At the time, his gun was leaning against one of the machines (R. 23).

4. "Rape is the unlawful carnal knowledge of a woman by force and without her consent...the force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b; CM P-1104 (1945)). Accused admitted the sexual intercourse concerning which the girl testified. Lack of consent appears from her testimony that she resisted, screamed and struggled, and was violated solely because of the superior strength of the accused. Although there is evidence that at one time she released her belt, she said she did so only because of the threat of a pointed gun and to avoid death. Immediately upon completion of the act and departure of the accused, she dressed and ran screaming to her home, appearing in a muddy, disheveled condition, crying and excited, and immediately reporting the occurrence to her family. A prompt complaint was made to the authorities. These facts supply sufficient substantial evidence from which a court could properly find such lack of consent as to justify a finding of guilty of rape (CM P-1104 supra).

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. The reviewing authority had the power to reduce the sentence to a definite period of years (CM P-1086 (1945); CM 241226 (1943), 2 Bull. JAG 379, 380). Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 278 and 330 of the Criminal Code of the United States (18 U. S. C. 457 and 567).

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

(Disqualified), Judge Advocate

Allan R. Browne, Judge Advocate

Just Snyder, Judge Advocate

Albert A. Ling, Judge Advocate

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

21 January 1945

Board of Review
CM P-1236

UNITED STATES v. Private WARREN C. WILSON, (39832172), Company I, 4th Infantry.	Trial by G.C.M. convened at Nagoya, Japan, 17 December 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. The United States Disciplinary Barracks, Fort Leavenworth, Kansas.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

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

Specification: In that Private Warren C. Wilson, Company I, 4th Infantry, did, at APO 25, on or about 1 April 1945, desert the service of the United States by absenting himself without proper leave from his organization, and did remain absent in desertion until he was apprehended at Manila, Luzon, Philippine Islands, on or about 29 September 1945.

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

Specification: In that Private Warren C. Wilson, Company I, 4th Infantry, did, without proper leave, absent himself from his station on board the USS Braxton, APA 138, at Lingayen Gulf, Luzon, Philippine Islands, from about 19 October 1945 to about 23 October 1945.

The accused pleaded not guilty of desertion, but guilty of absence without leave as to both specifications and charges. He was found guilty of both specifications and charges, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for fifteen years. The court considered one previous conviction by special court-martial. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks, Fort Leavenworth, Kansas, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence in the case revealed that on 1 April 1945, the accused absented himself without leave from his organization at APO 25. He remained out of military control until apprehended in Manila on 29 September 1945 (R. 5; Ex. 1). During this time he was known as "Gilbert Diaz", a civilian (R. 6).

After warning, he stated to a government agent on 9 October 1945 that after he had been in combat he was sent to a hospital. He was refused admission there because of the large number of battle casualties which were hospitalized. Instead of returning to his organization, he went to San Jose, remained there about two weeks and then went to Manila. After arriving, he lived with a civilian friend and on 15 May entered a partnership which operated a bar and coffee shop. During this time he posed as a civilian, telling those who questioned his status that he had been with the guerillas in the mountains of the Philippines during the war (R. 7).

The plea of guilty as to the absence without leave from 19 October 1945 to 23 October 1945 was supported by a stipulation that the accused was thus absent (Ex. 1).

In an unsworn statement made to the court after being advised of his rights as a witness, accused stated that while in Luzon in combat, news that his wife had been unfaithful caused him to take to liquor. He was transferred to a service company in an infantry regiment as a punishment and was sent to the front lines. A hernia forced him to go to a hospital. He was refused an operation because too many troops were there at the time, and after two weeks at the hospital went absent without leave (R. 12).

4. The specification of Charge I does not follow with exactness Form 13 as set forth in the Manual for Courts-Martial, 1928, at page 240. It includes the following words not found in the model specification, "by absenting himself without proper leave from his organization." As the offense was laid under the 58th Article of War and the specification otherwise properly alleged a desertion it is considered that such language may be disregarded as harmless surplusage (2 Wharton, Criminal Evidence, sec. 1089; United States v. Weiss (C.C.A.), 293 F. 992, 995).

In the first-mentioned authority it is said:

> "Surplusage may be defined as an averment which may be stricken out and yet leave a sufficient description of the offense. It consists of alleging facts other than those necessary to the sufficiency of the pleading. Consequently, all unnecessary words may, on trial or arrest of judgment, be rejected as surplusage if the indictment will be good upon striking them out."

In view of the accused's pleas of guilty of absence without leave and the stipulated facts, the only additional proof needed in connection with the charge of desertion was that accused intended not to return. "If the condition of absence without leave is much prolonged, and there is no satisfactory explanation of it, the court will be justified in inferring from that alone an intent to remain permanently absent" (MCM, 1928, par. 130a, p. 143; 251.19, 28 Jan 1919, Dig. Op. JAG 1912-40, sec. 416(9); CM ETO 1629 (1944), 5 B.R. (ETO) 119, 3 Bull. JAG 232, 233). In this case not only was there no explanation of the long absence but in addition an intent not to return was shown by the evidence that accused posed as a civilian and engaged in a commercial occupation under an alias (CM 216904 (1941), 11 B.R. 183, 187; CM A-1747 (1945).

There was therefore substantial evidence to sustain a finding of guilty of desertion under Charge I and absence without leave under Charge II.

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

(Absent), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Seyler, Judge Advocate

Albert A. Ling, Judge Advocate

1st Indorsement.

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 6 February 1946.

TO: Commanding General, 25th Infantry Division, APO 25.

1. In the case of Private Warren C. Wilson, 39832172, Company I, 4th Infantry, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Before final action is taken in this case it is recommended that further consideration be given the matter of the appropriate term of confinement. The accused was convicted of desertion in violation of AW 58 and of the minor offense of absence without leave for five days. The average term of confinement ordered executed for desertion during the period of hostilities is 7 years 3 months. There are mitigating factors in this case as recited in the review of the staff judge advocate and it would appear that a sentence of confinement not in excess of ten years would be more appropriate than that of fifteen years as adjudged by the court-martial.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-1236).

