John G. O'Brien Lt. Col. JAGD.

HOLDINGS AND OPINIONS

# BOARD OF REVIEW

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL

## CHINA-BURMA-INDIA
## INDIA-BURMA THEATER

VOLUME 3 B.R. (CBI -IBT)

CM IBT 489 - CM IBT 762

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

Judge Advocate General's Department

Holdings and Opinions

# B O A R D  O F  R E V I E W

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CHINA-BURMA-INDIA
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Volume 3 B.R. (CBI-IBT)

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CM IBT 489 - CM IBT 762

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CONTENTS OF VOLUME 3 B.R. (CBI-IBT)


| IBT No. | CM No. | Accused | Date | Page |
|---|---|---|---|---|
| 489 | 283140 | Gonzales | 1 May 1945 | 1 |
| 492 | 292546 | Wright | 17 Apr 1945 | 15 |
| 506 | 308785 | Howard | 4 May 1945 | 29 |
| 508 | 292353 | Dostellio | 20 May 1945 | 39 |
| 511 | 283129 | Baines | 19 Apr 1945 | 49 |
| 537 | 307888 | Pereira | 5 May 1945 | 55 |
| 569 | 293451 | Farley | 30 May 1945 | 61 |
| 577 | 293468 | Dixon | 5 Jun 1945 | 63 |
| 578 | 307877 | Moniz | 7 Jul 1945 | 67 |
| 581 | 307886 | Mason | 13 Aug 1945 | 75 |
| 607 | | Pugh | 10 Jul 1945 | 93 |
| 618 | 293505 | Carrington | 14 Jul 1945 | 103 |
| 622 | 308860 | Shim | 28 Jul 1945 | 111 |
| 626 | 309035 | Garrity | 17 Jul 1945 | 133 |
| 630 | 293481 | Miles, Palmer, Searcy, Thomas | 3 Sep 1945 | 135 |
| 637 | 308209 | Brennan, Cooper | 24 Aug 1945 | 153 |
| 648 | 293471 | Simmons | 11 Aug 1945 | 175 |
| 649 | 293478 | McGhee | 15 Aug 1945 | 183 |
| 651 | 293479 | Scarborough | 24 Aug 1945 | 191 |
| 658 | 308183 | Smolley, Irwin | 28 Aug 1945 | 201 |
| 661 | 308170 | Bernstein | 23 Aug 1945 | 213 |
| 667 | 307404 | Jones | 4 Sep 1945 | 219 |
| 677 | 308199 | Evans | 21 Aug 1945 | 231 |
| 678 | 308191 | Anderson | 25 Aug 1945 | 235 |
| 679 | 308167 | Stachiw | 29 Aug 1945 | 239 |
| 680 | 308168 | Coles, Hauser | 10 Sep 1945 | 247 |
| 684 | 308205 | Young, Riley, Roberts, Wideman, Lynch, McClurg | 14 Sep 1945 | 259 |
| 690 | 309013 | Walker | 12 Sep 1945 | 273 |
| 706 | 294959 | Stickney | 21 Sep 1945 | 279 |
| 725 | 307936 | Colburn | 17 Oct 1945 | 285 |
| 734 | 307926 | Pickens | 9 Oct 1945 | 305 |
| 738 | 307915 | Thomas | 9 Oct 1945 | 315 |
| 742 | 307842 | Carroll | 19 Oct 1945 | 317 |
| 743 | | Chambers | 2 Nov 1945 | 319 |
| 744 | 307843 | Clark | 31 Oct 1945 | 327 |
| 757 | 307855 | Envell | 15 Nov 1945 | 337 |
| 759 | 307373 | Zdon | 21 Nov 1945 | 353 |
| 760 | 307375 | Garretson | 28 Nov 1945 | 361 |
| 762 | 307316 | Ellis | 28 Nov 1945 | 373 |

New Delhi, India
1 May 1945

Board of Review
CM IBT 489

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| UNITED STATES<br><br>v<br><br>Private Ben E. Gonzales, 35555470, 44th Field Hospital | NORTHERN COMBAT AREA COMMAND<br><br>Trial by GCM convened at APO 218, % Postmaster, N.Y., N.Y., on 30 January 1945. Dishonorable Discharge, Total Forfeitures, Confinement at Hard Labor for 20 years. United States Penitentiary nearest port of debarkation in United States designated as place of confinement. |

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

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

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

CHARGE: Violation of the 92d Article of War.

Specification: In that Pvt Ben E Gonzales, did, at Mankrin, Burma, on or about 22 November 1944, with malice aforethought, willfully, deliberately, feloniously; unlawfully; and with premeditation kill one Lorkay, a human being, by shooting him with a carbine, caliber 30, M1.

Accused pleaded not guilty to and was found guilty of the Charge and the Specification. There was evidence of one previous conviction. He was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life. The reviewing authority approved the sentence but reduced the period of confinement to 20 years and designated

the United States Penitentiary nearest the port of debarkation as the place of confinement. The execution of the sentence was withheld and the record of trial was forwarded pursuant to Article of War 50½.

3. The evidence for the prosecution shows that on 22 November 1944 accused's duty was that of guard with the 44th Field Hospital which is located about one-half mile from the village of Mankrin, Burma. He had been issued carbine No. 2938679 (R. 7). On that night, at about 1730 or 1800 hours, he and Private Rios left their tent in the area and went to a house owned by a man named Oscar (R. 7, 8). They had fourteen bottles of beer, some of which they drank before leaving their tent (R. 7). Rios left accused about 2130 or 2200 hours and returned to the hospital. Accused had his carbine with him and was not drunk when Rios left (R. 7, 8).

Deceased Lorkay lived in Mankrin Village (R. 8, 9) about fifty yards from the residence of Rabi Lal. Between 2200 and 2300 hours, 22 November, Rabi Lal was awakened by approximately ten or eleven continuous shots (R. 9). "One hour later" deceased came to the house of Rabi Lal and at that time had blood on his body. He asked for water and said, "I was shot down by an American". He uttered this twice(R. 9). He died within twelve or fifteen feet of the house of Rabi Lal about an hour or an hour and a half later. After deceased was shot, Rabi Lal left his house to report "to the head man" but was stopped and threatened by an American soldier who told him not to go any farther. The soldier went with Rabi Lal to where deceased "fell to the ground", took the pulse of deceased, and both then went to Rabi Lal's house where the American stayed about a half an hour (R. 9, 10). There were no other soldiers there at the time (R. 10). On cross-examination Rabi Lal stated he went for the head man and was stopped by the American less than a half an hour after deceased asked for water (R. 10, 11). He identified accused as the American soldier and also testified that accused had a carbine with him that night. He did not see deceased have a knife (R. 10).

Sundram, who formerly worked in the laundry of the 44th Field Hospital (R. 11), lived about two hundred feet from the house of deceased (R. 12). On the night that Lorkay died, Sundram heard gun shots, and Lorkay, who had blood on his face and body, came to Sundram's house, asked for water and said, "I was shot by an American soldier". An American (R. 12), the accused (R. 13), came in Sundram's house "five minutes" "after Lorkay was shot". He carried a carbine (R. 12). Two Gurkha villagers were with him (R. 13). Sundram was asked "How long was the American soldier at your house when Lorkay came in?", and replied; "It was about one half hour". Lorkay died "after two hours time", and accused examined his pulse and said, "He's dead" (R. 12). Lorkay was twelve to fifteen feet from the house at the time. Accused "ordered" Sundram "to stay near to body, not to go". He said, "I'm an MP. I'll call more MP's".

but he did not do so (R. 12, 13). Sundram did not see any weapon in Lorkay's possession (R. 13).

On 23 November 1944 Captain Myers, a medical officer, examined a dead Indian or Burmese man of about thirty or thirty-five years of age. This man was lying on his back in a field. In the doctor's opinion death resulted from loss of blood, traumatic shock and peritonitis from perforating bullet wounds. There were apparently five bullet wounds (R. 14). Agent Purcell, Criminal Investigation Division, witnessed the examination (R. 19) and Sundram and Private First Class Bertlesmann were also present (R. 13, 16).

About 0200 or 0230 hours, 23 November, the guard at the hospital gate saw accused and was of the opinion that he was sober (R. 15, 16)

On 23 November, Private First Class Bertlesmann was assigned to investigate a shooting. He found a dead body a few feet from the house of Rabi Lal (R. 16). On the road about twenty-five to thirty feet from Rabi Lal's house, Bertlesmann found a blood spot which was approximately one and one-half feet in diameter. Nearby, about two feet away, he found an O.D. wool knit cap, and a few feet west of the blood spot he found ten empty carbine shells which he turned over to Agents Smith and Purcell, Criminal Investigation Division (R. 16; Exhibits 3 and 4). Approximately one hundred twenty-five feet away, at the west corner of a crossroads, is a large tree (R.16) On the morning of 23 November one Lieutenant Fomberg found a GI flashlight and a shirt marked "G 5470"(Ex. 1) under this tree. These were given to Captain Maung Ye, C.A.S. Police (R. 17), who turned them over to the agents, Smith and Purcell, Criminal Investigation Division (R. 18). There were a few spots of blood on the shirt.

After examining personnel records of the 44th Field Hospital and finding that the last four numbers of accused's serial number corresponded with the numbers on the shirt, Agents Smith and Purcell caused accused to be brought to the orderly room. They drove about three hundred yards (R. 25) toward Mankrin Village and stopped along the road. At first accused denied killing the native but, when told to stop bluffing (R. 21) and quit telling lies (R. 25), he admitted that he did (R. 21) and said "I shot him" (R. 25). The agents then placed accused under arrest, returned to the 44th Field Hospital, and searched accused's tent(R. 21). Beside the bed of accused they found a carbine (Ex. 13) and a pair of trousers (Ex. 14) marked G 5470. The trousers had blood spots in three places (R. 21). Accused was taken to the agents' tent in Myitkyina, which is six or seven miles south of Mankrin Village; where the 24th Article of War was read and explained to him (R. 22, 24). He signed a statement, Exhibit 16 (R. 22), after Lieutenant Carlson, Adjutant, "swore him in" (R. 25). Accused said he understood Article of War 24 (R. 25). No threats or promises were made (R. 22, 24), and it was made clear to accused that he would not be compelled to sign the statement.

"He was willing and wanted to tell and sign the statement" and "We told him that anything he would say or sign could be held against him" (R. 23). Accused's written statement was introduced and received in evidence as Prosecution's Exhibit 16. It states in pertinent parts:

"On 22 November 1944, at about 1800 hours, I left the hospital area with Pvt. John Rios. We had about twelve bottles of beer with us and carried them in our pockets. We walked down the road leading to Myitkyina and went to a native village near the Indian Army motor pool. Rios knew some natives in this village and we went to a hut occupied by one of them, and remained there for a few hours drinking beer. We did not have anything else to drink. I had my carbine with a clip holding 15 shells. I left the hut about 2200 hours and started back to the hospital alone. Rios remained in the hut. I went as far as Mankrin Village, and went to a native hut where I bought a pint bottle of saki for 10 rupees. I stayed in this hut until I drank the bottle of saki. The native drank some of the saki. When the bottle was empty I left the hut and went to the road. The native man followed me out and he was trying to speak to me. I just started walking toward the 475th Infantry area, and the native man followed me. After walking about 1/2 mile I stopped and asked what he wanted, but did not understand his answer. I saw that he was carrying a long machete. I then started back toward the 44th Field Hospital, and this native man continued to follow along behind me. When I reached the tree near the intersection of the roads in Mankrin Village I halted. The man continued to advance toward me. I shot the carbine in the air, firing one shot in the hope of scaring the man. He still kept walking so I pointed the gun at him and pulled the trigger, and fired until the clip was empty. He was about 50 feet from me when I fired. I saw him fall to the road. I then started toward the hospital but stopped to remove my shirt, and I threw the shirt in the bushes near a big tree. I then returned to the Hospital and went to bed. I did not see Rios again until the following morning.

"The shirt and trousers which are shown to me by the C.I.D. agents are mine, and I had them on the night of 22 November 1944. The carbine which is in the possession of the C.I.D. agents is mine, and it is the one I used to shoot the native man. It has serial number 2938679.

"I cannot recall touching the man after I shot him, and I do not know how the stains came to get on my shirt and trousers.

"The native man was wearing a cap of some sort and had a G. I. flashlight".

4. The defense called Rabi Lal as a witness and adduced testimony that deceased had a cap like Exhibit 3 though he could not absolutely identify it as belonging to him. He did not know whether accused was drunk. Sundram was also called by accused and testified that the American soldier, who was very drunk, came to his house after deceased came in. The accused having had his rights fully explained to him elected to remain silent.

5. The most serious matter to be given consideration is the admissibility of accused's written statement in which he admitted shooting a native and firing until the clip was empty, after having shot once in the air in the hope of scaring him. Accused, in this statement; attempted to exculpate himself on the ground of self-defense but, viewing it as a whole, we believe that the admissibility of the statement should be governed by the same rules of exclusion as if he had admitted murdering the victim, for that is in fact its effect. It is by its very context an inculpatory admission of the commission of the homicide and of itself imports guilt.

The record shows that accused was first questioned by two Criminal Investigation Division agents who did not warn him of his rights under the 24th Article of War. After first denying any connection with the shooting, he was told to stop bluffing and quit lying, whereupon he admitted shooting a native. In CM 254423, Gonzalez, 35 B.R. 243, the board of review said:

> "The statements in the nature of a confession of guilt made by accused to Lieutenant Frontera were not shown to have been voluntary. Accused; an enlisted man, had been arrested by Lieutenant Frontera, the officer of the day, and the statements were made in response to questions propounded by the officer. The accused had not been informed of his rights under the 24th Article of War and he had not been advised that he need not make a statement if he did not wish to do so. In the absence of such advice it may reasonably be assumed that accused would feel under compulsion to answer the questions asked of him by the officer who had him in custody, and the absence of threats, promises, or duress was not sufficient to establish the voluntary character of the statements. Under the circumstances the confession was incompetent and should not have been received in evidence (MCM, 1928, Par. 114a; CM 222148, Griggs, Bull. JAG I, p. 158, 13 B.R. 269, 277; CM 237225, Chesson, Bull. JAG II, p. 306, 23 B.R. 317, 319)".

It is our opinion that accused's oral statement was inadmissible and should have been excluded by the court. In this respect military law differs from that of the majority of criminal jurisdictions.

Almost immediately after the oral statement was made, accused was driven to the tent of the Criminal Investigation Division agents,

approximately seven miles away, where a written statement, Exhibit 16, was prepared. Before the statement was written, the agents warned accused of his rights under Article of War 24 and made it clear to him that he would not be compelled to sign the statement and that anything he would say or sign could be held against him. One agent testified "He was willing and wanted to tell and sign the statement". After the statement was prepared accused was taken before Lieutenant Carlson, Adjutant, who explained Article of War 24 to him, after which accused signed the statement.