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

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

19 January 1946

Board of Review
CM P-1261

UNITED STATES v. Technician Fifth Grade JAMES F. BARRETT (35586407), 601st Malaria Survey Detachment.	Trial by G.C.M., convened at Seoul, Korea, 28-29 November 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, Terre Haute, Indiana.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade James F. Barrett, 601st Malaria Survey Detachment, did at Seoul, Korea, on or about 1800, 2 November 1945, forcibly and feloniously, against her will, have carnal knowledge of Kim Chung Sook.

The accused pleaded not guilty to, but was found guilty of the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, Terre Haute, Indiana, or such other place as may be determined by the Secretary of War, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence in the case reveals that shortly after 1700, 2 November 1945, two Korean girls, one age 16, the other, Kim Chung Sook, 14, undersized and weighing about 85 pounds (R. 15, 27, 39, 42), were walking along the street near Seoul, Korea, when two soldiers offered them a ride toward Seoul in a truck. The younger girl recognized the driver, whom she had seen in the restaurant where she worked. They drove to the top of a mountain and parked the truck. The elder girl got out voluntarily and walked away with one of the soldiers (R. 7, 16, 28). The accused lifted the fourteen year old out of the truck and carried her in another direction to a place where he pointed out Seoul. She denied his request to kiss and endeavored to get free from his arms. He laid her down on the grass, pulled up her skirt and touched her body. She became fearful of his intentions and tried to get away but was unable to do so. As he was attempting to loosen her bloomer string the other couple appeared and observed the accused between his companion's legs (R. 19, 29, 30). His face was "angry" (R. 26) as he sent them away. He then pulled Kim Chung Sook by the hand to another place in spite of her efforts to run to the older girl. In the presence of the accused she then loosened her bloomer string, rolled up her skirts and urinated. She did not leave his presence to do this because she was afraid and believed he might think she was trying to escape. After she refastened her clothing, the soldier embraced her and again placed her on the grass despite her efforts to escape. She realized she was far from any house and the location was a sloping place and even dangerous "if she stand up" (R. 30). Although she tried to rise the accused pressed her down, pulled up her skirt, loosened the bloomer string and attempted sexual intercourse. Because of her small size he was at first unsuccessful, but with saliva as a lubricant was eventually able to accomplish his purpose. The girl tried to "spit on his face", felt "very bad" and attempted to avoid the act, but was so weak she could not move any more (R. 30). Without success she "tried to get the penis away from her body" (R. 33). She cried out and the accused covered her mouth. By moving her head she was able to cry out again for help (R. 30, 31). The intercourse was very painful and was a new experience for her. After consummation of the act, both arose. The girl felt blood and wiped it away with a handkerchief which the soldier supplied. Blood was on her bloomers and she was extremely tired. She walked painfully to the truck, met the other girl there and berated her with "Why don't you come over there and help me?" (R. 31). Her endeavors to get in the truck were unsuccessful until she was lifted in by the soldier accompanying the accused (R. 32).

Upon returning to Seoul the girls left the truck and went to a hospital. There she was found to be in a hysterical condition. She was sweating and her breathing was labored. Her head ached and she suffered excruciating pain in the genitals (R. 38). Her vagina was bleeding and there was a second degree laceration of the perineum from the entrance of the vagina, about .5 cm. deep and 2.00 cm. long, caused by the forcible

penetration of some object. Many actively moving spermatozoa were found by examination of the vaginal content. The laceration was greater than normally results from the first act of intercourse (R. 38-42). Her body around her ribs and hips was painful to the touch (R. 45).

The accused testified that he drove to the mountain top with the intention of engaging in intercourse. When the vehicle was stopped, the other couple moved away and the accused lifted the remaining girl down and carried her to a spot where they could see Seoul. He attempted unsuccessfully to kiss her. By motions he indicated to her his desire for sexual intercourse. She walked around freely, complied when he motioned to her to lie down and did not scream, resist or evidence pain during the ensuing intercourse. When he had completed the act, both arose and returned after the girl had ministered to herself and he had wiped the blood from his genital organ with his handkerchief. All climbed in the truck, no assistance being given to Kim Chung Sook (R. 46-48). He testified that on the way down the mountainside he told the other soldier that he "had intercourse with this girl, just like if I had gone out with any other girl" (R. 48).

4. "Rape is the unlawful carnal knowledge of a woman by force and without her consent... The force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b; CM P-1104 (1945)). Accused admitted the sexual intercourse concerning which the girl testified. Lack of consent appears from her testimony that she resisted, tried to escape, called for help and when her voice was muffled by accused, freed her head and called again, together with the other circumstances in the case such as her presence on the isolated mountain top, his apparent strength evidenced by his ability to carry her bodily over a dangerously steep slope, the extremely brutal tearing of her genital parts and her complaint to her friend of the latter's failure to answer her cries for assistance.

> "While the degree of resistance is an incident by which consent can be determined, it is not in law necessary to show that the woman opposed all the resistance in her power, if her resistance was honest, and was the utmost, according to her lights, that she could offer" (1 Wharton, Criminal Law, 12th ed., sec. 701, p. 944).

Whether or not the girl exercised all the resistance within her power under the circumstances is a matter for the court-martial and reviewing authority to decide (Mills v. United States, 164 U.S. 644, 17 S. Ct. 210; CM A-602 (1943)). In considering a case forwarded under Article of War 50½ it is not the function of the Board of Review to weigh the evidence. If the findings are supported by substantial evidence they should be sustained (CM 152797, cited in MCM, 1928, p. 216; CM P-951 (1945)).

The facts in this case supply substantial evidence from which the court could properly find such lack of consent as to justify a finding of guilty of rape (CM P-1104, supra)).

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457, 567).

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

(Absent), Judge Advocate

Allan R. Browne, Judge Advocate

Earl Snyder, Judge Advocate

Lawrence A. King, Judge Advocate

1st Indorsement.

Army Service Forces, Branch Office of The Judge Advocate General, APO 75, 6 February 1946.

TO: Commanding General, 7th Infantry Division, APO 7.