Does the fact that an oral statement to the effect that accused shot a native, drawn from him under the circumstances hereinbefore related, cause a written statement taken a short time thereafter, after due and proper warning, to be likewise inadmissible? We think not. In coming to this conclusion we are fully cognizant of our opinion in CM IBT 284, Perry. The circumstances here are manifestly different and readily distinguishable from those in that case. There we said:

> "It is believed that a serious irregularity appears with respect to the admission in evidence of accused's written confession (Exs. P-5, P-6). The record discloses that on 20 July 1944, immediately after Perry had been wounded and apprehended, he was questioned at length by CID agents and, after first denying his identity, finally admitted in the presence of four military superiors that he shot Lieutenant Cady. Defense counsel's objection to the admission of testimony as to the statements then made by Perry was sustained by the Law member. The trial judge advocate did not attempt to lay a foundation for the admission of such statements and the matter was not pursued by defense counsel on cross examination. Therefore, except as above indicated, the record is silent as to the nature of Perry's statement of 20 July and the circumstances under which they were made. In particular, there is no showing whether such statements constitute a confession or an admission and, if the former, whether it was voluntary. Manifestly, such circumstances as do appear of record militate against the voluntary nature of any confession then made. Under the reasoning applied in CM ETO 1436 (1944) 3 Bull. JAG 227, if Perry's statements of 20 July 1944 constitute a confession, and if such confession was improperly induced, it may be presumed, in the absence of clear and convincing evidence to the contrary, that the influence of such prior inducement continued with respect to his confessions of 23 and 27 July. Under the circumstances of this case, it is believed that the court should have fully elicited and carefully scrutinized the facts with respect to Perry's statements of 20 July in order to determine that no improper inducement was then used which might have continued with respect to the confessions of 23 and 27 July. It is considered that the court's failure to do so

casts a serious cloud on the admissibility of the subsequent confessions which has not been dispelled by the testimony adduced. Accordingly, it is the view of the Board that Perry's written confessions (Exs. P-5, P-6) were inadmissible and their reception by the court was error".

It is to be noted that in that case no circumstances were shown which would prove that Perry's first statement was voluntary and that the circumstances as a whole pointed to the contrary. It therefore could not be determined whether there was any inducement, duress or intimidation which would carry over and make inadmissible a later confession after due warning. Because of the failure to show such facts under the particular circumstances there, we were of the opinion that the later confession should not have been admitted.

In CM 233543, McFarland, 20 B.R. 21, 22, the board of review stated:

"The first alleged confession of guilt was made on the morning of March 5, 1943 to Captain Brown and Sergeant Warner. Both of these men were military superiors of the accused. Neither witness could clearly explain to what the accused referred when he said 'I did it'. He was not warned in any way that what he might say might be used against him. The rules of evidence quoted above relating to confessions require further inquiry into the circumstances of a confession to a military superior to clearly show its voluntary nature, otherwise it will be rejected. We are of the opinion that the testimony of both of these witnesses should, for the reasons stated, be rejected. This statement is entirely excluded from consideration by the Board of Review in acting upon this case.

"With reference to the confession made to Police Officer Rankin at 1 p.m. on the same day, in the presence of two of the accused's superior officers, the same criticism can be made. There was no warning given him. While it was not shown that the Army officers participated in the questioning, the prosecution failed to show that they did not. It is a fair inference that the police officer acted for the Army officers present in obtaining this confession used in this trial within a few days. The prosecution failed to inquire into the circumstances of the confession in such a manner as to show the voluntary character thereof. While the witness stated that 'the statements' were voluntary (R.76) - a conclusion without facts to support or explain it - yet the witness did not state whose statements were voluntary. It is clear from the record that the accused had no sleep the entire night of March 4-5; that he was questioned most of the morning of the 5th by his commanding officer; that he had been drinking to the extent of

being visibly drunk at midnight and as late as 1:30 a.m. of the 5th. This alleged confession was obtained about 1 p.m. on the same day with four men of authority pressing him. While only the police officer apparently was doing the questioning, the others were present --two of whom were the accused's military superiors. The voluntary nature of the confession under such circumstances is doubtful. The burden of proving it to be voluntary--by showing the circumstances--was upon the prosecution. This it failed to do and therefore the confession should have been rejected from the evidence. This confession is excluded by the Board in considering this case.

"With reference to the third confession obtained from accused, it appears that it was obtained by Lieutenant Ryan, the Army officer detailed to investigate the charges in this case, on the late afternoon of March 6. It should be noted that he was also present the previous day when the accused was questioned by the police officer, Lieutenant Rankin. For the first time, the accused was given a proper warning. The confession was properly admissible in evidence *****".

And in CM 210693, Alexander, 9 B.R. 341, the board of review quoted the assistant corp area judge advocate as follows:

"The second question is whether the confession offered in this case was voluntary. The purported confession was made to Lieutenant Coughlin on the day of accused's arrest. Lieutenant Coughlin testified that he told accused if accused remained silent he would be confined, but that if he satisfactorily explained his actions he would be released. This explanation of his rights left the accused in no doubt but that he should make some statement or face the alternative of confinement in the guardhouse. At this point his statement does not appear to have been made under circumstances showing he acted voluntarily and freely, as required by military law, before the confession may be introduced in evidence. Later, during a formal investigation of the charges, the accused was again informed of his rights to remain silent or to make a statement. He was informed that if he did make a statement such statement might be used against him. The accused, at that time, stated that he wished to stand on the statement he had made to Lieutenant Coughlin and that he had nothing to add to it. This appears to be a reaffirmation of the former statement, after due and proper information as to his rights. I believe the admission of the statement of the accused was proper".

and then said:

"Except that it declines to commit itself as to what its view might be if the confession to Lieutenant Coughlin were the

only one made by accused, the Board concurs in the above and adopts it as a statement of its views. *****"

Insofar as the facts of the instant case are concerned, we agree with the foregoing statement of that board of review. We also believe that the facts in this case are materially different from those appearing in the digest of CM ETO 1486 (1944)(3 Bull. JAG 227). The true test seems to us to be whether the first statement was actually produced by duress or other improper inducement as distinguished from a theory of assumed compulsion as is set forth in the Gonzales case, supra. If in fact the first statement was actually obtained without warning and the facts reveal that in truth no real or actual compulsion was used, we would indeed be reluctant to say that in no event could a later confession be admissible without a warning that a prior statement could not be used against an accused. Especially is this so where the facts surrounding such second statement indicate that it was voluntarily given after due warning. In Lyons v State of Oklahoma, 64 Supreme Court, p. 1208, at page 1212, the Supreme Court stated:

"No formula to determine this question by its application to the facts of a given case can be devised. Hopt v. Utah, 110 U.S. 574, 583, 4 S.Ct. 202, 206, 28 L.Ed. 262; Betts v. Brady, 316 U.S. 455, 462, 62 S.Ct. 1252, 1256, 86 L.Ed. 1595. ***Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. Lisenba v. California, 314 U.S. 219, 240, 62 S.Ct 280, 291, 86 L.Ed. 166. The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime. Ashcraft v. State of Tennessee, 322 U.S.--, 64 S.Ct. 921; Hysler v. Florida, 315 U.S. 411, 413, 62 S.Ct. 688, 689, 86 L.Ed. 932".

Admittedly it is a dangerous and reckless procedure for representatives of military authority to conduct an investigation of crime without first giving proper warning. If in this case there was any indication of threats, duress, intimidation or offer or promise of reward in connection with the making of accused's oral statement, we believe his written statement might have been inadmissible. But here we find no evidence of inducement or coercion which could carry over and indicate that the written statement was other than voluntary in nature. Especially is this true in view of the several warnings given and the assurance that accused would not be compelled to sign the statement but that if he would say or sign anything it could be held against him. Further, the evidence is of a

positive nature that he was willing and wanted to tell and sign a statement. In the Alexander case, supra, the board of review further said:

> "* * *Here again the Board finds a rule of evidence excluding involuntary confessions, on the theory that, if involuntary, the confession is likely to be false, i.e., the statement of an innocent man falsely accusing himself. The rule is of undoubted utility in preventing the use of confessions obtained by torture or so-called third degree methods, but of these there is no suggestion in the present case. As applied in other cases, the rule is of doubtful utility, as the Board considers the likelihood of an innocent soldier falsely accusing himself, except as a result of torture or other very strong pressure, so remote as to be neglibible. The rule is, of course, too well established for the Board to overthrow, and it makes no attempt to do so; but the Board is unwilling to extend the rule in doubtful cases further than the precedents require".

This reflects our opinion as applied to this case, and we therefore conclude that the written statement was properly admitted.

6. A further question arises as to the competency of the deceased's statements, "I was shot by an American soldier", "I was shot down by an American". The record is not clear as to how long after the shots were fired that deceased came for water and made the above quoted statements. However, the longest length of time appearing in the record is one hour. Other evidence sets the time at one-half hour, and there is evidence from which it could be determined that the period of time was five minutes or less. Although Sundram testified that the American soldier was at his house about one-half hour before Lorkay came in, he also said the American came in his house five minutes after Lorkay was shot and that the American came to his house after Lorkay did. There is nothing to reveal where the deceased was from the time the shots were fired until he made the above statements, but it is evident that he had blood on his face and body at that time and later examination revealed that he sustained five bullet wounds in the scalp, left upper forearm, right wrist, the abdomen and the right upper mid gluteal region. Later that night he died. Although his statement cannot be admitted as a dying declaration in view of the fact that no proper foundation was laid, yet the question arises as to its admissibility as a spontaneous exclamation under the res gestae doctrine. The true test concerning spontaneous exclamations is not necessarily when the exclamation was made, although that is an important element to be considered, but whether under all the circumstances the speaker may be considered as speaking under the stress of nervous excitement and shock produced by the act in issue. What the law distrusts is not after-speech but after-thought. As stated in Wigmore on Evidence, Third Edition, Vol VI, section 1747:

"This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and preceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection; the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts".

In Kennedy v. R. Co., 130 N.Y. 656, 29 N.E. 141, as quoted in Wigmore, supra, in Vol. VI, page 143:

"There is no imaginary line somewhere between a few hours and a few days or a few weeks, on one side of which declarations in favor of a party are admissible in evidence, while on the other they are inadmissible. Unless such complaints form a part of the 'res gestae' they are inadmissible; and if they are so far detached from the occurrence as to admit of the deliberate design and be the product of a calculating policy on the part of the actors, then they cannot be regarded as a part of the 'res gestae'".

Wigmore, at page 155, further cites Roach v. Great Northern R. Co., 133 Minn. 257, 158 N.W. 232:

"* * * In passing upon the admissibility of testimony claimed to constitute a part of the 'res gestae' the trial Court determines whether unsworn statements are so accredited that they may go to the jury and be weighed and valued by it, and in determining this it considers whether the statements are spontaneous; whether there was an opportunity for fabrication or a likelihood of it; the lapse of time between the act and the declaration relating to it; the attendant excitement; the mental and physical condition of the declarant, and other circumstances important in determining whether the trustworthiness of the unsworn statement is such that they may safely go to the jury * * *".

Underhill's Criminal Evidence, Fourth Edition, pages 370 and 371 states:

"So, generally in all cases of homicide and assault, the statement by the person injured as to the mode by which the assault had been perpetrated made immediately after the assault

to a person who comes to the assistance of the person assaulted, is competent as a part of the res gestae; the fact that the statement was elicited by a question does not exclude it. And the American cases, as a rule, do not sustain the strict English doctrine that the declarations, to be admissible, must be strictly contemporaneous with the main transaction, if the declarations are illustrative and spontaneous and not mere narratives of what has passed. If there has been an interval of taking advice, or fabricating a story, or preparing a narrative, or incidents intervene which change the declarant's mental condition, or introduce a new motive, the statement can not be used * * *".

"Many crimes involve scenes and actions which, by their exciting character, engross the mind and stir it deeply. The period within which a declaration may be uttered and yet be admissible can, to some extent, be measured by the character of the passions and emotions which exist in the breast of the speaker. Thus, in order that statements should be res gestae on a trial for murder, the speaker must have been prompted to speak solely from the excitement of the event of which it is claimed the statement formed a part, and before he could sufficiently regain his self-possession to be suspected of having made the statement from design. If the declarant is implicated, either as agent or patient, in a murderous assault, the fear, hatred, rage or other passion which customarily accompanies a homicide, or attempted homicide, and engrosses the mind of all participants, may, with reason, be considered to prolong the period during which language may be presumed to be spontaneous. The presence of these passions is not conducive to the mental calmness and deliberation necessary to concoct an untrue narrative declaration. On the other hand the mental distraction which is the result of a mortal wound, the physical shock or nervous excitement which is the result of serious bodily injury, the pain and physical anguish of the sufferer, the danger of death and the urgent need for procuring speedy relief or aid would be very likely to prevent the language of the victim from assuming a narrative or retrospective character. The imperative present needs of the body, filling the mind with apprehension and fear, certainly preclude under these circumstances much mental consideration of past events, or mental preparation or intention to narrate them; and tend to make all language used the reflection of the existing mental condition".

It is apparent, in the light of the foregoing authorities that no hard and fast rule may be set forth but that the circumstances of each case are controlling. In the case at hand there is no showing that deceased would have any cause to fabricate when making the statement in question. On the contrary, it is reasonable to say that under all the facts and circumstances the shock and nervous excitement prevailed without breakdown from the moment of the event

and that such statement was not one made after due reflection. We believe that no error was committed in the admission of deceased's statement.

7. Murder, as defined in MCM 1928, paragraph 148a, is the unlawfull killing of a human being with malice aforethought. "Unlawful" means without legal justification or excuse. Malice does not necessarily mean hated or personal ill will toward the person killed nor an actual intent to take his life or even to take anyone's life. The use of the word "Aforethought" does not mean that the malice must exist for any particular time before commission of the act or that the intention to kill must have previously existed. It is sufficient that it exists at the time the act is committed. As stated in 29 Corpus Juris, page 1085, malice in a legal sense signifies a general malignant recklessness of the life and safety of others, or a condition of mind which shows a heart regardless of social duty and fatally bent on mischief.

> "* * *A homicide which is * * *done in self-defense on a sudden affray, is excusable* * *. To excuse a killing on the ground of self-defense upon a sudden affray the killing must have been believed on reasonable grounds by the person doing the killing to be necessary to save his life or the lives of those whom he was then bound to protect or to prevent great bodily harm to himself or them. The danger must be believed on reasonable grounds to be imminent, and no necessity will exist until the person, if not in his own house, has retreated as far as he safely can. To avail himself of the right of self-defense the person doing the killing must not have been the aggressor and intentionally provoked the difficulty; but if after provoking the fight he withdraws in good faith and his adversary follows and renews the fight, the latter becomes the aggressor" (MCM 1928, par. 148a).

The test of responsibleness applied is that the circumstances surrounding the accused at the time of the killing must be such as would induce a reasonable man so situated honestly to believe that he is in imminent peril and that it is necessary for him to kill in order to save himself from death or great bodily harm. (See 30 C.J., page 62)

In CM 235044, Winters, 21 B.R. 271, the board of review 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)".

Applying the facts in this case to the foregoing principles of law, we believe that the court was amply justified in finding that the homicide was not committed in self-defense but, to the contrary, was unlawful, willful and malicious, and, as such, constituted the offense of murder.

8. The charge sheet shows that accused was twenty-one years old at the time he committed the offense and that he was inducted into the military service on 15 May 1943.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentence. Penitentiary confinement is authorized for the offense (18 U.S.C. decs. 452, 454).