1. In the case of Technician Fifth Grade James F. Barrett, 35586407, 601st Malaria Survey Detachment, attention is invited to the foregoing holding by the Board of Review that the record of trial is legally sufficient to support the sentence, which holding is hereby approved. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. It is noted that the United States Penitentiary, Terre Haute, Indiana has been designated as the place of confinement. This office has received no information indicating authority to designate such penitentiary

as the place of confinement rather than the United States Penitentiary, McNeil Island, Washington, and in the absence of such authority within your knowledge it is requested that the latter penitentiary be designated in your court-martial orders.

3. When copies of the published order in this case are forwarded to this office they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, please place the file number of the record in brackets at the end of the published order, as follows:

(CM P-1261).

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

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

Board of Review
CM P-1279

28 January 1946

UNITED STATES v. Private First Class JAMES W. ALLEN, (38504587), 572d Quartermaster Railhead Company, APO 159.	Trial by G.C.M., convened at Davao, Philippine Islands, 30 November 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, McNeil Island, Washington

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private 1st Class James W. Allen, 2d Platoon, 572d Quartermaster Railhead Company, APO 159 did, at APO 159, on or about 5 October 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with with premeditation kill one Private 1st Class Dan Martin, 2d Platoon, 572d Quartermaster Railhead Company, APO 159, a human being by shooting him with a pistol.

The accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that the deceased, a soldier named Dan Martin (R. 9, 18), and the accused were participating in a dice game on 5 October 1945 at about 1630 (R. 23, 25). When the former failed to return 15 pesos change due to accused, an argument arose and deceased struck him on the mouth. A fist fight followed but the contest was inconclusive as neither succeeded in hitting the other (R. 23, 37).

The accused went to his tent where an officer talked to him. He seemed neither excited nor sullen and was observed to smile and laugh (R. 25). Upon the officer's departure accused proceeded to the ration dump about a quarter of a mile distant, where he obtained a revolver and ammunition which another soldier had borrowed from him. His manner appeared normal (R. 27, 29, 31, 37).

At about 1730 (R. 13) accused appeared at the messhall where he found Martin eating in the company of three other soldiers. After walking through the messhall he returned to deceased, addressed him with "Hey, pappa. Hey, pappa" (R. 9, 10), took the gun from his pocket and began shooting at him as the latter looked up (R. 9, 15). Accused fired until the weapon's ammunition was apparently exhausted, then left (R. 9, 18). The deceased, who had said nothing to accused (R. 11, 15, 19) save perhaps "Hey, daddy", in response to his greeting (R. 21), fell beneath the table (R. 18).

At about 1700 or 1800 on the same day, a colored soldier was brought to the hospital. He died the following morning. An autopsy disclosed five gunshot wounds in the ear, arm, shoulder, back and chest, respectively. Death was caused by the chest wound (R. 7). The soldier was identified as Dan Martin by the medical officer who treated him and who later performed the autopsy. The witness had not previously known him. When asked by the defense counsel, "Some one told you his name was Dan Martin?" he answered, "Yes sir" (R. 8).

The accused testified under oath (R. 33) that he and the deceased had argued on other occasions (R. 35, 36) and that he distrusted deceased (R. 38). He denied that he had procured the weapon with intent to shoot or kill the deceased and stated that he had gone to the mess hall only to obtain a sandwich, without knowledge that deceased was there (R. 41, 42). Accused was already "upset and rather skittish and trembling" (R. 40). As he walked by deceased, he heard him say in a low voice, "I am going to kill Allen. I am going to kill Allen" (R. 37, 41). Accused turned back (R. 37, 46) and as he did so Martin turned, dropped his hands to his side and started to rise from his chair (R. 37, 47). Accused, who knew that deceased possessed some pistols but saw no weapons on him at the time, thought he might be killed at any time. Becoming more upset, he pulled out his gun (R. 42, 47) and shot deceased (R. 34, 37).

The defense asked a medical witness a hypothetical question as to whether accused "could...or might...have been" temporarily insane, in terrific anger or full of revenge. The witness answered, "He might" (R. 52).

Prior to the arraignment but after the prosecution had exercised its one peremptory challenge, the trial judge advocate asked whether any member of the court had conscientious scruples against capital punishment. When one officer indicated that he entertained such objections, the prosecution requested that he be excused. The president stated, "Lt. Biondi is excused" and the latter withdrew from the courtroom (R. 3).

4. No prejudice resulted from excusing the lieutenant from the court. Where an accused is to be tried for a crime punishable by death, a juror who states on voir dire that he possesses conscientious scruples in regard to the infliction of the death penalty for crime may rightfully be challenged for cause by the prosecution (Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 628; 31 Am. Jur. 674). Although the objection should have been formally voted upon by the court, no harmful error resulted from thus summarily disposing of the matter (CM 114929 (1918), CM 133703 (1919), Dig. Op. JAG, 1912-30, sec. 1357).

It appeared from the record that the medical officer's identification of the injured soldier whom he attended on the day of the shooting and upon whom he thereafter performed an autopsy, was based upon the statement of some third person that his name was Dan Martin. The evidence was not objectionable as hearsay.

> "A person's name is the title by which habitually he calls himself and others call him. To know a person's name, therefore, is to have heard him so called by himself and by others. In strictness, such an utterance is not hearsay...except where it is made as an assertion of fact. But, though it may be hearsay, as a source of information, yet it is universally relied upon as a source of knowledge. Courts have commonly accepted the testimony founded upon it." (Wigmore on Evidence, 3d ed., sec. 667a).

As stated in a footnote to the above quotation, "the only source by which we 'know' most persons' names is by somebody telling us that such is the name".

There was evidence from which the court could properly believe that the accused, after a fight with deceased, calmly and with deliberation, went from his tent to the ration dump a quarter of a mile distant, obtained a revolver and returned to his own area; that he there found the deceased, apparently unarmed, seated at a mess hall table, spoke to him in a casual manner and then, as deceased looked up, fired five shots into his body. Such evidence did not compel a finding that accused was guilty only of the lesser included offense of manslaughter, upon the theory that he acted under such provocation as was adequate to excite uncontrollable passion in the mind of a reasonable man and that the act was committed under the influence of such passion (MCM, 1928, par. 149a, p. 166). Although deceased had made an apparently unprovoked assault

upon accused, arousing in him a wholly natural indignation, there was evidence that the latter's passion had abated during the hour which intervened between the assault and the shooting. A sufficient cooling period had elapsed (Collins v. United States, 150 U.S. 62, 14 S.Ct. 9; CM 246101 (1944), 29 B.R. 381, 387, 3 Bull. JAG 343; CM P-1086 (1945)).

The facts sustain a finding of murder, an offense defined as follows:

> "Murder is the unlawful killing of a human being with malice aforethought.
>
> * * *
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following states of mind preceding or coexisting with the act or omission by which death is caused: . . . knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused" (MCM, 1928, par. 148a).

Every person is presumed to intend the natural and probable consequences of his act, and the use of a deadly weapon resulting in a homicide by one having no right to use it at that time and place, and in the absence of any mitigating circumstances, is always regarded as evidence of the existence of malice aforethought (Allen v. United States, 164 U.S. 492, 17 S.Ct. 154; MCM, 1928, par. 112a; CM P-1086, supra).

5. A sentence of death or life imprisonment is mandatory upon conviction of murder in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 275 and 330 of the Criminal Code of the United States (18 U.S.C. 454, 567).

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

(Absent), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Snyder, Judge Advocate

Albert A. King, Judge Advocate

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

Board of Review
CM P-1313

1 February 1946

UNITED STATES v. Private JAMES YOUNG, (34711793), Company C, 1871st Engineer Aviation Battalion, APO 75.	Trial by G.C.M., convened at APO 75, 25 September 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private James Young, Company "C", 1871st Engineer Aviation Battalion, APO 75, did, at APO 75, on or about 15 July 1945, forcibly and feloniously, against her will, have carnal knowledge of Cecilia Cruz, Caniogan Street, Pasig, Rizal, P.I.

The accused pleaded not guilty to but was found guilty of the specification and the charge and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The court considered three previous convictions by summary courts-martial. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on 15 July 1945 at about 1700 to 1730 two girls, Flairana Santos, age 15, and Cecilia Cruz, age 16, were

walking along a highway near Manila, Philippine Islands. They had been selling or trading bananas at a nearby army installation and Cecilia carried in a basket some chocolate and cigarettes which she had received (R. 18-20, 31).

As they were passing a guard shack where trucks were checked they met accused who inquired as to the contents of the basket. When he saw the cigarettes and chocolate he announced that he would have to take the girls to the military police (R. 20, 21, 44). They demurred but he insisted, telling them that he would shoot them if they refused. He and another soldier, McGinnis, took them down a side road for a distance, then returned part of the way to a hut. There the accused first told them they would have to sit and wait for the military police, then took Cecilia down to some bushes on the pretext that they were going to find a military policeman (R. 21-23, 37; Def. Ex. A). Upon arrival at this location, accused, in Cecilia's words, commenced "pushing me and 'forcing' me" (R. 23). She testified, "I did not like to give myself and told him he had better kill me." (R. 23). He continued to "force" the girl and she fell down. He opened the front of his trousers, pulled down her panties, tore them and took them off. She was fighting and trying to push him away. She cried out for help and begged the accused to leave her alone. No help arrived and the accused was able to lie on her and insert his private parts into hers. Upon cross examination she could not say specifically what had entered her genital organs. The intercourse was painful and continued for approximately 15 minutes (R. 23-25, 28, 29).

Accused's actions were interrupted by the appearance of Flairana and McGinnis. Cecilia was dirty, crying, and both sides of her dress were torn. When Young went to the other girl, the older one made her escape, running to her aunt's house nearby, in her haste leaving the basket and her panties at the scene. She fainted, and when restored reported the occurrence to her aunt and others present. The aunt armed herself with a bolo and with Cecilia and others proceeded at once to the scene of the incident (R. 25, 26, 34, 35, 42, Def. Ex. A). There, the basket and clothing were retrieved. Some distance away, the accused was seen on the road carrying a gun. A soldier was notified and he attempted unsuccessfully to stop the accused by whistling at him (R. 26, 42, 43, 46).

Cecilia was taken to an Army doctor who found her to be a small girl in a disheveled, soiled condition. She was emotionally upset, her slip was bloody and her external genitals and upper thighs on the inner aspect were covered with dried and fresh blood. From a three millimeter recent jagged tear in her hymen, blood was oozing. No spermatozoa were found in the vaginal content. She told him she had been raped by a colored man. It was his opinion, reached without considering her allegation of rape, that the findings were consistent with intercourse within two hours from the time of examination and that the subject had previously been a virgin (R. 12, 14, 15).

Before the approach of the two girls accused had expressed to other soldiers his intent to engage in sexual intercourse before he went to bed that night (R. 44, 49).

The accused presented evidence that approximately at the time of the alleged incident with the girls he was in his camp area about three-fourths of a mile away from the scene or a fifteen to twenty minute walk (R. 57-60, 62, 64).

Accused exercised his right to remain silent.

4. Complaint was made by the defense as to admission of testimony on the part of the examining doctor that the victim had told him in connection with the clinical history that she had been raped by a negro. It is not deemed necessary to discuss the question as to whether this statement was admissible as a complaint made shortly after the commission of the offense of rape. The matter was cumulative only, and its admission could in no event have been prejudicial because other strong and compelling evidence appeared which sustained the findings beyond a reasonable doubt (CM ETO 1486 (1944), 4 B.R. (ETO) 357,373, 3 Bull. JAG 227, 228; CM 177400 (1927), Dig. Op. JAG 1912-40, sec. 395 (2)).

Although Cecilia's direct testimony as to penetration was weakened by her subsequent statement that she did not know what had been inserted into her vagina, there was substantial circumstantial evidence of penetration. The circumstances in evidence in this case to the effect that the accused tore off the girl's underclothing, tore her dress, lay on her for approximately 15 minutes, during which time she felt something inserted in her genital organs, and the tearing and bleeding of her hymen are sufficient upon which to base a finding in that respect (CM 249224 (1944), 32 B.R. 69, 76, 77, 3 Bull. JAG 147; CM 250294 (1944), 32 B.R. 323, 328).