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

/s/ Itimous T. Valentine, Judge Advocate

/s/ Robert C. Van Ness, Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(15)

New Delhi, India
17 April 1945

Board of Review
CM IBT 492

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| UNITED STATES<br><br>v<br><br>Captain Leo A. Wright, 0474125, Air Corps, 69th Army Airways Communication System Group. | XX BOMBER COMMAND<br><br>Trial by GCM convened at APO 493 % Postmaster, New York, N.Y., 29, 30, 31 January 1945. Dismissal, total forfeitures, confinement at hard labor for six months. |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Captain Leo A. Wright, 69th Army Airways Communication System Group, acting in conjunction with Captain J. C. Frazer, 69th Army Airways Communication System Group, did, at Kharagpur, India, on or about 22 December 1944, with malice aforethought, wilfully, deliberately, feloniously, unlawfully and with premeditation kill one Beharilal Kohar and one Nishamoni, both human beings, by shooting them with a .45 calibre, U. S. Army pistol.

(The specification referred to the court for trial read, in part, as follows: "In that Captain Leo A. Wright, 69th Army Airways Communication System Group, and Captain J. C. Frazer, 69th Army Airways Communication System Group, acting jointly and in pursuance of a common intent, * * *" (underscoring supplied). Before arraignment, on motion by the prosecution

and without objection by the defense, the foregoing underscored words were stricken out and the following words substituted, to-wit, "acting in conjunction with Captain J. C. Frazer, 69th Army Airways Communication System Group". The accused was then arraigned on the specification above set out. Such procedure substantially conforms with that prescribed in paragraph 71b, Manual for Courts-Martial, 1928).

3. The accused pleaded not guilty to the Charge and Specification as above set out. He was found not guilty of the Charge, but guilty of a violation of the 93rd Article of War, and guilty of the Specification, except the words "with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation", and substituting therefor, respectively, the words, "wilfully, feloniously, and unlawfully;" of the excepted words, not guilty, of the substituted words, guilty. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for six months. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces, India Burma Theater, for action under Article of War 48. The confirming authority confirmed the sentence but withheld the order of execution and forwarded the record of trial to this office for action under Article of War 50½. The forwarding indorsement (201. Wright, Leo A. (0) 17 (26 Feb 45)), dated 17 March 1945, stated that the rehabilitation center in the service command in which the port of debarkation is located will be designated as the place of confinement.

4. The evidence for the prosecution shows that during the early evening of 22 December 1944, the accused and Captain Frazer were present at a farewell party at the quarters of Major Jones at Hijli Base Area (R. 19, 26). After having several gin drinks, they went to the Hijli Base Officers' Club to eat (R. 26, 27). The accused and Frazer engaged in a playful scuffle at the club which developed into an altercation in which bystanders intervened when Wright lost his temper and struck Frazer on the cheek, causing it to bleed (R. 15, 16, 27, 28). Both Wright and Frazer appeared to be at least slightly under the influence of liquor (R.29). Frazer and First Lieutenant Bogress left the club together and Frazer took Bogress to the latter's quarters in a jeep, arriving there at about 2215 or 2230 (R. 28, 29). At 2254 a jeep with two men in it was checked through the control point on the road leading to Kharagpur. The jeep was numbered 6791. Frazer, who was driving, said his destination was Kharagpur (R. 31, 32). A jeep bearing the numbers 6791 was assigned to Captain Alfred A.

Arraj, who had attended the mentioned farewell party. He saw the jeep at about 1715, 22 December, in front of his quarters and did not see it again until 0930 the following morning, at which time he found that two rocks were in it and that the windshield had been badly cracked. He had not given Captain Frazer permission to use the jeep (R. 20, 21, 22).

At about 2300 that night a jeep was seen proceeding south on Jig-Jig Lane in Old Kharagpur (R. 39, 40, 42). It stopped in front of the brothel of Jagannath Ram (R. 40, 41, 45). A tall, medium build man in uniform got out of the jeep and asked if there were any "bebes" (women) there or if there was any "jig-jig" (sexual intercourse) (R. 40, 81). One Gopinathsahu, hereafter referred to as Gopi, said he did not know, and Jagannath, in response to a similar question, said,"No; bad bebe, bebe got sick" (R. 41, 81). The man in the jeep said, "Come on, come on", and Jagannath heard a "clicking sound" from the jeep (R. 41). The other man indicated with his hand that Jagannath should get in the jeep and, when Jagannath refused to do so, the man pushed him and raised his hand as if to strike, whereupon Jagannath ran away (R. 41, 42, 82). Prior to this, three prostitutes who had been standing outside the brothel went inside (R. 40, 41, 82). The man who had gotten out of the jeep then got in and it drove south. It turned around farther down the street and in about five minutes came back past Jagannath's house (R. 42, 43). Gopi and Jagannath then saw it stop in front of Nishamoni's house (R. 43, 82) and shortly thereafter Jagannath heard three reports, after which the jeep moved off (R. 43). In the meantime, Gopi had gone to the vicinity of Nishamoni's house (R. 82). He positively identified the man who got out of the jeep at Jagannath's house as the man who later got out at Nishamoni's house (R. 82). However, it was stipulated that Gopi had been unable to identify accused or Captain Frazer during a pre-trial investigation of the case (R. 96), and it appears that Gopi then pointed to an officer with a build similar to accused and said, "That looks like him, about the same build and everything, but it is not him" (R. 97).

At about 2300 or 2305 an American jeep containing two men in uniform pulled up to Abdul Alif Miya, Baijuram and Shahwaz Kahn, three constables on duty in Jig-Jig Lane (R. 48, 59, 63). The jeep came from the north (R. 59). One of the occupants, a stout, tall man, got out of the jeep. The one who remained in the jeep asked if there was any jig-jig there (R. 48, 59). Baijuram said there was not and pointed to the south (R. 48, 59). The man who was out of the jeep tried to get Baijuram into the

jeep but Baijuram turned his light on his belt buckle and said he could not go because he was a constable (R. 59). The occupant of the jeep pointed a revolver at Baijuram and pressed the trigger twice (R. 49, 60). The other man held Baijuram's hand until Baijuram pretended that he was getting into the jeep, then Baijuram ran away (R. 48). The man outside the jeep asked Miya where the jig-jig place was. Miya replied, "I am Bengal Police. This is my number and my belt. I am now on duty. I will not go with you because my round officer will come. If he arrests me I will be punished by my officer" (R. 49). The man in the jeep was calling out "Come on, come on", and was clicking a revolver (R. 49). Shahwaz Kahn answered the inquiries of the men by saying, "No jig-jig, syphilis" (R. 64). The man in the jeep also pointed the pistol at Shahwaz Kahn, resting it on the jeep about eighteen inches from Kahn (R. 64). The jeep then turned around and went north (R. 49). About seven or eight minutes later, three reports were heard (R. 51, 64, 65). Alif Miya and Shahwaz Kahn went to the scene of the shooting and found a dead man, Beharilal (sometimes referred to as Behari), on the ground with a wound on his right cheek and at the back of his head, and a woman, Nishamoni, with blood stains on her cloth, was being taken away (R. 51, 52, 65). Between ten and twelve (R. 52) or eight and ten people (R. 65) were at the scene. None of the constables were able to identify the occupants of the jeep (R. 49, 61, 65).

When the jeep stopped at the house of Beharilal and Nishamoni, a tall, broad man, whom Gopi identified as the accused, got out, walked up to the front of the house and lifted the bamboo tat covering hanging in front of the house (R. 74, 82, 83). Beharilal and Nishamoni were sitting on the veranda, eating. The man asked Behari, "Is there a bebe", and Behari replied in Indian, "There is no bebe here" (R. 83). The man then walked into the veranda and Nishamoni got up and went into the room (R. 83). The man asked Behari for the lamp (R. 83). Behari refused to give it to him, the man tried to pull it away from him, and they went outside of the veranda where Behari dropped the lamp (R. 72, 83). The man then slapped Behari on both cheeks (R. 72, 83). Both antagonists fell to the ground (R. 73, 83). Behari got up first (R. 83), at which time the occupant of the jeep fired one shot toward the roof of the house (R. 73, 83). He then fired toward Behari who fell to the ground (R. 73, 83). Nishamoni came out of the house saying, "My husband is shot" or "My husband is dead" (R. 68, 83). One witness testified that she picked up and threw some stones (R. 68), but other eyewitnesses denied this (R. 75, 79). No other attack was made on the two

men (R. 83). The man in the jeep fired toward Nishamoni and she fell to the ground (R. 73, 83). The man who had been out of the jeep got in it and they drove away (R. 74, 83). The other man had remained in the jeep from the time it stopped and each of the three shots were fired from the jeep (R. 74, 78).

Beharilal's death occurred at the scene of the shooting and was attributed to shock and hemorrhage resulting from gunshot injuries (R. 14, 18, 56). Nishamoni died at 0530, 23 December 1944, as the result of a bullet wound in the abdomen (R. 14). The margins of both wounds were scorched (R. 14).

The town of Old Kharagpur, including Jig-Jig Lane, was off-limits on 23 December 1944 (R. 92, 97; Exs. 11, 13). At about 2325 that night Captain Jones, the base provost marshal, saw jeep No. 6791 as it came off the off-limits area (R. 96). He followed it through the control point (R. 96), which it passed at about 2335 (R. 35). Later that night Captain Jones went to Captain Frazer's quarters, woke Frazer, and asked him if he had been off the base that night. Frazer admitted that he and Wright had been. Jones then took Frazer's .45 automatic, No. 1436666, from Frazer's suitcase. It had six cartridges in the clip and one in the barrel. He looked in the barrel of the pistol and smelled it and stated that in his opinion it had recently been fired (R. 94, 95). Bullets subsequently fired from the pistol, a lead slug and an empty cartridge found at the scene of the shooting, and an empty cartridge found in the jeep on 23 December were given a ballistic test (R. 34, 35, 56, 57, 87, 94; Ex. 16). It was stipulated that if one D. G. Hart, an arms and ballistics expert, were present he would testify that the two empty shells and one flattened bullet were, in his opinion, fired from .45 caliber Colt pistol No. 1436666 (R. 94, 95).

Captain Frazer was called as a witness for the prosecution (R. 10). He testified that he had known the accused since about 10 November; that he and accused were together at the Hijli Officers' Club on 22 December; that they went off the base in Captain Arraj's jeep; that he (Frazer) had his .45 pistol with him; that he fired three shots from it in Old Kharagpur at about 2245 or 2300; that at the time the shots were fired accused was "out of the jeep, laying on the ground with a bunch of natives over him"; that he and accused left the scene and returned to the base together (R. 11-14). He answered in the affirmative when asked whether the shots struck anybody (R. 14).

5. The defense elicited testimony, through the accused and Captain Frazer, to the following effect: They drank some gin drinks at a farewell party at the quarters of Major Jones and Captain Arraj early in the evening of 22 December. At 2000 Frazer borrowed Captain Arraj's jeep, and the accused, Frazer, and Lieutenant Bogrees went to the officers' club for sandwiches and drinks (R. 108, 139). While at the club, Wright and Frazer had a scuffle, Wright struck Frazer, then apologized (R. 109, 139, 140). Wright left the club first. After driving Bogrees to his quarters, Frazer overtook Wright. They decided to go for a ride, but stopped at their quarters first. Wright was standing at the door of Frazer's quarters when the latter commented that he had not packed his gun. Wright suggested that he bring it along as they might see a jackal to shoot (R. 110, 140). Frazer put the pistol in a crevice behind the seat of the jeep (R. 110) but Wright did not see him do this (R. 141) and did not inquire if he had brought it (R. 110). They passed through the control point, drove to Kharagpur, and finally entered the lane where the shooting occurred (R. 111, 141). Frazer had not been off the field before and was not familiar with the roads in the vicinity (R. 110), and Wright denied having previously been on that street or in that part of town (R. 160, 166). Neither of them saw any off-limits signs, they did not talk about women, were not looking for jig-jig (R. 111, 141), and did not talk to a brothel keeper (R. 111, 120, 141). After they had driven down the street a way, Wright remarked that they were probably out of bounds, so they turned around at the first opportunity (R. 111, 142). They saw a uniformed man, apparently a Gurkha guard, near where they turned around. Accused motioned to him to come to the jeep, took hold of his belt buckle, and tried to buy it from him. He could not understand what the guard said, so turned him loose (R. 111, 142). Wright had not yet seen the pistol or holster in the jeep (R. 143). After turning, they drove about one hundred or one hundred and fifty yards down the street (R. 112) and came on a native standing beside the road waving a lantern (R. 112, 143). Wright said, "Let's stop and see what he wants" (R. 112, 143). They stopped a short distance beyond the native, Wright got out, and walked back to him. The native, who was weaving slightly on his feet, held the lantern up, looked at Wright's face, and said something in a foreign tongue. Wright said, "What's the matter, Joe, too much bamboo juice", and the native swung the lantern up in a threatening manner (R. 112, 144). Wright grasped the lantern and began to jerk it, whereupon the native reached down and picked up what Wright assumed to be a rock (R. 144). Frazer

shouted, "Stop", or "Halt". Accused released the lantern and slapped or shoved the native in the face. The native did not fall but, instead, lunged at accused with his head down, causing accused to trip and fall with the native on top of him (R. 112, 144). The native struck at accused's head with the stone but accused blocked the blow with his hand, thereby scratching his wrist. Accused started to rise, whereupon three or four other natives "piled on top" or "jumped" on him (R. 144). At about this point Frazer picked up the pistol and fired one shot in the air (R. 112). The natives were beating accused, striking him on the back, ear and skull (R. 144, 145). Frazer was ten or fifteen feet away. He fired at one end of the group of natives, then at the other end (R. 113). The three shots were fired about thirty seconds apart (R. 124, 125). He thought at the time he would hit someone (R. 126) and he fired in an attempt to save Wright (R. 135). Wright did not call for help (R. 160). Rocks were flying and hitting the jeep (R. 113, 145). Accused rolled over, got on his hands and knees, rose to his feet, got to the jeep, and they drove away (R. 113, 144, 145). On the way back to the base, Wright asked if Frazer fired the shots and Frazer said he had (R. 114, 145). On reaching Frazer's quarters at the base, Frazer filled the clip of his pistol with some loose shells and put the pistol in his bag. Wright asked him if he hit anyone when he fired and Frazer said, "I don't think so" (R. 145), or, "No, I am sure I didn't; I didn't see anybody fall" (R. 114). Wright's trousers were dirty and his knees were skinned, but he brushed the trousers and wore them the next day (R. 166). On 23 December, both Wright and Frazer denied, in statements to Captain Jones, that they had any knowledge of a shooting, but they admitted they had been off the base (R. 126, 128, 146). Later, when told that a ballistics test was to be made and that their previous statements would be forgotten (R. 132) and the shorthand notes thereof returned to them (R. 146), they made statements setting forth the facts substantially as related by them at the trial (R. 132, 137, 146).

When accused was asked on cross-examination if he had previously been on any street near Jig-Jig Lane, he replied, "I don't know. I was out-of-bounds one time and given a two months' restriction to the post for being caught out-of-bounds" (R. 166). On further examination, he stated that he and two other captains attended a party at Kharagpur on 2 October 1944. On leaving the party they gave two enlisted men a ride toward their station. One of the enlisted men wanted to go to a place where gin was available and after some discussion, the driver of the jeep

agreed to take them. They met some military police, the two enlisted men got out and talked to the military police, then returned to the jeep and said that everything was all right but did not say they were out-of-bounds. Wright further testified, "They [the M.P.'s] caught us later and told us to get out. They told us and we left the out-of-bounds area right away" (R. 167).