"Rape is the unlawful carnal knowledge of a woman by force and without her consent... The force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM 1928, par. 148b; CM P-1104 (1945)). Lack of consent appears from the testimony of the girl's resistance, her call for help, her torn, disheveled, dirty and discarded clothing, her escape, her immediate complaint while in an emotional condition and her return to the scene with aid in search of the accused. Thus there was substantial evidence as to all of the elements of rape from which a court could properly arrive at a finding of guilty (CM P-1208 (1946)).

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457, 567).

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

(Absent), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Snyder, Judge Advocate

Albert A. Ring, Judge Advocate

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

Board of Review
CM P-1319

5 February 1946

UNITED STATES v. Staff Sergeant NORMAN DURAN (37703911) and Staff Sergeant LEONARD V. RAINEY (34802746), both of Company C, 184th Infantry.	Trial by G.C.M., convened at Seoul, Korea, 17 December 1945. As to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. As to accused Duran: The United States Penitentiary, Leavenworth, Kansas. As to accused Rainey: The United States Penitentiary, Atlanta, Georgia.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

As to accused Duran:

CHARGE: Violation of the 92nd Article of War.

Specification: In that S/Sgt Norman Duran, Company C, 184th Infantry, did, at Kyongsong, Korea, on or about 23 October 1945, forcibly and feloniously, against her will, have carnal knowledge of Kang, Yun Ok.

As to accused Rainey:

CHARGE: Violation of the 92nd Article of War.

Specification: In that S/Sgt Leonard V. Rainey, Company C, 184th Infantry, did, at Kyongsong, Korea, on or about 23 October 1945, forcibly and feloniously, against her will, have carnal knowledge of Kang, Yun Ok.

Each accused pleaded not guilty to, but was found guilty of, the specification and the charge applicable to him, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentences and designated as the place of confinement in the case of accused Duran the United States Penitentiary, Leavenworth, Kansas, and in the case of accused Rainey the United States Penitentiary, Atlanta, Georgia, or, in each case, such other place as the Secretary of War may direct, and forwarded the record of trial for action under Article of War 50½.

3. There was evidence that the two accused, at about 1900 of 23 October 1945, and again at 2000, visited a drinking house in Seoul (Kyongsong), Korea (R. 6, 7, 15, 18). Since on a previous occasion they had been "fresh" with a waitress there employed, a 27 year old divorcee named Kang Yun Ok, the proprietor gave them some sake so that they would go away, but instead they stayed, and the waitress ran out of the building to avoid them (R. 14, 15, 18, 19). At 2100 the place was closed for the night but not locked. At 2200 the waitress was sleeping inside the house in the same room with the two male proprietors, when the two accused entered (R. 7, 15, 16). As to the subsequent events, she testified, through an interpreter:

> "When the two soldiers came in the room both Koreans got up, was sitting beside one soldier, the other soldier pull out dagger and force these two Korean men outside the room, but they would not like to go out so this soldier force them to go out so I made two Korean men go outside the room because it is better than this. Then after they got out the soldier got out the room too. Meanwhile they were out this soldier put the light out and try to undress me and he did. After he undressed me he did what he liked to do, he fucked me. Then after while he finished his job there the tall soldier came in the house and did the same thing what the other soldier did to me" (R. 17).

Both accused accomplished penetration (R. 17).

The woman further testified, as to the first soldier, Duran:

> "I have made attempt to get away. I was frightened and cried and made effort to get away...and I was so frightened" (R. 17).
>
> "When I made effort to cry he slapped my face once and put his hand on my mouth" (R. 20).

and as to the second, Rainey:

> "When the next one came in I was dressed again so he make me undress again and he put out my dress and he tried

climb on my belly and I made effort to get away from that but I was so weak and could not help it, but he tried next time to get on my belly so I made effort to get away, but after he did the thing" (R. 17).

"I was crying...but he did put his hand over my mouth" (R. 20).

The dagger was displayed only when the soldiers first came in, to make the two Koreans leave; after the latter had gone, it was returned to accused Duran's belt. The woman was not threatened with it (R. 20). One of the Koreans testified that he heard her cry out while the accused were with her and that after they left, "she just lying on the floor and she crying and looks like she feels some kind of pain" (R. 8). She herself said that she did not enjoy the experience, (R. 17, 18) but that "I felt all right after a while" (R. 18).

At 2300 that night, she reported to the police that "two soldiers came to my room and raped me" (R. 18).

The accused elected to remain silent (R. 40). The defense introduced testimony of a number of fellow soldiers indicating that the accused were in or about their quarters during the evening in question. This evidence as to accused Rainey accounted for the period until 2100 (R. 21-26, 20; Ex. C), and as to accused Duran placed him in or near his quarters during the whole of the evening prior to 2230 (R. 27, 28, 35-39). The morning of the 24th of October, military police called out eight soldiers into a formation and a woman, after some hesitation, pointed out accused Duran as a man who was wanted (R. 35).

4. The court was not bound to believe the defense's evidence of alibi. As to accused Rainey, this evidence did not cover the period after 2100 of the evening in question and was not inconsistent with his presence at the drinking house later, when the rape was alleged to have occurred, although it contradicted the prosecution's evidence that he visited the house twice earlier in the evening. Both the woman and one of her Korean employers positively identified accused as the two soldiers who invaded the house later in the evening and said that they had seen the soldiers on other, previous occasions. The court could properly conclude both that an offense occurred and that accused were sufficiently identified as the offenders.

The elements of rape are described in the Manual for Courts-Martial, paragraph 148b, as follows:

"Rape is the unlawful carnal knowledge of a woman by force and without her consent."

The first element of the offense could have been found from the woman's positive testimony that both accused achieved penetration.

The second element, the force, appeared from the circumstances related by the prosecution's witnesses. The two American soldiers, who had previously been repulsed in their advances toward the woman, later in the same evening , without permission, entered the room in which she was sleeping and at the point of a knife forced the other occupants to leave. Although the weapon was not used to threaten her directly, it was kept on the person of one of the soldiers where it was presumably available for instant use. Both attempted to stop her outcries by covering her mouth and one slapped her on the face. Such force was substantially greater than the minimum prescribed by the Manual for Courts-Martial, which points out (par. 148b) that "the force involved in the act of penetration is alone sufficient where there is in fact no consent."