6. The prosecution, in rebuttal, offered evidence showing in substance that on 2 October 1944, Wright, two other captains and two enlisted men were stopped in the vicinity of Jig-Jig Lane by military police and warned that they should not go there or they would be placed in arrest; that shortly afterward on the same night the five men, including Wright, were apprehended in an off-limits area adjacent to Jig-Jig Lane (R. 176-186).

Captain Jones testified on rebuttal that accused told him on 23 December that he was then wearing the same clothes he had on the night before; that the clothes appeared to have been worn but were not torn or extremely dirty; that accused had a small bruise around or behind his ear (R. 186, 187).

7. At the close of the case for the prosecution, and after it had been stipulated that Captain Frazer, who was jointly charged with accused, had been separately tried and acquitted by another court, the court overruled a "motion for a directed verdict" in which the defense urged, in substance, that as a matter of law the acquittal of Captain Frazer as the actual perpetrator of the offense alleged precludes conviction of the accused as aider and abetter (R. 100-105).

The common law rule followed in England and in several jurisdictions in the United States appears to be as follows:

> "If a person charged as principal in murder be acquitted, a conviction of another charged in the indictment as present aiding and abetting him in the murder, is good. Holt, C. J., said: 'Though the indictment be against the prisoner for aiding, assisting, and abetting A, who was acquitted, yet the indictment and trial of this prisoner is well enough, for all are principals, and it is not material who actually did the murder'" (Russell on Crimes and Misdemeanors, 8th Ed., Vol. I, p. 118)(Also see Wharton's Criminal Law, 12th Ed., Vol. I, sec. 260).

A contrary rule has been followed in other jurisdictions in the United States (22 C.J.S. pp. 172, 173, note 83 and 84). This contrary rule, it is believed, represents an archaism devolved from the technicalities of common law criminal pleading. The substantive reasons in support of the rule first stated (Russell, supra) are considered compelling, that is, the aider and abetter should not escape punishment simply because his principal was acquitted owing to technical rules, the unavailability of evidence, the capriciousness of a court or similar reasons (cf. 12 Harvard Law Rev. p. 282; 45 id; p. 930). However, regardless of the common law rule, it is well established that, under the Federal statute (Criminal Code, sec. 332; 18 U.S.C.A., sec. 550) and similar statutes abolishing the distinction between principals and aiders and abetters, the acquittal of a principal does not preclude conviction of one who aids and abets. The rule is stated as follows:

> "Under statutes as to the punishment of principals in the first and second degrees, the court may, it has been held, in its discretion put a principal in the second degree on his trial and he may be convicted, before the trial and conviction of the principal in the first degree. Moreover, this has been held to be so notwithstanding the alleged principal in the first degree has never been apprehended, or has escaped or died, or has been acquitted. Further, the effect of a statute authorizing the prosecution of one who aids or abets as if he had directly committed the offense has been held to permit the prosecution of one who aids and abets without regard to the conviction
> —/ or acquittal of one, who under the common law would have been called a principal.* * *" (22 C.J.S. p. 172)(Also see 14 Am. Jur. pp. 831, 832).

For the foregoing reasons, the Board of Review concludes that the proposition advanced by the defense in support of its motion is legally untenable and that the motion was properly overruled.

8. The evidence is uncontradicted that accused and Captain Frazer were together at the scene of the shooting and that Frazer fired the fatal shots after the accused had engaged in a struggle with Beharilal, one of the deceased. Beyond this, the evidence adduced by the prosecution and defense is sharply contradictory. However, in cases of this nature, it is not the function of the Board of Review or the Assistant Judge Advocate General to weigh the evidence, judge the credibility of the witnesses, or determine

controverted questions of fact; instead, it is their function merely to determine whether there is in the record any substantial evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty (Dig. Op. JAG 1912-40, sec. 408(2)) (CBI 40, 109, 110). The evidence in the case will be considered accordingly.

There is in this case competent, albeit partly contradicted, evidence, direct or circumstantial, showing in substance that, on the night of 22 December 1944, the accused and Captain Frazer went to Jig-Jig Lane, an out-of-bounds brothel area, for the purpose of visiting a house of prostitution; that Frazer, at Wright's suggestion, brought with him a .45 caliber automatic pistol; that they stopped at a brothel where Wright, in Frazer's presence and without provocation, assaulted the brothel keeper; that almost immediately afterward they asked three constables to show them to a brothel and, when the constables refused to do so, Wright forcibly detained one of the constables and endeavored to force him into the jeep and that Frazer threateningly pointed his pistol at two of the constables; that they next proceeded to the house occupied by the decedents, which Wright entered by trespass and where he committed an unprovoked assault and battery on Beharilal; that Frazer, on seeing Wright so engaged, shot Beharilal and Nishamoni, who had intervened to help her husband.

The following principles of law are considered apposite in the light of the foregoing evidence:

> "Where there is a general resolution against all opposers, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behavior, at or before the scene of action, and homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him who gave the mortal blow. Thus, where several persons are together for the purpose of committing a breach of the peace, assaulting persons who pass, and, while acting together in that common object, a fatal blow is given, it is immaterial which struck the blow, for the blow given under such circumstances is in point of law the blow of all, and it is unnecessary to prove which struck the blow" (Russell on Crimes and Misdemeanors, 8th Ed. Vol. I, p. 117).

"All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. Thus, if several persons come armed to a house with intent to commit an affray or a personal outrage (such affray or outrage having bloodshed as a probable incident), and a homicide ensues while the assailants are engaged in such illegal proceedings, then even those who may not actually participate in any overt act of outrage will be principals in the homicide" (Wharton's Criminal Law, 12th Ed., Vol. I, pp. 343, 344).

"The rule holding one responsible for a homicide committed by his confederate in the furtherance of a common design has been applied where the common object or purpose was to commit or perpetrate an assault involving the element or consideration of danger to human life; a breach of the peace, particularly if involving personal violence or the use of deadly weapons; * * *" (40 C.J.S. pp. 845, 846).

"* * * The actual perpetrator is considered as the agent of his associates and his act is their act; and under such rule, according to the authorities, his intent is imputable to the others. Responsibility attaches although the taking of life was not specifically intended or contemplated by the parties or involved in the plan, or was even forbidden by accused; and the fact that accused regretted that the killing had occurred in no way lessens his responsibility.

"A common design need not have existed for any particular length of time before the commission of the homicide; it is sufficient if there was a community of purpose between accused and the direct actor at the time the homicide was committed" (40 C.J.S. pp. 844, 845).

The evidence adduced is clearly susceptible of findings that accused and Frazer went to an out-of-bounds area in search of illicit intercourse and there jointly embarked on a riotous course of misconduct involving simple assault and battery and the threatening display of a dangerous weapon. The evidence further indicates that each party not only acquiesced in the

other's misconduct but actually incited and encouraged the other to further wrongdoing. Under these circumstances, the court was justified in finding that there was a community of purpose between the accused and Frazer when they stopped at the house of Beharilal and Nishamoni and that such community of purpose was not innocent in nature but involved not only a search for illicit intercourse but also partook of the nature of and was in effect a continuation of their previous acts of violence and disturbance of the peace. From this point on, under the authorities quoted, the act of one in the furtherance of the common design became the act of the other. Thus, Wright's trespass and assault, which, under all the circumstances, clearly involved the element of danger to human life, was the act of Frazer, and the act of Frazer in shooting the decedent was the act of Wright. In short, both were equally responsible for the criminal acts of the other. Accused may not be heard to complain that he was unarmed and that he did not intend that Frazer should resort to taking human life. There is evidence that he knew Frazer was armed and he should reasonably have known that homicide might be the plain and direct consequence of the violence that he had precipitated (40 C.J.S. p. 845, supra)(cf. State v Darling, 216 Mo. 450, 115 SW 1002). The evidence amply supports the findings of guilty of manslaughter.

9. The court was legally constituted. The sentence adjudged was authorized by law. The court had jurisdiction of the subject matter of the offense charged and of the person of the accused. No errors injuriously affecting the substantial rights of the accused intervened upon the trial. The Board of Review is of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings of guilty and the sentence.

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

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

CM IBT 492 (Wright, Leo A.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, New York, N. Y., 18 April 1945.

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

1. In the case of Captain Leo A. Wright, 0474125, Air Corps, 69th Army Airways Communication System Group, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 492).

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

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(Sentence ordered executed. GCMO 12, IBT, 18 Apr 1945)

New Delhi, India
4 May 1945

Board of Review
CM IBT 506

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| UNITED STATES<br><br>v.<br><br>First Lieutenant Elkins M. Howard, 0925557, CE. | SERVICES OF SUPPLY<br><br>Trial by GCM convened at APO 629, % Postmaster, New York, N. Y., 14 February 1945. Dismissal. |

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

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

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

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

Specification: In that 1st Lt. Elkins M. Howard, C.E., 20th Dist. Eng., did, at Chabua, Assam, India, on or about 30 December 1944, with intent to do her bodily harm, commit an assault upon 2nd Lt. Adele B. Yozates, ANC, by willfully and feloniously striking the said 2nd Lt. Adele B. Yozates in the mouth with his fist.

CHARGE II: (finding of not guilty)

Specification: (finding of not guilty)

Accused pleaded not guilty to both charges and specifications. He was found not guilty of Charge II and its Specifica-

tion and guilty of Charge I and the Specification thereunder. There was no evidence of previous conviction. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial under Article of War 48. The confirming authority confirmed the sentence but remitted the forfeiture. The execution of the sentence was withheld and the record of trial was forwarded to this office for action under Article of War 50½.

3. With respect to the specification of which accused was found guilty, the evidence of the prosecution discloses that on the evening of 29 December 1944 (R. 57) accused had a social engagement with Second Lieutenant Adele B. Yozates, ANC, 234th General Hospital (R. 33, 34, 57). After having a drink (R. 41), they left the 234th General Hospital, Chabua, Assam, India (R. 57), and drove to the 51st Service Club and the 20th Engineers' Basha where they again had some drinks (R. 36, 37, 41, 46, 53, 54, 57). While at the basha there was ill feeling manifested between the two, for it appears that accused threatened to strike Lieutenant Yozates and that she screamed (R. 37, 39). She asked him to take her home (R. 37) and he agreed to do so (R. 38, 43, 44, 49). Up to this point his behavior had been satisfactory (R. 44). They left the basha at about 0200 hours (R. 37) and when they were some distance along the road the jeep was stopped, Lieutenant Yozates got out, and a struggle followed (R. 38) as a result of accused's effort to get her back in the jeep. During the altercation accused dragged her a short distance (R. 38, 39, 40). She was crying and screaming (R. 39). Accused drove the jeep toward the nurses' barracks but he stopped again for Lieutenant Yozates to go to the latrine (R. 34). However, her real purpose was to get out of the jeep, go to her barracks and free herself from accused's unwelcome advances (R. 36, 38, 43). He did not try to hold her in the jeep (R. 39, 40) and no struggle occurred while they were in the jeep (R. 34, 41, 47). This was about 0300 hours (R. 34, 38, 73). She got only about thirty feet from the jeep in the direction of her quarters which were only a short distance away (R. 36, 40). Accused overtook and grabbed her, and another altercation and struggle ensued during which accused said he would not let her go and "that he would have me and would knock me out" (R. 34). He struck Lieutenant Yozates in the mouth with his fist with sufficient force to knock out three of her upper front teeth, lacerate her lower lip and knock her down (R. 34, 35, 36, 40, 42). Lieutenant Yozates bled freely from the injury to her mouth (R. 17, 30, 31, 42). She asked accused to take her to the hospital but he declined to do so or otherwise render assistance to her (R. 24, 34, 35, 40). After striking Lieutenant Yozates accused went back to the jeep and with some object in his hand smashed the windshield from the inside by the application of

several blows (R. 35). Accused then remarked that Lieutenant Yozates would not get him in trouble and that he was going to fix it up so it would look like an accident (R. 35).

They got in the jeep and drove to the area of the 1332nd Army Air Forces Base, Mohanbari, Assam, India (R. 16, 17, 23, 29, 30, 57), where they were halted by a sentry at Military Police Gate No. 1 (R. 23, 27, 29, 30, 41, 46). It was then 0300 or 0330 hours (R. 24). Just as the jeep stopped, Lieutenant Yozates jumped out and shouted, "Help! M.P.! Don't let him get me. He will kill me." (R. 24), or "M. P.! M.P.! Help! Don't let this man get me. He will kill me" (R. 30). She was crying (R. 30). Accused told the sentry that he was trying to take the lady home. She insisted she didn't want him to and she would not let him get close to her (R. 27, 33). When he came near her she clung to the sentry on duty (R. 33). Lieutenant Yozates was at that time holding a handkerchief to her freely bleeding mouth (R. 17, 30). The sentry gave her another handkerchief and soon that too was filled with blood (R. 30). She called accused a "wolf" and said he had knocked her teeth out and smashed the windshield (R. 22, 24, 30). Accused denied striking or touching her and gave as the reason for her injury that he had run off the right side of the road over an embankment, throwing both of them into the windshield with sufficient force to smash the windshield, break Lieutenant Yozates teeth out, and otherwise injure her (R. 9, 27, 30, 31, 47, 53, 57). She at all times denied that the jeep ran off the road (R. 41). When asked by the sentry where the incident occurred, accused failed to answer (R. 30). Accused then held out his hands palms up (R. 27, 30, 31) and put them back in his pocket (R. 24, 25), saying, "Look at my hands, can you see any blood on them?" (R. 31), or "You don't see where I hit her" (R. 25). He did not show the back of his hands. There was blood on the back of his hand (R. 25, 31) about one inch above the third knuckle (R. 18, 27, 31). At this time one of the guards brought Captain Charles A. Hagemeister, AC, 1332nd AAF Base Unit, who was officer of the day (R. 17) to the gate (R. 25, 30, 33). Lieutenant Yozates told Captain Hagemeister that accused had hit her in the mouth and knocked her teeth out (R. 17). Accused again insisted that he had run into a ditch and that her teeth were knocked out as she was thrown against the windshield (R. 17, 24). He said that Lieutenant Yozates was under the influence of liqour and could not be believed concerning the altercation and her injuries (R. 26, 27, 28, 30, 31). Lieutenant Yozates appeared to have been in a tussle (R. 28) and was in a very nervous condition at the time (R. 18). The officer of the day and the guards observed that the windshield of the jeep was smashed (R. 18, 26, 30, 32). There was one or two (R. 53) smears or spots of blood on the windshield (R. 19, 21, 23). The windshield was offered into evidence as Exhibit "B" (R. 19).

Lieutenant Yozates wanted to be taken to the hospital (R. 17),

but objected to being accompanied by accused (R. 20). Accused insisted on going and was allowed to accompany Captain Hagemeister and Lieutenant Yozates (R. 20, 22). Both Lieutenant Yozates and the accused had the odor of liquor on their breath (R. 22). Accused told Captain Hagemeister he had never been in trouble before, that he was married and had children (R. 20).