The third element of rape, lack of consent, could have been found by implication from the foregoing acts of force. Although the circumstances might have indicated that the girl was approachable, her moral character was immaterial if in fact she did not consent. There is not only no evidence that she encouraged the accused in any way, but there is her testimony that earlier in the evening she had run away from them. In any event, "...the crime of common-law rape may be committed as well on a woman unchaste, or a common prostitute, as on any other female" (44 Am. Jur. 923). While the record, it is true, does not contain evidence of great physical resistance on the woman's part, the court could properly have concluded that she showed her lack of consent by all the resistance which she thought she could make without endangering her life.

> "Consent of the woman from fear of personal violence is void. Even though a man lays no hands on a woman, yet if by an array of physical force he so overpowers her mind that she dares not resist, or she ceases resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape" (44 Am. Jur. 910).

Whether or not the woman exercised all the resistance within her power under the circumstances was a matter for the court-martial and reviewing authority to decide (Mills v. United States, 164 U.S. 644, 17 S.Ct. 210; CM A-602 (1943)).

From the foregoing it appears that there is substantial evidence of record from which the court could properly have found each accused guilty of the crime with which he was charged.

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized under Article of War 42 for the offense of rape, recognized as one of a civil nature and punishable by penitentiary confinement by sections 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457, 567).

6. For the reasons stated above the Board of Reviewholds the record of trial legally sufficient to support the findings and sentences.

~~(Absent)~~, Judge Advocate

~~Allen R. Browne~~, Judge Advocate

_____, Judge Advocare

~~*****~~, Judge Advocare

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

8 February 1946

Board of Review
CM P-1350

UNITED STATES v. Private JOHN H. BAILEY, (44045881), Private SAMUEL C. BANKS, (34994093), both of 136th Port Company, TC.	Trial by G.C.M., convened at APO 331, 2 January 1946. As to each accused: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Samuel C. Banks and Private John H. Bailey, acting jointly and in pursuance of a common intent, did, at Okinawa Shima, on the 4th day of December 1945 about 1400, forcibly and feloniously, against her will, have carnal knowledge of Higa Mitsu.

Each accused pleaded not guilty to, but was found guilty of, the specification and the charge, and was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. The court considered one previous conviction by summary court-martial as to accused Banks. The reviewing authority approved the sentences, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement, and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that on or about the 4th day of December 1945, at an undisclosed time, Higa Mitsu, a 16 year old Okinawan girl, and another girl were walking along a road near the town of Imbu, Okinawa. When the two accused, colored soldiers, appeared at a point in the road the girls started to run. Both fell and Higa Mitsu was seized by the pursuing soldiers. The other girl, however, made good her escape and ran toward her home, leaving her companion struggling with the men (R. 11, 13, 14). Higa Mitsu identified both accused as the two soldiers (R. 12, 13).

The accused dragged Higa Mitsu to the side of the road. While one held her mouth and body the other attempted to pull down her dress. She was "pressed down" (R. 11), and they endeavored to stop her from screaming by holding her by the face and mouth. One then engaged in sexual intercourse with her while the other restrained her. Thereafter the other performed a similar act, and was in turn aided by his companion in quieting the girl's struggles. She eventually succeeded in getting her mouth free and called for help, "MP, MP" (R. 12, 13) and for her mother. Thereupon the two men fled, and the girl set out for home. A sailor, driving by in a jeep, encountered her, and when he inquired as to the reason for her tears received the reply, "push push...black face" (R. 7). He backed up his jeep to where the girl was pointing and observed two negroes going through the bushes. When he called to them, one turned around with a .45 caliber revolver. The sailor, frightened, drove away with the girl to the hospital (R. 7).

A subsequent medical examination revealed a torn hymen, but no spermatozoa (R. 15). It did not appear whether the tear was recent.

At about 1430 or 1530 on the 4th of December, the accused were stopped at a road block by military policemen. Bailey was found upon search to have a .45 caliber revolver (R. 8).

After having been advised of their rights under Article of War 24 the accused signed sworn statements (R. 22, 23, 27; Ex. 2, 3) which were admitted in evidence after testimony by Banks that he had been placed in a room containing only two stools and a box. When he refused to talk he was told by the interrogator, a captain, that the other accused blamed him solely and "that if I did not talk, he could hold me down there until we did talk, in that cell, if it took six months for us to talk" (R. 25). Banks denied that the statement was read to or by him and said he signed it because he "was wanting to get out from there" (R. 26). The officer who took the statements denied any such threats or misstatements (R. 24).

The statement of each of accused revealed joint participation in the assault on Higa Mitsu. Banks admitted that he achieved penetration, but Bailey asserted his own failure in that respect. The probative value of each statement was limited by the law member to its signer (R. 27).

Except as stated above, the accused exercised their right to remain silent (R. 27).

4. There was substantial testimony to the effect that each of the accused was properly warned before he signed and swore to a statement. Only one of the accused alleged that any improper means had been used by the investigators to procure the confessions and his assertion was controverted. The court was not compelled to accept his testimony and exclude either confession (CM P-1044 (1945)).

Substantial testimony revealed that the victim was forcibly dragged from the road, was pressed to the ground by the joint efforts of the two accused, her efforts to cry out muffled and penetration accomplished by each in turn despite her strongest efforts at resistance. She further evidenced lack of consent by a prompt complaint to a passerby.

"Rape is the unlawful carnal knowledge of a woman by force and without her consent... The force involved in the act of penetration is alone sufficient where there is in fact no consent" (MCM, 1928, par. 148b; CM P-1104 (1945)). Thus there was sufficient evidence as to each of the elements of rape to support the findings (CM P-1208 (1946)).

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457, 567).

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

(Absent), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Snyder, Judge Advocate

Albert A. Cing, Judge Advocate

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

Board of Review
CM P-1352

11 February 1946

UNITED STATES v. Sergeant LEON C. RODRIGUE, JR. (38496196), Technician Fifth Grade SHERMAN WADE (36790061), and Private First Class LEWIS HENRY (34347885), all of Company B, 1908th Engineer Aviation Battalion	Trial by G.C.M., convened at APO 331, 29 December 1945. As to accused Wade: Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, McNeil Island, Washington. As to accused Lewis: Acquittal. As to accused Rodrigue: Sentence disapproved by reviewing authority.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 92d Article of War.

Specification 1: In that Sergeant Leon C Rodrigue, Jr, Company B, Technician Fifth Grade Sherman Wade, Company B, and Private First Class Lewis Henry, Company B, all of 1908th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Okinawa near the intersection of routes numbered 13 and 24, APO 337, on or about 20 September 1945, forcibly and feloniously and against her will, have carnal knowledge of a woman, Miyagi Yoneko.

Specification 2: In that Sergeant Leon C Rodrigue, Jr, Company B, Technician Fifth Grade Sherman Wade, Company B, and Private First Class Lewis Henry, Company B, all

of 1908th Engineer Aviation Battalion, acting jointly and in pursuance of a common intent, did, at Okinawa near the intersection of routes numbered 13 and 24, APO 337, on or about 20 September 1945, forcibly and feloniously and against her will, have carnal knowledge of a woman, Teruko Ota.

Each accused pleaded not guilty to both specifications and the charge. Accused Sergeant Leon C. Rodrigue and Technician Fifth Grade Sherman Wade were found guilty of both specifications and the charge and each was sentenced to dishonorable discharge, total forfeitures and confinement at hard labor for life. Accused Private First Class Lewis Henry was acquitted. The reviewing authority disapproved the sentence as to accused Rodrigue but approved it as to accused Wade, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The evidence reveals that at 2100 or 2130 of the evening of 20 September 1945, Pharmacist Mate Second Class Richard I. Church, was driving a truck near Nodake, Okinawa, in which he was carrying two women, Teruko Ota, age 24, and Miyagi Yoneko, age 18, when he was forced to stop because his path was blocked by another truck parked crossways of the road (R. 6-8, 27; Ex. 1). Church testified:

> "...I noticed a small group negroes at the front of my truck, so I climbed out and asked these negroes how I could get back to Nodake. They didn't have anything to say, however, and they kept mumbling to themselves. And I heard the girls in the back of the truck screaming, and one of girls got into the cab and I got into the cab next to her, and the accused Wade said to get the girl out of the cab, get out of the cab yourself and give them the girl...He continued to tell me to get out of the truck, and he opened the door and tried to get me out, and struck me. He went around the other side and started to pull the girl out by her right arm, and I was hanging on to her as best I could, and then he let go of her and hit me again. ...And he grabbed a carbine and levelled it at me, and told me I had better get out of the cab, and since he had been drinking, I had smelled the alcohol on him, I thought I had better get out" (R. 7).

Accused Wade pulled the girl out of the cab and both she and the one who had remained in the rear of the truck were taken to some nearby bushes, whining and protesting (R. 22).

There three or four negroes tore the older girl's clothes, held her hand and legs and had sexual intercourse with her even though she fought against them. She was unable to identify accused as having been present (R. 14). Three men "forced" (R. 19) sexual intercourse upon the younger girl, Miyagi Yoneko. While she was unable to identify accused

Wade as one of the three, she did say that she remembered his features faintly (R. 18, 19). Asked specifically if Wade was present during the incident, she did not answer and the following colloquy then ensued:

> "Q. Was this man Wade you have pointed out in the court room, or anyone like him, present at the time you were raped, or is there anyone in the court room that looks like him present at the time you were being raped?
>
> "A. Yes, the one in the center.
>
> "LAW MEMBER: The man referred to in the center is Wade" (R. 19).

Eventually, "Ota came walking out of the cornstalk patch rather forlorn and beaten up. Her dress was dirty" (R. 9). Both she and Miyagi Yoneko, who also came back to the road, appeared "very ashamed and shocked and scared" (R. 11). They were taken to a general hospital for an examination (R. 10) which disclosed no "signs or symptoms of force" as to the younger girl, but as to the other, it showed blood on the vulva and a 1-cm. fissure in the mucous membrane of the vagina which "might have been caused by a possible forced induction of the penis into the vagina" (Ex. 1).

Accused Wade was sworn and testified in his own behalf. He said that on the evening in question he drove his truck until some time after 2130. When he was through work, he turned in the vehicle to the motor pool, and then played cards with another soldier. He denied "contact with any woman" (R. 25) on 20 September and denied seeing any truck with two girls in it (R. 25, 26).

4. In questioning the two Okinawan girls, the trial judge advocate resorted to a number of leading questions in an effort to bring out their account of the attacks. This method of examination is proper when necessary to secure answers from foreign witnesses who must testify through an interpreter, or when "modesty or delicacy prevent full answers to general interrogatories" as in the case of prosecutions for rape (70 C.J. 530-532).

"Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, par. 148b). There is substantial evidence of record from which the court could find that the two women were raped by a group of negro soldiers on the date alleged. The force and lack of consent necessary to the crime appear from the overpowering of the truck driver, the pulling of one girl from the cab, and the taking of the two of them into nearby bushes. Teruko Ota testified that she fought against her attackers and the other said that the intercourse was forced.

Although it was not proved that Wade himself had sexual intercourse with either woman there was substantial evidence that the offense was a joint undertaking in which he actively participated by assaulting the truck driver and pulling one of the girls from the cab of the vehicle.

The old, common-law distinctions between principals and accessories and between principals in the first and second degrees having been abolished in military law, Wade could properly be found guilty under the rule that one who aids in the commission of a crime is a principal and may be punished as such (CM ETO 1453 (1944), 4 B.R. (ETO) 337, 347, 348, 3 Bull. JAG 284, 285). The fact that two of accused Wade's co-defendants were either acquitted or absolved by the reviewing authority cannot help him.

> "As a general rule, the fact that a person charged with the actual perpetration of a crime as principal in the first degree has been tried and acquitted presents no impediment to the trial and conviction of a person charged with aiding and abetting the commission of the crime. This rests upon the theory that the aider and abettor is in law guilty of the crime to the same extent as the so-called 'principal' in the first degree. The offense of each is complete in itself, without dependency one on the other. Furthermore, the actual perpetrator of a crime may not be known with certainty, and the fact that one mistakenly supposed to have committed the crime was tried therefor does not affect the guilt or the liability to punishment of one proved to have been present aiding and abetting" (14 Am. Jur. 831, 832).