During the early hours of the morning of 30 December Captain Walter A. Hamburger, 234th General Hospital (R. 6), was called to see Lieutenant Yozates (R. 7). Upon examination he found three of her teeth were missing (R. 85) from the upper jaw (R. 7). The wound was covered with blood clot which he did not disturb (R. 7, 12). In addition to her missing teeth, she had a laceration of the lower lip (R. 7, 8, 12, 85). Lieutenant Yozates told Captain Hamburger in the presence of accused that accused had hit her in the jaw when she resisted his advances. Accused answered that she was hysterical and that Captain Hamburger should pay no attention to her on that account (R. 9). Accused added that there had been a jeep accident, but she strongly denied this. In the opinion of Captain Hamburger, the injury sustained by Lieutenant Yozates was caused by a "localized blow" from a blunt object such as a baseball and could have been caused by a fist (R. 9, 85). Captain Hamburger also observed a superficial abrasion of the skin of the third proximal knuckle of the right hand of accused (R. 7, 8, 10, 13). There was no injury seen on his left hand (R. 10, 14, 15), nor was there injury to the palms or backs (R. 13) of accused's hands (R. 10, 14, 15). The injury to accused's hand would likely be produced by striking a protruding surface something like a tooth (R. 10) but could possibly have been done by striking a smooth surface (R. 13). Accused said to Captain Hamburger, "You know, Captain, anyone can make a mistake" (R. 11). There was no clarification of this statement by accused. Following the examination, accused was taken into custody by an officer of the Military Police (R. 12, 14).

At about 0600 hours an examination of the jeep was made to ascertain whether there were signs indicating that it had been driven off the road. There were no weeds or dirt or anything else to indicate that the jeep had been driven off the road as claimed by accused (R. 18, 47, 51, 52). No part of the jeep was broken or bent except the windshield (R. 19, 20). At about 1100 hours accused went with Major Cullum to a point on the road where he claimed the jeep was run off the road and Lieutenant Yozates injured (R. 47). Major Cullum examined the place where accused said he thought the accident occurred but could not see any sign of tire tracks and no sign whatever of a vehicle having gone off the road (R.51, 52) within the previous twelve to eighteen hours (R. 48). In the opinion of Major Cullum, the grass would have shown some signs if a jeep had gone off at that place (R. 47, 51, 52). The breaks in the windshield could have been caused by several blows with the fist (R. 50). There was a loose but undamaged metal fire extinguisher in the jeep (R. 53).

4. Accused, after being warned of his rights under the 24th Article of War, became a witness in his own behalf, the substance of his testimony being as follows: He met Lieutenant Yozates on 22 December and a date for a dinner party with some other friends was arranged but not filled (R. 59). On the evening of the 29th of December at about 1930 hours, pursuant to a date arranged by a medical officer at the hospital, he called for Lieutenant Yozates at her quarters where they had some drinks. From there they went to several places including the 51st Service Club. They had some more drinks at the club and had a good time generally. There was no trouble between them at that time (R. 59). On the way back they stopped at a basha, built a fire, had a drink "and did some more necking on the couch in front of the fireplace". At about 0200 hours, Lieutenant Yozates, according to the accused, did not desire his company and "simply became somewhat contrary" (R. 60, 73) "and when I told her I would take her home she said she wouldn't go home at that time" (R. 60, 72). They finally started but, at a distance of about fifty or seventy-five yards from the basha, she wanted to get out of the jeep. Accused reasoned with her and tried to get her to go back with him to the hospital (R. 60). A tussle between them followed. He picked her up and put her back in the jeep where she sat quietly for a while (R. 60). About a half or three-fourths of a mile farther she wanted to get out of the jeep again. Accused put his arm around her and just before the turn on to the main road he ran the jeep off the side of the road and over a bank (R. 60, 62, 65, 70, 75). The jeep at that time was going about twenty or twenty-five miles per hour (R. 62, 71). The jeep swung around and dropped off the embankment. Accused slammed on the brakes (R. 75) and swung the jeep to the left (R. 61, 62). Upon application of the brakes, both occupants of the jeep were thrown forward against the windshield (R. 71, 72, 75) breaking it and injuring Lieutenant Yozates (R. 62). Accused then picked her up, put her in the jeep and drove to the gate where he was halted (R. 63). Here Lieutenant Yozates told the guards of her injuries and that accused had hit her in the mouth with his fist. Accused insisted to the guards that her story was not true (R. 63). Accused admitted going with Major Cullum to point out the place where he had driven the jeep off the road but contended that the Major took only about thirty seconds to view the scene from the jeep (R. 64). Accused was himself unable to see anything to indicate where he had run off the road (R. 65). He catagorically denied hitting or striking Lieutenant Yozates (R. 65, 73). Accused received treatment for his injured hand which, for three days after the incident, was swollen "about three times its normal size" (R. 65, 66). The swelling commenced at the knuckles and went up the wrist (R. 66). He denied having any scratches on his fingers but claimed that the abrasion referred to was on the back of his hand (R. 66, 77). The windshield of the jeep was in good condition before the incident (R. 66). Accused was of the opinion that Lieutenant Yozates did not come in contact with the windshield but with his arm which in turn hit and broke the windshield (R. 62, 71).

Some time after the incident a jeep was driven off the road at the point indicated by the figure 4 on Defense Exhibit "3" to ascertain whether marks or signs would be left. No tracks or other visible signs appeared on the road or in the grass in the field (R. 76). This operation was observed by Captain Merritt W. Davis, 129th Chemical Processing Company (R. 75- 76).

Sergeant Walter P. Donahue, Intermediate Section No. 2 (R. 78), pointed out the location of his quarters and other objects on Defense Exhibit "3" and stated that he heard no scream at about 0100 hours on the morning of 30 December 1944 although his basha was near enough to the point of the altercation for him to have heard a scream (R. 79). He could not recall whether he was awake at about that hour in the morning (R. 80

Captains Paul H. McCall and Allen L. Byrd, 234th General Hospital, testified that accused had a good reputation (R. 82).

5. A question arises as to the competency of the exclamations and statements made by Lieutenant Yozates at the military police gate and the hospital. All the evidence on this point tends to prove that immediately after the jeep was stopped at the gate she jumped out and called for help and the protection of the sentries there on duty. She repeatedly stated that accused had assaulted her and knocked her teeth out. As her accusations were denied by accused, they are clearly incompetent unless they may be considered as part of the res gestae. Looking at all the facts as they appeared to the court, we find no reason to say it was incorrect in receiving this testimony upon the doctrine of res gestae. While the length of time which elapsed between the assault and the statements does not definitely appear, it is fair to assume from the evidence that it was not more than thirty or forty minutes. The time element, while not controlling, is important upon the question of spontaneity and is to be considered along with all other facts in determining the competency of such statements. In the present case Lieutenant Yozates had received a severe and shocking wound from which she was bleeding freely and over which she was crying. She was in such a state of fright and nervousness that she jumped out of the jeep at the first opportunity and called to the guards to rescue her. While describing the assault to the guards and to the officer of the day in the presence of accused, whose presence seemed to frighten her, her nervous strain was so great that she actually clung to the guard for protection. The accused himself described her condition as hysterical and gave that as a reason why her statements could not be believed. While being examined by Dr. Hamburger at the hospital, she repeated her charge that accused had assaulted her and injured her. Accused again made the statement that she was hysterical. We think these facts were sufficient to justify the court in concluding that her injury and excitement were sufficient to preclude the probability of reflection and deliberation and guarantee the trustworthiness of her statement.

In support of the admissibility of this evidence the following excerpts of law are quoted.

"* * * No hard and fast rule can be laid down as to the admissibility of evidence as a part of the res gestae. The facts and circumstances presented in different cases vary so widely that the courts have come to the point of adjudging this question as it is presented by the particular case under consideration; and the admissibility vel non of evidence as a part of the res gestae is a matter resting very largely in the discretion of the trial court. The tendency of the courts, however, has been to extend rather than narrow the matters which may be admitted under the res gestae doctrine" (32 C.J.S. par. 403, pp. 21, 22).

"* * * The modern tendency seems to be to treat spontaneity as a substitute for contemporaneousness, * * * and, while the time element is always important in determining whether a statement should be admitted as a part of the res gestae, it is not controlling, * * *" (Id. par. 411, p. 30).

"* * *There can be no definite and fixed limit of time within which statements must be made to become a part of the res gestae, but each case must depend on its own circumstances, and the trial court must be allowed some latitude in the matter, the burden being on the party offering the evidence to show such connection as makes it admissible.

"In accordance with these rules, facts or statements which, although subsequent in point of time to a personal injury, follow at once thereafter and serve to characterize the occurrence, or which are done or made under such circumstances as to exclude the possibility of premeditation or design and which are so close to the injury as to be fairly a part of the occurrence, are admissible as part of the res gestae" (Id. par. 413, pp. 37, 38).

"In order for a declaration to be admissible as a part of the res gestae, it must be the spontaneous utterance of the mind while under the influence of the transaction, the test being whether the declaration was the facts talking through the party, or the party talking about the facts. The test has also been declared to be whether the statement was made under such circumstances of physical shock or nervous excitement as to preclude the likelihood of reflection of fabrication" (Id. par. 417, pp. 45, 46).

"* * *A statement will ordinarily be deemed spontaneous if, at the time when it was made, the condition of declarant was such as to raise an inference that the effect of the occurrence on his mind still continued, as where he had just received a serious injury, was suffering severe

pain, or was under intense excitement.* * *

* * * * *

"In determining the question of spontaneity, it is important to consider the form and nature of the statement and the circumstances under which it was made.* * *" (Id. par. 419, pp 51, 52).

6. Over objection of the defense counsel Captain Hamburger was allowed to testify:

"I had the feeling that the accused had struck one of the nurses of my hospital and that as long as I had the authority that I would prefer charges or have him put in custody so that charges could be preferred. I had a personal impression of his guilt and I had the authority, which the M.P.'s told me I had, to have him put in custody" (R. 14).

This is merely an expression of the personal and individual opinion of the witness and, therefore, wholly incompetent (Dig. Op. JAG 1912-40, sec. 395 (23)). However, in the light of all the evidence adduced in the case this error did not prejudice any substantial right of accused.

7. There is here presented a clear-cut issue of fact which was a matter addressed to the court and reviewing authority rather than to this Board of Review. It suffices to observe that there is substantial evidence to support the testimony of the prosecuting witness and abundantly justify the court in rejecting accused's contention that Lieutenant Yozates's injuries were the result of a motor accident. Such evidence shows that, in the early morning of 30 December 1944, accused and Lieutenant Yozates were returning from a date which took them, among other places, to the 51st Service Club, where they had some drinks, and to the 20th Engineers' Basha, where some disagreement arose between them and where accused threatened to slap his companion. They stopped on the road back to the nurses' quarters for the ostensible purpose of allowing her to go to the latrine but for the real purpose of giving her an opportunity to absent herself from accused's presence and free herself from his unwelcome advances. When she had reached a point about thirty feet from the jeep, accused overtook her, struggled with her and hit her in the mouth with sufficient force to knock her down and knock out three of her teeth. He then went back to the jeep and smashed the windshield to make it appear that an accident had been responsible for her injuries. That the assault was committed with intent to do bodily harm is manifest in view of the injuries inflicted. The evidence amply justified the court in finding accused guilty under the 93rd Article of War (Par. 149n, MCM 1928).

8. The charge sheet shows accused was thirty years old

at the time he committed the offense and that he was commissioned first lieutenant, CE, AUS, 23 September 1943, and entered on active duty 8 October 1943.

9. The court was legally constituted and had jurisdiction of the person and the offense. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. Dismissal is authorized under the 93rd Article of War.

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

/s/ Itimous T. Valentine, Judge Advocate

/s/ Robert C. Van Ness, Judge Advocate

CM IBT 506 (Howard, Elkins M.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, U. S. Army, 5 May 1945.

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

1. In the case of First Lieutenant Elkins M. Howard, 0925557, C.E., attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 506).

/s/ William J. Bacon
/t/ WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

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(Sentence as modified ordered executed. GCMO 13, IBT, 5 May 1945)

New Delhi, India
20 May 1945

Board of Review
CM IBT 508

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| UNITED STATES<br><br>v<br><br>Private Tony M. Dostellio, 33480168, 490th Bombardment Squadron (M) AAF. | TENTH AIR FORCE<br><br>Trial by GCM convened at APO 218, % Postmaster New York, N.Y., 24 March 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 4 years. |

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

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

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

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

Specification: In that Private Tony M. Dostellio, 490th Bombardment Squadron (M), Tenth Air Force, did, without proper leave, absent himself from his station at APO 218 from about 0800 hours, 21 February 1945 to about 1830 hours, 21 February 1945.

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

Specification: In that Private Tony M. Dostellio, 490th Bombardment Squadron (M), Tenth Air Force, there being then in full force and effect a lawful published order of the Commanding General, Tenth Air Force, forbidding the entry of villages and individual hutments in Burma, by Military Personnel, did, at Suzette Village, Burma, on or about 21 February 1945, fail to obey the same.

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

Specification: In that Private Tony M. Dostellio, 490th Bombardment Squadron (M), Tenth Air Force, did, at Suzette Village, Burma, on or about 21 February 1945, with intent to commit a felony, viz, murder, commit an assault upon an inhabitant of such village, one Bremnarayan, by willfully, unlawfully and feloniously shooting at him with a pistol.

Accused pleaded guilty to the Specification, Charge I, and Charge I, and the Specification, Charge II, and Charge II, but not guilty to the Specification, Charge III, and Charge III. He was found guilty of Charge I and Charge II and the Specifications thereunder and, of the Specification, Charge III, "Guilty, except the words, 'a felony, viz, murder' subsituting therefor the words 'an assault with intent to do bodily harm with a dangerous weapon'; of the excepted words, Not Guilty; of the substituted words, Guilty", and guilty of Charge III. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor a such place as the reviewing authority may direct for four years. The reviewing authority approved the sentence, designated a federal reformatory or correctional institution as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50-1/2.

3. As to the Specification, Charge I, and the Specification, Charge II, it was stipulated that if the following named persons were present they would testify as follows(R. 6):

Cloyd R. Hassinger, Jr.; 490th Bombardment Squadron (M); That on or about 21 February 1945, the witness and accused left APO 218 at about 0800 hours, went to Myitkyina, which is over seventy miles away, and returned to APO 218 at about 1830 hours.

Master Sergeant Raymond Gordon, 490th Bombardment Squadron (M): That he is first sergeant of the 490th Bombardment Squadron and has charge of passes to leave the area, and that accused did not have a pass on 21 February 1945.

Captain Sigurd W. Krostue, Adjutant, 490th Bombardment Squadron: That the published order of the Tenth Air Force, file 10AF 335.14, subject: "Off-Limits", to Commanding Officers, All Tenth Air Force Units in Burma, dated 2 January 1945, was posted on the bulletin board of the Headquarters 490th Bombardment Squadron (M) AAF, sometime the early part of February 1945. The enlisted men of the 490th Bombardment Squadron are required to read the bulletin board. The witness is familiar with the practices in force therein during the month of February 1945, and that at all times during the month of February 1945, the enlisted men were required to have passes and to sign out before leaving the station area, and that Dostellio's name does not appear in the regular sign-out book for 21 February 1945.

4. As to the Specification, Charge III, the testimony of the prosecution witnesses was substantially as follows:

Attar Singh testified that he saw an ambulance stop in Suzette village one afternoon during the latter part of February 1945 (R. 7; 10). An American soldier, whom he was unable to indentify (R. 10), got out of the ambulance (R. 7). Shortly afterward Singh heard a man shout for help in Nepalese and immediately after that he heard shots. The ambulance had been moved about forty yards from where he first saw it and was headed in the opposite direction (R. 8). He lay on the ground and heard ten or twelve shots over a period of four or five minutes (R. 8, 44). The ambulance was gone when he got up again (R. 8).

Bremnarayan saw an ambulance stop near his house in Suzette Village on the day in question. Three American soldiers got out of the ambulance and entered his house (R. 12). One of them was light complexioned and carried a pistol in a shoulder holster (R. 12). Another was dark complexioned (R. 12). Povitra, the witness' sister-in-law (R. 14), entered the house, carrying a water jug (R. 12). The dark complexioned man said to her something that sounded like "BeeBee, come on"(R. 12). Povitra threw down the jug of water and fled from the house through the grounds in back (R. 12). The dark complexioned man stood for a moment calling, "BeeBee", or "Baby", and the witness told him, "Sahib, no BeeBee" (R. 12). The man with the pistol was in the back of the house and the witness did not know where the third man was (R. 12). The armed man pointed in the direction Povitra had fled, the dark complexioned man started in pursuit, and the witness pursued him (R. 12). The armed man then fired six or eight shots at the witness from a distance of sixty or eighty yards. The bullets "spattered" around him and were "extremely close" (R. 15). Povitra headed into the jungle and her pursuer stopped and returned to the road (R. 13). The witness then went to a nearby house where he obtained a gun and cartridges (R. 13). When he returned to the scene, the ambulance was moving south forty or fifty yards down the road (R. 13). He fired at the ambulance but heard no shots in reply (R. 13). He was unable to identify any of the occupants of the ambulance (R. 14).

Povitra testified that she saw the ambulance in the road as she returned to the house from the latrine. A man was standing near the ambulance. When she entered the house she was accosted by a dark complexioned man who said "BeeBee". She dropped her water bucket and, as she fled into the garder, saw a man with a pistol standing outside the house. The dark complexioned man followed her, saying, "BeeBee". She heard shots while she was running. Although unable to identify her pursuer, she stated he was not an Asiatic (R. 15, 16).

Private Louis M. Kadell, 86th Airdrome Squadron, testified that he and two other soldiers, Kingswan and Nicola, had been drinking during the morning of 21 February (R. 18). Accused joined them at

about 1300 hours. At about 1400 hours the four men got into an ambulance at the squadron dispensary in Myitkyina North (R. 18). A soldier named Smith drove the ambulance. Kingswan sat in front with Smith. Accused had a .45 automatic in a shoulder holster and was the only one armed (R. 19). They proceeded to a village where they planned to pick up a prostitute named Mary Lou (R. 19). On learning she was not there, they drove two or three miles to Suzette Village, where all except Smith got out of the ambulance. Kingswan and Nicola entered a native's house and began to chase two or three natives, including one woman, "in through the house and out back". Accused did not enter the house (R. 20) but joined the chase and fired six or seven times into the ground while running, after which everybody gave up the chase and returned to the ambulance (R. 20). The witness, accused and Kingswan got in back of the ambulance. Accused drew his gun, saying, "They are drawing a bead on us". Smith said, "Don't fire", but accused fired three times (R. 21, 22). The natives returned the fire and the witness, Smith and Kingswan were wounded (R. 21). Accused changed the magazine of his pistol and fired three more shots, one of which was a mis-fire (R. 23). Witness saw the ambulance when he was relaased from the hospital. It had several bullet holes high on the right-hand side in back and the windshield was shattered (R. 26).

5. Private Charles Smith, a witness for the defense, testified that he, accused, Nicola, Kadell and Kingswan did some drinking in the dispensary of the 86th Airdrome Squadron in the early afternoon of 21 February, then decide to go in search of a woman. They proceeded in an ambulance, which was driven by Smith, to the village where she lived and, on finding her gone, drove on to another village (R. 27), where accused, Kadell and Kingswan got out (R. 28). Kadell walked twenty or thirty feet in front of the ambulance. The other two went to the rear where Smith could not see them. They got back in the ambulance in about three minutes. Smith had turned the ambulance around in the meantime. The witness noticed nothing unusual while they were gone but heard jabbering and talking after they got in. As the witness started to drive away, accused said he was going to shoot. Smith said, "Don't shoot". Accused said he was going to fire in the air and pointed in the air, and the shooting started simultaneously (R. 28, 29).

Private Frederick B. Nicola's testimony for the defense was substantially the same as Smith's (R. 29, 32), except that Nicola stated that he heard a "sharp crack like something snapping" immediately before accused fired from the ambulance (R. 31).

Private Victor Kingswan testified that he, accused and Kadell got out of the ambulane at the village. He told Smith to turn the ambulance around. Kadell went up to a man, asked it there was any "BeeBee", and was told, "No BeeBee". The witness saw a woman about sixty yards behind a house. Accused pointed at her but did not approach her or any other woman (R. 33, 37). They got about fifteen

yards away from the ambulance and were out of it about two or three minutes. Nothing unusual happened during this time (R. 33). After they got in the ambulance, shooting started from outside. A hole appeared in the windshield, two more shots were fired, and Kadell said "I'm hit". Accused took his gun out and motioned with it. Smith said, "Don't shoot", and accused said, "I will shoot once in the air", then fired several shots (R. 34). They drove off about fifty feet, stopped and finished the bottle of gin (R. 34).

The accused, having been advised of his rights (R. 38), testified in part as follows:

"Since it [21 February 1945] was a squadron holiday, I asked my Sergeant permission to go to Myitkyina to see a few friends up there. He said it was okay. I didn't sign in or out. I was only gone a few hours. I got in the jeep with another fellow and we rode up the Ledo Road. I took my 45 to do a little hunting. When I got up to Myitkyina about 1230 I went to the dispensary and I saw a few of the boys I know and they offered me a can of beer and I drank it. We had some gin. So we were there talking about this woman, Mary Lou. All the squadron -- most of the boys were having some relation with her the way they talked. Somebody suggested we go out and get Mary Lou. So the fellows got in the ambulance. I got in the back with Kadell and Nicola. I stretched out on the seat there. We went over to Mary Lou's. Kingswan, Kadell and myself got out and we went over about 20 yards to three huts there and there was a door open and another woman in there. Kingswan asked was Mary Lou home. I want to say that it was the first time I have ever been to Myitkyina. I didn't know Mary Lou. I didn't know it was off-limits. I didn't know nothing. She said that Mary Lou went up the road with four Americans, so I guess that's why we took that road. In the meantime, I had another shot of gin in the ambulance. Smith kept driving. Finally we came to this village. So we stopped and Kingswan, myself and Kadell got out. I guess one was going to ask if Mary Lou was around or see if she was there. Kingswan was talking to this guy asking him for BeeBee. Anyway, all at once those natives got mad because we came in their village, because it is isolated. I guess they got mad about that. They started jabbering. So I knew there was going to be trouble, so I says, 'Kingswan, we better get back in front of the ambulance and get out of here.' I told Smith to turn the ambulance around and he did it. I got in back and ready to close the doors when all at once I heard firing. So I said, 'I am going to shoot in the air,' and there was natives around the ambulance, about 15 or 20 yards away; quite a few natives. We started to go when they started firing. I fired just two shots. I got proof I had one clip. Nicola fooled around with my gun" (R. 38).

Accused further testified that they were out of the ambulance not more than two or three minutes (R. 38); that he never got more

than fifteen yards away from it (R. 39); that he brought the pistol because he thought they might see an animal (R. 41); that he did not have an extra clip for the pistol (R. 41); that the only woman he saw was one who went into a house when they entered the village (R. 39).

6. The findings of guilty of the Specification, Charge I, and the Specification, Charge II, are supported by accused's pleas of guilty, the meaning of which were explained to him by the law member and by the stipulation as to the testimony of expected witnesses. Accused's testimony that he had obtained permission from "my Sergeant" to go to Myitkyina is not considered inconsistent with his plea of guilty to the Specification, Charge I, in view of his admission that he did not sign in or out and the uncontradicted stipulated testimony that he did not obtain a pass from the sergeant authorized to give passes and did not sign out as required. Likewise, his testimony that he did not know Myitkyina was off-limits is not deemed inconsistent with his plea of guilty to the Specification, Charge II, as his claimed lack of knowledge was not a defense in view of the uncontradicted stipulated testimony that the order defining off-limits areas was posted on the bulletin board of accused's organization and that all enlisted men of the organization were required to read the bulletin board (cf. CM 248497, 31 B.R. 303, at 311).

The mentioned "off-limits" order was not set forth or specifically described in the Specification, Charge II, nor was it introduced in evidence, but it was specifically referred to in the stipulation and a copy of it is included in the miscellaneous papers accompanying the record of trial. This order (10AF 335.14, dated 2 January 1945, subject: Off-Limits) provides in pertinent part that all villages and individual hutments within Burma are off-limits at all times to personnel of the Tenth Air Force. Although a specification alleging the violation of a written order should set forth the writing, preferably verbatim (par. 29c, MCM 1928), the omission in this case was waived by accused's plea of guilty (par. 64, MCM 1928). The court could properly take judicial notice of the off-limits order as it was issued by the appointing authority (par. 125, MCM 1928).

7. The record of trial contains the following errors in the admission of evidence as to the Specification, Charge III:

a. The trial judge advocate, on direct examination of Bremnarayan, who was one of the prosecution's principal witnesses, asked if the witness had anything to show he was friendly to Americans prior to the date of the alleged offense. In response, the witness produced and there was received in evidence a paper, entitled "Certificate of Merit", reading as follows (R. 14):

"27 September 1944

This is to certify that Bremnarayan, Volunteer of Mankrin Shwezet Village has aided the Allied Forces in the expulsion of

of the Japanese Forces from Myitkyina, North Burma, and its environs, in the capacity of scout, guide and field messenger during the fighting in the months of May, June, July and August, 1944.

For:
Col. Charles N. Hunter
Commanding
5307th Composit Unit
United States Army
Myitkyina Task Force

OFFICIAL:

/s/ William L. Osborne
Lt. Col. William L. Osborne
Executive Officer."

The trial judge advocate also examined the witness, Bremnarayan, as follows (R. 14):

"Q. What is Povitra's character?
A. She is Brahman, which is the highest caste, and is an extremely good and virtuous women."

And on direct examination of Captain William H. Rogers, a rebuttal witness for the prosecution, the following examination occurred (R. 42):

"Q. Do you know Louis Kadell?
A. Yes, Sir.

Q. How long?
A. Since I first joined the 86th Airdrome Squadron in September 1943.

Q. What opportunity have you had to observe his general character and conduct?
A. Since he was in the Medical Department, I had many occasions to observe him.

Q. Do you think you had an opportunity to form an opinion as to whether or not he is a truthful man?
A. I believe so.

Q. Would you say whether or not he is truthful?
A. To the best of my knowledge, he is truthful.

The rule that evidence favorable to the general reputation or good character of a witness may not be introduced until and unless he is impeached or his character is attacked and that mere contradiction of his testimony does not constitute impeachment is too well

established to require discussion (Dig. Op. JAG 1912-40, sec. 395 (8); CM 240738, 3 Bull. JAG 96; CM 201710, 5 B.R. 291; CM 201997, 5 B.R. 337; cf. CM 211228, 10 B.R. 31; Wigmore on Evidence, 3rd Ed., sec. 1104; 70 C.J.S. pp. 790, 791). Bremnarayan, Povitra and Kadell had not been impeached in contemplation of law. Therefore, under the rule stated, the introduction of evidence as to their character was erroneous. In addition, it is noted that the "Certificate of Merit" was incompetent as hearsay evidence and, further, was of a nature likely to appeal to the passion and prejudice of the court on a wholly extraneous matter.

b. On redirect examination of Kadell, a witness for the prosecution, the following examination occurred (R. 23):

"Q. I believe you have been court-martialed for your participation in this offense.
A. Yes, sir.

Q. Were you convicted?
A. Yes, sir."

Substantially the same questions appear in the cross-examination of Smith (R. 29), Kingswan (R. 36), and Nicola (R. 31), defense witnesses. Smith and Kingswan each answered categorically in the affirmative but Kingswan qualified his answer by stating that he was found guilty of being out of bounds. The fact that the foregoing evidence was elicited by the trial judge advocate both from the mentioned defense witnesses and his own witness, Kadell, and that he subsequently introduced character evidence in support of the latter's testimony indicates that impeachment of those witnesses was not contemplated. Furthermore, the prosecution did not purport to disclose whether the offense of which each witness was convicted involved moral turpitude or affected his credibility within the meaning of paragraph 124b, Manual for Courts-Martial, 1928, and, in the case of Kingswan, it affirmatively appears by a non-responsive answer that the offense of which he was convicted was not of that nature. Under all the circumstances, it appears that the evidence in question was introduced as substantive evidence of accused's guilt. Its admission under such a theory was erroneous. The accused had a right to be tried upon such relevant and competent evidence as tended to prove his guilt and quite irrespectively of the intrinsic and irrelevent fact that his companions had been separately tried and convicted for their participation in the offense or offenses for which he was on trial (16 C.J. p. 670; 22C.J.S. p. 1333; Wharton's Criminal Evidence, 11th Edition, sec. 724).

In connection with the foregoing, it should be observed that evidence of conviction of a confederate for an offense involving moral turpitude or affecting his credibility as a witness may be admissible, not as substantive evidence of the guilt of the accused, but to impeach such person convicted when he takes the stand to testify in the trial of accused (par. 124b, MCM, 1928). However, in such a situation, the purpose of the evidence and its limitation to

the witness should be explained to the court (Wharton's Criminal Evidence, supra).

c. The prosecution's witness, Attar Singh, was recalled at the direction of the president of the court (R. 43) and, in response to questions by the law member, testified as follows (R. 44).

"Q. When the truck moved away, did you see anyone with a rifle?
A. No, sir.

Q. Did you hear that anybody had fired a gun?
A. After the shooting, the story was that Americans fired.

Q. That was the story?
A. Yes, sir, two fellows from the village went and complained, and one boy reported the matter to the military police.

Q. Do you know who?
A. Yes, sir.

Q. What was his name?
A. Suka Mahatan, I think."

The foregoing testimony was hearsay (par. 113, MCM, 1928). Its prejudicial effect was aggravated by the fact that it was elicited through questions by the law member. It undoubtedly added to the cumulative effect of the errors previously noted.

8. As indicated by the summary of testimony, the evidence of the defense and prosecution as to the Specification, Charge III, is highly contradictory. The legal evidence, standing alone is clearly not of such probative force as virtually to compel a conviction. Therefore, in view of the substantial errors noted, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Specification, Charge III, and Charge III (sec. 1284, Dig. Op. JAG 1912-30).

9. The court was legally constituted and had jurisdiction of the person and the offense. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty of the Specification, Charge I, and Charge I, and the Specification, Charge II, and Charge II, and legally insufficient to support the findings of guilty of the Specification, Charge III, and Charge III. Confinement in a penitentiary is not authorized under the 42nd Article of War for absence without leave or for failure to obey a standing order. Therefore, the record of trial is legally sufficient to support only so much of the sentence as involves dishonorable discharge, forfeiture of all pay and allowances due of to become due, and confinement at hard labor for four years in a place other than a penitentiary, federal correctional institution, or reformatory.