Thus, a rape having been shown to have occurred, and an accused having been shown to have aided and abetted its commission, he can be legally convicted even though the men who actually accomplished the rape remain undiscovered and unpunished. It is therefore concluded that there is substantial evidence of record from which the court could find accused guilty as charged.

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary confinement by sections 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457, 567).

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

(Absent), Judge Advocate

Allan R. Browne, Judge Advocate

Hart Snyder, Judge Advocate

Lemuel A. King, Judge Advocate

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

Board of Review
CM P-1368

9 February 1946

UNITED STATES v. Private First Class JESSIE CHESTNUT (34953750), 1250th Engineer Fire Fighting Platoon	Trial by G.C.M., convened at APO 73, 4 December 1945. Dishonorable discharge, total forfeitures and confinement at hard labor for life. The United States Penitentiary, McNeil Island, Washington.

HOLDING by the BOARD OF REVIEW
ROBERTS, BROWNE, SNYDER and KING
Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Jessie Chestnut, 1250th Engineer Fire Fighting Platoon, did, at APO 73, on or about 3 November 1945, forcibly and feloniously, against her will, have carnal knowledge of Zenaida Legaspi.

The accused pleaded not guilty to but was found guilty of the specification and the charge and was sentenced to reduction to the grade of private, dishonorable discharge, total forfeitures and confinement at hard labor for life. The reviewing authority approved the sentence, designated the United States Penitentiary, McNeil Island, Washington, as the place of confinement and forwarded the record of trial for action under Article of War 50½.

3. The competent evidence of record shows that at about 1830 on 3 November 1945, accused approached the dwelling of Zenaida Legaspi, located in the barrio of Lagnas, Batangas Province, Philippine Islands, and said he had a message for her from her soldier common law husband, Dallas Flakes, who had escaped from a stockade and was hiding in a nearby schoolhouse (R. 6). She followed accused to the schoolhouse but refused to go inside until satisfied that her husband was there. She testified through an interpreter as to what followed:

> "Chestnut called Flakes twice but nobody answered. Then I started to feel scared. I started to walk off he then jumped out of the window and he grabbed me and knocked me down to the ground. I landed on the ground with my face down. I started to scream and yell for help. As I was lying with my stomach on the ground he was forcing me to change my position, he then started chocking and hitting me. All the while I was screaming for help. He then threatened me not to shout or he would kill me. After telling me that he would kill me, he bit me on the back. He then struck me with his fist on my face. After striking me several times on my face, he stood up, grabbed me by my two hands and pulled me. He pulled me to the mango tree but I still managed to land with my stomach on the ground. While in that position he sat on my head. He asked me if I would roll over on the side. I told him I would not. He managed to weaken me so much so that I couldn't resist his making me lie on my side. I was still screaming and yelling for help. He then had his two fingers (thumb and index finger) on my throat trying to choke me. He kneeled beside me and then took off my underwear. He then pulled my dress up to the waist while one hand of his was at my throat and then he let go of my throat while he unbuttoned his pants. He then abused me" (R. 7).

His sexual organ entered hers and remained inside for about five minutes (R. 16). When accused had finished, he let the woman go; she returned to her home and told her landlady what Chestnut had done. The military police were called immediately (R. 7, 8).

She was examined by a physician the next morning and was found to have bruises in the shoulder region and about the neck, face, arm and wrist. There were no bruises in the vicinity of her vagina, and only an old rupture of the hymen. She was so hoarse that she could not speak above a whisper (R. 13, 14).

The prosecution introduced in evidence a pre-trial statement of accused, obtained by a special agent after a reading of the 24th Article of War and an explanation of accused's rights (R. 14). Accused therein described much the same sequence of events as did the woman in her testimony at the trial:

"When we got to the schoolhouse, I crawled up in the window and called her husband. No one answered, and Zenalda got suspicious. I wanted her to come up thru the window, but she wanted me to call him--so that Zenalda would know her husband was actually in the schoolhouse. When no one answered, she broke and ran and I dropped from the window and grabbed her. I grabbed her by the shoulders with both hands, we slipped and fell to the ground. She was struggling at the time, but had not hollered for help. While on the ground, she was lying on her side and I was kneeling on the side of her. I told her to turn over, seeing she did not turn over I hit her on the face once, holding her with the other hand on her breast. When I struck her she turned over. When she turned over I held her right hand on the ground by her side with my left hand, and while straddling her--I lifted her dress up as far as her waist, with my right hand. I'm sure that Zenalda did not have any drawers on. With my right hand I unbuttoned my pants, and started to put my penis in her vagina. She was still struggling and at this time she twisted and screamed. With my penis still out and laying on outside of her vagina, I found out that she was menustrating. For blood had gotten on my pants. I had my penis out of my pants and on her vagina for about five minutes. I'm not sure whether my penis entered her vagina during the time she was struggling, but when I later buttoned my pants up--I noticed that blood was on my penis, and that the blood covered about an inch of surface, on my penis. Seeing that she was sick, and after the five minutes had passed while my penis was on her vagina--I got up" (R. 15; Ex. A).

Accused remained silent at the trial (R. 16).

4. "Rape is the unlawful carnal knowledge of a woman by force and without her consent" (MCM, 1928, 148b). It appears from the evidence that there was substantial testimony that all elements of the offense were present in this case. The woman testified positively that penetration was accomplished. "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not" (MCM, 1928, par. 148b). Both the woman and accused said that she was lured to the schoolhouse by a ruse, that she struggled and screamed in resistance to accused's advances, and that he hit her at least once during the process of subduing her. Thus the findings of the court were supported by substantial evidence.

5. A sentence of death or life imprisonment is mandatory upon conviction of rape in violation of Article of War 92. Confinement in a penitentiary is authorized by Article of War 42 for the offense of rape, recognized as an offense of a civil nature and punishable by penitentiary

confinement by sections 278 and 330 of the Criminal Code of the United States (18 U.S.C. 457, 567).

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

(Absent), Judge Advocate

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