(48)

JOHN G. O'BRIEN, Judge Advocate

ITIMOUS T. VALENTINE, Judge Advocate

ROBERT C. VAN NESS, Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
19 April, 1945.

Board of Review
CM IBT 511

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| UNITED STATES<br><br>v.<br><br>Technician Fifth Grade John (NMI) Baines, 38242339, 3509th Quartermaster Truck Co. | SERVICES OF SUPPLY<br><br>Trial by GCM convened at APO 465, % Postmaster, New York, N.Y., 8 March 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 20 years. United States Disciplinary Barracks nearest port of debarkation designated as place of confinement. |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade JOHN BAINES, 3509th Quartermaster Truck Company, did at Howrah, India, on or about 8 February 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Kali Sonar, a human being, by stabbing him with a knife.

Accused pleaded not guilty to the Charge and Specification and was found guilty of the Charge, and, of the Specification, guilty, "but that the word 'premeditation' be stricken out". No evidence of previous convictions was submitted. Accused was sentenced to be dismissed the service, to forfeit all pay and

allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life (see par. 5, infra). The reviewing authority approved the sentence, but reduced the period of confinement to 20 years, designated the United States Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement, and forwarded the record of trial for action pursuant to Article of War 50½.

3. The evidence for the prosecution shows that the accused was stationed at Camp Howrah near the city of Howrah, India, at the time of the offense alleged. He was present in his bed in his barracks when a bed check was conducted at 0100, 8 February 1944 (R. 14). Shortly thereafter he appeared at the quarters of Sushila Bali Dasi, an Indian prostitute, in the city of Howrah (R. 20, 23, 25). Sushila had had sexual relations with accused on two previous occasions (R. 19), and she and two other Indian witnesses positively identified the accused (R. 23, 25). Accused took a knife from his pocket while at Sushila's quarters (R. 21, 24) and, according to one witness, opened it there (R. 24). He stayed with Sushila until about 0500 (R. 20). A passageway or alley leads from Sushila's quarters to Grand Trunk Road, which is nearby (R. 19). Sometime between 0530 and 0630, 8 February (R. 27, 34, 38), accused appeared at a place where two rickshaws were parked opposite a hotel at 506 Grand Trunk Road (R. 28, 35). The rickshaw wallahs, Mathuni Kahn and Kali Sonar, were sleeping in the rickshaws (R. 28, 35). The accused woke Mathuni Kahn and told him to take accused to camp but Mathuni said his rickshaw was broken (R. 28, 36). Accused then woke Kali Sonar, the deceased, apparently by pulling his rickshaw across the street (R. 36, 37), and asked him to take him to camp. Deceased said that he was sick (R. 28) or, "I took you out there before and you never gave me the fare. I won't take you" (R. 36). When deceased got to the ground, accused slapped him, knocking him down (R. 30, 37). Deceased got to his feet, whereupon accused took a knife from his pocket and stabbed deceased (R. 30, 34, 37). Deceased fell down, saying, "A negro struck me with a knife" (R. 31, 37). Accused then ran away (R. 31, 37). An eyewitness of the foregoing events followed accused a short distance and saw him get in a rickshaw that went toward camp (R. 31, 32). Accused was positively identified as deceased's assailant by a bystander and Mathuni Kahn, both of whom had seen accused previously (R. 34, 36).

Deceased was taken in a rickshaw to a nearby police station, thence to Howrah General Hospital where he was admitted at 0705 (R. 7, 38, 39, 40). He died at 0830, 8 February (R. 8). The attending physician and the physician who conducted the autopsy testified that death was due to shock and hemorrhage from a stab wound in the chest which, in the opinion of the former, had been inflicted about two hours prior to deceased's admission to the hospital (R. 6-12).

4. The defense adduced testimony substantially as follows:

Technician Fourth Grade James E. Boggs, Criminal Investigation Division: Witness searched accused's personal effects at about 1930, 8 February, and did not find a knife or any blood-stained clothing (R. 46).

First Lieutenant Richard E. Swearingen: Accused had been under witness' command since August 1943; he was a good soldier and was made a Technician Fifth Grade in May 1944; the curfew hour at Camp Howrah is 0100; witness never personally found accused missing at bed check (R. 47-48).

Testimony elicited from four enlisted men was to the effect that accused was present in his barracks during the evening of 7 February; that he played cards there until about 2400, 7 February (R. 53), or 0100, 8 February (R. 51, 52); that someone about the same size as accused but not positively identified as him was seen rolling up accused's mosquito net at about 0545, 8 February (R. 55); that accused was seen at breakfast on 8 February (R. 58).

Accused, having been advised of his rights, elected to take the stand (R. 59). He testified that he was in his barracks on the night of 7 February and played cards until about 0050, 8 February, when he undressed and went to bed. He then asked another soldier for the time and was told that it was 0054 hours. Captain Cashion (who testified that accused was present at bed check (R. 14, supra)) came through the barracks three or four minutes later and accused talked to him (R. 60). He did not get up until the next morning. He was the first one up in the barracks. He went to the latrine and on his return to the barracks saw Sergeant Frazier coming out of the barrack door. He then went to the washroom, washed and shaved, returned to the barrack for his shirt, and went to the mess hall (R. 61). He denied killing Kali Sonar or being away from camp on 7 or 8 February, and he stated that he repeatedly denied his guilt when questioned by members of the Criminal Investigation Department (R. 62,63).

He acknowledged that he was acquainted with Sushila and other of the Indian witnesses (R. 62). On cross-examination, he admitted that he borrowed ten rupees from another soldier on the night of 7 February. He explained that although he had no intention of going out that night, he told the soldier he might do so, and borrowed the money "to see if he would let me have it" (R. 64). He further admitted that he frequently went to Sushila's house, the last occasions being on the previous Sunday (4 February) and Tuesday (6 February) nights (R. 64, 66). He denied owning a knife (R. 66), and stated that he has not had one in his mess equipment since he came overseas (R. 67).

5. The court, by three-fourths vote, found accused guilty of the Charge and, of the Specification, guilty, "but that the word 'premeditation' be stricken out", and, by the same vote, sentenced accused to dishonorable discharge, total forfeitures, and confinement at hard labor for thirty years. The reviewing authority thereupon transmitted the record of trial to the Assistant Judge Advocate General, Branch Office, United States Forces, India Burma Theatre, for advance opinion whether the action of the court in striking the word "premeditation" from its finding reduced the offense from murder to manslaughter. The Assistant Judge Advocate General expressed the opinion that the finding of the court constituted one of guilty of murder under the 92nd Article of War. It was pointed out that paragraph 148, Manual for Courts-Martial, 1928, which defines murder as the unlawful killing of a human being with malice aforethought, expressly states that malice aforethought may exist when the act is unpremeditated and that, as parenthetically stated in CM 236505, Heflin (23 B.R. 25), in such cases the use of the words "with premeditation" in the specification is mere surplusage. It was further pointed out that although premeditation may be an element of first degree murder in jurisdictions having statutory degrees of murder, it is not an element of murder at common law (Wharton's Criminal Law, Vol. I, p. 631; 40 C.J.S. p. 860; 26 Am. Jur. p. 182) and that degrees of murder are not recognized under Article of War 92. For these reasons, the Board of Review concurs in the opinion of the Assistant Judge Advocate General that the finding of the court constituted a finding of guilty of murder under Article of War 92.

On receipt of the mentioned advance opinion, the reviewing authority returned the record of trial to the court with the direction that the court reconvene, vacate its previous sentence, and adjudge an appropriate sentence as made mandatory by Article of War 92. The court accordingly reconvened and, in the absence

of the accused and one member who had been present at the previous session, revoked its former sentence and, with all members present concurring, sentenced accused to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for the term of his natural life. The procedure followed was authorized and proper (AW 40(d), MCM, 1928)(CM NATO 544 (1943), 2 Bull. JAG p. 426, 427). The presence of accused was not required (par. 83, MCM, 1928), and the absence of one member of the court did not affect the validity of the proceedings (CM 235044, Winters, 21 B.R. 265).

6. The court, as the principal weigher of evidence and judge of the credibility of the witnesses, rejected the accused's defense of alibi and accepted as true the evidence adduced by the prosecution. Such evidence shows that accused, after first slapping deceased with his hand and knocking him to the ground, stabbed him with a knife, and that accused died shortly afterward as a result of the wound so inflicted. There is no evidence indicating that the homicide was done with legal justification or excuse or with adequate provocation or in self defense. It follows that it remains only to determine whether it was committed with malice aforethought, the distinctive characteristic of murder. Malice aforethought is defined as follows:

> "* * * Malice, in this definition, 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.
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>
> "* * * It is not the less malice aforethought, within the meaning of the law, because the act is done suddenly after the intention to commit the homicide is formed: it is sufficient that the malicious intention precedes and accompanies the act of homicide. It is manifest, therefore, that the words 'malice aforethought', in the description of murder, do not imply deliberation, or the lapse of considerable time between the malicious intent to take life and the actual execution of that intent, but rather denote purpose and design in contradistinction to accident and mischance" (Commonwealth v. Webster, 5 Cush. 296; 52 Am. Dec. 711)(Also see paragraph 148a, page 163, MCM, 1928).

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

It is apparent in the light of the foregoing definition that the court was justified in concluding that the homicide was committed with malice aforethought, and, further, that it was willful, deliberate, felonious and unlawful. It follows that the finding of guilty of murder was warranted.

7. The record shows accused to be 41 years of age. He was inducted 7 October 1942 and had no prior service.

8. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the finding of guilty and the sentence as mitigated by the reviewing authority.

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

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

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(55)

New Delhi, India
5 May 1945

Board of Review
CM IBT 537

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| UNITED STATES | ) | ARMY AIR FORCES |
| v | ) | Trial by GCM convened at APO 671, % Postmaster, New York, N.Y., 20 April 1945. Dismissal, total forfeitures. |
| First Lieutenant Joseph A. Pereira, 01643216, Signal Corps, AUS. | ) | |

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

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

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

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

Specification 1: In that First Lieutenant Joseph A. Pereira, Signal Corps, 424th Signal Company (Avn) did, at Hastings Air Base, between 31 October 1944 and 4 February 1945, feloniously embezzle by fraudulently converting to his own use Rs 705/- of the value of $213.35, the property of enlisted personnel of the 424th Signal Company (Avn) entrusted to him by the said enlisted men while he was acting in the capacity of Company Special Service Officer for payment of expenses of a company party.

Specification 2: In that First Lieutenant Joseph A. Pereira, Signal Corps, 424th Signal Company (Avn) did, at Hastings Air Base, between 31 January 1945 and 4 February 1945, feloniously embezzle, by fraudulently converting to his own use Rs 1471/- of the value of $445.16, the property of the 424th Signal Company (Avn) personnel entrusted to him by S/Sgt Frank Poli,

Supply Sergeant 424th Signal Co (Avn) while acting in his capacity as Supply Officer, for the payment of the Company monthly laundry account.

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

Specification 1: In that First Lieutenant Joseph A. Pereira, Signal Corps, 424th Signal Company (Avn), did, at Hastings Air Base, on or about 10 December 1944, wrongfully borrow a sum of $30.27 from M/Sgt Richard Kroll, 424th Signal Company (Avn), an enlisted man.

Specification 2: In that First Lieutenant Joseph A. Pereira, Signal Corps, 424th Signal Company (Avn), did, at Hastings Air Base, on or about the 10th day of December, 1944, wrongfully borrow the sum of $30.27 from T/Sgt Bernard Lovitky, 424th Signal Company (Avn), an enlisted man.

Specification 3: In that First Lieutenant Joseph A. Pereira, Signal Corps, 424th Signal Company (Avn), did, at Hastings Air Base, during the month of September 1944 wrongfully borrow the sum of $63.56 from T/Sgt Francis Douglas, 424th Signal Company (Avn), an enlisted man.

Specification 4: In that First Lieutenant Joseph A. Pereira, Signal Corps, 424th Signal Company (Avn), did, at Hastings Air Base, on or about 2 February 1945, wrongfully borrow the sum of $60.54 from Sgt Ira E. Cornelius, 424th Signal Company (Avn), an enlisted man.

3. The accused pleaded guilty to and was found guilty of all Charges and Specifications. He was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, India Burma Theater for action under Article of War 48. The confirming authority confirmed the sentence and the record of trial was forwarded to this office for action under Article of War 50½.

4. Evidence for the prosecution:

It appears from the testimony of First Lieutenant Joseph Colpaert that in November 1944 he was personnel officer of the company of which accused was a member. Accused was helping in

the preparations for a company party. The witness, at the request of accused and First Sergeant Wadyko, kept in the company safe certain funds that had been collected for the party. The witness turned the money over to Sergeant Wadyko or accused when either or both of them asked for it. Sergeant Wadyko was later transferred to the United States (R. 16, 17).

Staff Sergeant Frank Poli testified that on 31 January 1945 he collected from the enlisted men of the 424th Signal Company a little over Rs 1400 representing the amounts due on their laundry accounts for January. He later collected Rs 71. The entire amount was turned over to accused, who was the company's supply officer. Monthly receipts for the laundry accounts were normally kept in the company files but no receipt appeared for January (R. 9, 10).

Master Sergeant Richard Kroll, Technical Sergeant Bernard Lavitky, Technical Sergeant Francis Douglass and Technical Sergeant Earl Cornelius, all of accused's organization, each testified that he voluntarily loaned to accused Rs 100 (R. 14, 15), Rs 100 (R. 8), Rs 210 (R. 7, 8) and Rs 175 (R. 6), respectively, on 10 December 1944, 10 December 1944, in September 1944, and on 2 February 1945, respectively. Cornelius stated that he told accused he had only Rs 200 and was indebted to the Army Emergency Relief and that accused said he wanted the money only for a day or two (R. 7).

Captain Owen F. Haynes, commanding the 424th Signal Company, testified that accused came to his office on 4 February 1945 and stated that he wanted to talk about a very personal matter. At accused's insistence, they went to their quarters where accused said that he had lost a considerable sum of money and had no way of getting it back or doing anything about it. He mentioned losing laundry money amounting to about Rs 1400 and company party funds amounting to about Rs 800 (R. 17, 18).

5. Evidence for the defense:

Captain Haynes, accused's commanding officer, testified that he has known accused since 3 September 1943, that accused has always performed his duties in a satisfactory manner, and that until the present nothing has occurred that would lead the witness to believe accused's character was not of the best (R. 19).

Accused, after being fully advised of his rights, elected to make an unsworn statement. He stated, in substance, that he was appointed a second lieutenant in February 1943 and, having

never earned much money, the pay and allowances of his office "seemed to me enough to make me practically a multi-millionaire". He and his wife began to live beyond their income and incur indebtedness, so it became necessary for him to borrow money from a finance company and Army Emergency Relief and to draw partial pay. He reduced his personal living expenses and instructed his wife to make payments on the bills. However, when he visited her on leave, he found that she had made no attempt to pay the past-due debts and had incurred others for rent and utilities. On his return to his organization he told his commanding officer of his financial troubles and obtained another Army Emergency Relief loan. He sent the greater portion of this money to his wife and made her a $150.00 allotment. After he arrived overseas, his wife informed him she was pregnant. He raised her allotment to $160.00 and told her to save part for hospital and medical expenses. He doubted that she saved any money, and she continued to write him for more. In October 1944 he found he was getting deeper in debt. He raised the allotment to $275.00, but his wife insisted that was not enough. He was sending her so much that he was unable to meet his ordinary expenses, so he began borrowing money. The total amount borrowed became large and he cancelled his wife's allotment for October. However, this worried him, so, "out of sheer desperation" and with full intentions of replacing the funds, he appropriated the laundry fund and the party fund of the 424th Signal Company. He voluntarily told his commanding officer of his wrongdoing when it became apparent that he could not replace the money immediately. He made several attempts to pay some of his debts and reduced his allotment to his wife. He stated that he feels his acts were occasioned by his environment and lack of financial responsibility before entering the army and that he has learned his lesson and is fully repentent, and he prayed the leniency of the court (R. 19-22).

6. Accused's pleas of guilty support the finding of guilty. Accused was fully advised as to the meaning and effect of his pleas, and there is nothing of record inconsistent therewith or to indicate that they were improvidently made. It is noted that the evidence adduced by the prosecution as to Specifications 1 and 2, Charge I, does not, under strict rules of proof, make out a prima facie case. However, accused admitted commission of the alleged offenses in his unsworn statement and, in any event, the failure of the prosecution to establish a prima facie case is of no legal consequence in view of the pleas of guilty. The Specifications, Charge II, clearly set out offenses cognizable under the 96th Article of War (CM 192128, 1 B.R. 329; CM 221833, 13 B.R. 239).

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

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

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

CM IBT 537 (Pereira, Joseph A.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, U. S. Army, 6 May 1945.

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

1. In the case of First Lieutenant Joseph A. Pereira, 01643216, Signal Corps, AUS, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings of guilty, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 537).

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

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(Sentence ordered executed. GCMO 14, IBT, 6 May 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
30 May 1945

Board of Review
CM IBT 569

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| UNITED STATES<br><br>v.<br><br>Private Donald E. Farley, 35410122, 327th Harbor Craft Company. | SERVICES OF SUPPLY<br><br>Trial by GCM convened at APO 465, % Postmaster, New York, N.Y., 8 May 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 5 years. United States Disciplinary Barracks nearest port of debarkation in the United States designated as place of confinement. |

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

The record of trial in the case of the soldier above named has been examined by the Board of Review established in the office of The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, India Burma Theater, and the Board finds the same to be legally sufficient to support the sentence. The offense of sodomy, including penetration, requires strict proof; but circumstantial evidence may be sufficient (CM 119377, Ellison; 119378, McBryant; CM 191413, La Pointe). The uncontradicted evidence showing compromising conduct between accused and his companion over a period of three hours, when considered in connection with accused's contemporaneous statement (R. 8) characterizing the nature of such conduct, is deemed sufficient to exclude every reasonable hypothesis of innocence and to justify the court, as the trier of the facts, in inferring that penetration, per os and per anum, did occur.

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

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

1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, U. S. Army, 1 June 1945.

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

1. The record of trial and accompanying papers in the case of Private Donald E. Farley, 35410122, 327th Harbor Craft Company, and the opinion of the Board of Review thereon are submitted herewith pursuant to Article of War 50½ for the action of the Theater Commander.

2. The Board of Review holds that the record of trial is legally sufficient to support the sentence. I am unable to concur in that part of the holding by the Board of Review that the evidence establishes sodomy per os. Actual penetration or sexual connection is a necessary element of the offense of sodomy, CM 227873, 16 B.R., p. 1. While such may be proved by circumstantial evidence, strict proof is required. Mere conjecture, speculation or suspicion is not enough, CM 206242, 8 B.R. 255; CM 209651, 9 B.R. 121. There is no direct evidence of penetration in this case and that vital element must have been established, if at all, by the circumstances considered in conjunction with the compromising statement made by accused during the time he was in bed with his male companion to wit: "I will fuck you again" (R 8). The circumstances taken alone, while highly incriminating, are, under the authorities cited above, insufficient to establish actual penetration. Resort must therefore be had to the construction and import of the extra-judicial admission of accused. No authoritative definition of the indelicate term employed by the accused can be found, for it does not appear in any standard self-respecting English dictionary or in any compilation of accepted drawing-room expressions, but belongs rather to the vulgar vernacular of the out-house. It is not, however, a total stranger to modern male conversation, where it has acquired a rather commonly accepted meaning. While the term is more usually employed to denote an act of intimacy with one of the female sex, it likewise connotes, when used with reference to unnatural sexual acts between males, connection per annum. That this was the sense in which it was used by the accused, and that the act referred to was in fact sodomy per anum, rather than per os, seems inescapable when consideration is given to the surrounding circumstances viz: the movement and squeaking of the bed, the disrobing of both participants upon retiring, and their position in bed, one being on top of the other. This conclusion is further strengthened by the opinion expressed by one witness that "Cornholing" was taking place (R 8). This gross, obscene expression is likewise barred from polite society but as used in gutter conversation commonly denotes homosexual relations per anum between men. Considering the self-inculpatory statement of the accused and allthe circumstances corroborative thereof, I am of the opinion that the record sustains only so much of the findings as finds the accused guilty of sodomy per anum, and the sentence.

3. I therefore recommend that you disapprove the finding of guilty of sodomy per os.

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

(Only so much of finding of guilty of Specification as amounts to finding of guilty of committing sodomy per annum approved. As thus modified action of reviewing authority confirmed. Sentence ordered executed.
GCMO 18, IBT, 3 Jun 1945)

New Delhi, India
5 June 1945.

Board of Review
CM IBT 577

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| UNITED STATES<br><br>v<br><br>Private Charles E. Dixon, Sr., 14128866, 2466th Quartermaster Truck Company (Aviation) | INDIA BURMA AIR SERVICE COMMAND<br><br>Trial by GCM convened at APO 492, % Postmaster, New York, N.Y., 17 May 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 1 year. Disciplinary Barracks. |

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

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

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

CHARGE: Violation of the 96th Article of War.

Specification 1: In that Private Charles E. Dixon Senior, 2466th Quartermaster Truck Company (Aviation), Bengal Air Depot, Army Post Office Number 492, did, on or about 26 April 1945 at Army Post Office Number 492 aforesaid, wrongfully use without authority of the owner, a certain motor vehicle of a value in excess of $50.00, to wit: number 432049, property of the British Government.

Specification 2: In that Private Charles E. Dixon, Senior, 2466th Quartermaster Truck Company (Aviation), Bengal Air Depot, Army Post Office Number 492, did, on or about 26 April 1945, at Army Post Office Number 492 aforesaid, wrongfully operate a certain motor vehicle upon a public highway, to wit: Barrackpore Trunk Road, while he was under the influence of intoxicating liquor.

Specification 3: In that Private Charles E. Dixon, Senior, 2466th Quartermaster Truck Company (Aviation), Bengal

Air Depot, Army Post Office Number 492, did, on or about 26 April 1945 at Army Post Office Number 492 aforesaid, wrongfully operate a certain motor vehicle upon a public highway, to wit: Barrackpore Trunk Road, at a rate of speed in excess of that prescribed for the locality by Bengal Air Depot Regulations Number 46-4, paragraph 4, in that he operated said vehicle at a speed of fifty miles per hour in a thirty miles per hour zone.

Accused pleaded not guilty to and was found guilty of the Charge and the Specifications thereunder. Evidence of one previous conviction for absence without leave was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 12 months. The reviewing authority approved the sentence and designated the United States Disciplinary Barracks nearest port of debarkation as the place of confinement. The order directing execution of the sentence was withheld and the record forwarded for action under Article of War 50½.

3. The record of trial is legally sufficient to support the findings of guilty of Specification 1 and 2 of the Charge.

4. With respect to Specification 3 of the Charge, the evidence shows that accused, on the date alleged, operated a motor vehicle at a speed of fifty miles per hour on the Barrackpore Trunk Road (R. 12, 13, 18). The military policeman who apprehended accused testified that there was a thirty mile per hour speed limit in the zone through which accused traveled (R. 16, 17). He did not identify the regulations defining the zone or establishing the speed limit therein. The president of the court granted a request by the prosecution that the court "take judicial notice of the Depot Regulation with regard to speed limits" (R. 17), but the regulation so referred to were not read or introduced in evidence and do not accompany the record of trial.

5. Accused was on trial under Specification 3 for operating a motor vehicle in excess of the speed limit prescribed by the regulation described in that Specification. As previously indicated, no evidence whatever was adduced as to the source or contents of the regulations. Therefore, unless the court was empowered to take judicial notice thereof, the record of trial is legally insufficient to show that the alleged violation occured.

Paragraph 125 of the Manual for Courts-Martial reads in part as follows:

"The principal matters of which a court-martial may take judicial notice are as follows:

* * * * * * *

"General order, bulletins, circulars, and general court-

martial orders of the WardDepartment; general orders, bulletins, circulars, and general court-martial orders of the authority appointing the court and of all higher authority" (Underscoring supplied).

In CM 207523, McKinnon (8 B.R. 347; sec. 395 (30), Dig. Op. JAG 1912-40), it was held that the clause above quoted from the Manual for Courts-Martial was intended to bear an express limitation within its terms and to exclude from judicial notice by courts-martial orders issued by an authority inferior to the authority appointing the court which might seek knowledge of such orders.

It follows from the foregoing that the court appointed by the Commanding General, India Burma Air Service Command, could not properly take judicial notice of regulations issued by the Commanding General, Bengal Air Depot, an authority inferior to the appointing authority. The record of trial, therefore, is devoid of proof that the accused operated a motor vehicle in excess of any speed limit prescribed by the regulations described in the specification.

6. The court was legally constituted. Except as indicated, no errors injuriously affecting the substantial rights of the accused were committed during the trial. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of Specification 3 of the Charge but legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge and the Charge, and legally sufficient to support the sentence.

JOHN G. O'BRIEN, Judge Advocate

ITIMOUS T. VALENTINE, Judge Advocate

ROBERT C. VAN NESS, Judge Advocate

CM IBT 577 (Dixon, Sr., Charles E.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, U. S. Army, 6 June 1945.

To; Commanding General, Headquarters, India Burma Air Service Command, APO 671, U. S. Army.

1. In the case of Private Charles E. Dixon, Sr., 14128866, 2466th Quartermaster Truck Company (Aviation) attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally insufficient to support the findings of guilty of Specification 3 of the Charge but legally sufficient to support the findings of guilty of Specifications 1 and 2 of the Charge and the Charge, and legally sufficient to support the sentence, which holding is herby approved and concurred in. Under the provisions of AW 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 577)

/s/ William J. Bacon
/t/ WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General

New Delhi, India
7 July 1945

Board of Review
CM IBT 578

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| UNITED STATES<br><br>v<br><br>Private Eugene R. Moniz, 110-57652, Headquarters and Headquarters Squadron, Northern Air Service Area Command. | INDIA BURMA AIR SERVICE COMMAND<br><br>Trial by GCM convened at APO 629, % Postmaster, New York, N.Y., 27 April 1945. Dishonorable discharge (suspended), total forfeitures, confinement at hard labor for 18 months. |

OPINION of the BOARD OF REVIEW
O'BRIEN, VALENTINE and VAN NESS, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the office of The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, India Burma Theater, and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Assistant Judge Advocate General.

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

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

Specification 1: In that Private Eugene R. Moniz, Headquarters and Headquarters Squadron, Northern Air Service Area Command did, at APO 629, on or about 1 March 1945, wrongfully strike T/Sgt Donald L. Weber, acting first sergeant, Headquarters and Headquarters Squadron, Northern Air Service Area Command a non-commissioned officer who was then in the execution of his office, by hitting him on the shoulder with his fist.

Specification 2: In that Private Eugene R. Moniz, Headquarters and Headquarters Squadron, Northern Air Service Area Command having received a lawful order from T/Sgt Donald L. Weber, acting first sergeant Headquarters and Headquarters Squadron, Northern Air Service Area Command, a non-commissioned officer who was in the execution of his office, to remove himself from the Non-Commissioned Officers' Club, Northern Air Service Area Command, did, at APO 629, on or about 1 March 1945, willfully disobey the same.

Specifications 3 and 4: (Finding of not guilty)

CHARGE II and Specification thereunder: (Finding of not guilty)

Accused pleaded not guilty to all Charges and Specifications and was found guilty of Specifications 1 and 2, Charge I, and Charge I, and not guilty of the remaining Charges and Specifications. Evidence of one previous conviction was improperly admitted but the ruling was reconsidered and the law member properly advised the court to ignore such evidence in its deliberation upon sentence. Accused was sentenced to dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for eighteen months. The reviewing authority approved the sentence, suspended the execution of the dishonorable discharge until the soldier's release from confinement, and designated IB Stockade No. 2, APO 629, as the place of confinement. The proceedings were published in General Court Martial Orders No. 21, Headquarters India Burma Air Service Command, APO 671, 24 May 1945.

3. The evidence shows that Technical Sergeant Robert C. Jobe observed the accused at the canteen of the Red Cross Club at the base in question at about 2000 hours, 1 March 1945. The accused "was staggering somewhat" and was intoxicated but "seemed all right" (R. 14, 16). At about 2200 hours, accused and two companions were admitted into the Non-Commissioned Officers' Club at the base by Staff Sergeant Norman A Habighurst, the club steward (R. 20, 23). The accused appeared to be drunk (R. 22), so the steward instructed the bar tender not to serve him anything but water (R. 26). He then took accused to a corner table and engaged in conversation with him (R. 20,28). The accused did not stagger and talked coherently (R. 22). He was highly nervous, spoke slowly but clearly, raised his voice at times, and did not appear belligerent (R. 22, 28). He clenched his teeth and breathed rather heavily during the conversation, and he "grabbed the table with rather a firm grip" and "attempted to throw it down" (R. 28). In the opinion of the steward, accused was not completely drunk, appeared to know what he was doing, and was in full control of his faculties(R. 22, 31). While they were talking, several people entered the club and went to a back room (R. 20). Accused wanted to go there to talk to them and the steward said it would be "all right if he could act like a gentleman" (R. 20). The steward then approached Master Sergeant Donald L. Weber, who was in the back room with a party of four other sergeants ( R. 6), and "warned him he had better get Private Moniz out as there might be trouble" (R. 20. Accused walked up to the table occupied by the sergeants and several of them greeted him but accused did not reply (R. 6, 14, 37). Instead, he stood with his hands on his hips and "glared" at the members of the party in an unfriendly manner (R. 6, 14, 37). After a short interval Sergeant Weber said, "All right, Moniz, time to go home" or "All right, Moniz, let's go" (R. 6, 14, 20, 37). Accused made no move to go. Weber then grabbed him by the arm, said, "Moniz, go home!", and led him toward the door into the first room (R. 6, 14, 18, 20, 37, 38). Accused began to argue and struggle and said, "Let me alone. Take your hands off me" (R. 41). Sergeant Weber said, "I've had enough of this. I'm going for the MPs" (R. 6, 14, 20). Accused said, "You are not going to get the MPs", or, "Please, Weber, don't call the MPs", and he lunged at Sergeant Weber and struck him on the shoulder with his fist (R. 6, 8, 9, 14, 16, 21,

39, 42). Some of the persons present pulled the two apart and Weber left the club (R. 6, 14, 20, 37). Sergeant Weber testified that at the time the struggle occurred accused seemed angry but not mentally deranged (R. 8) and was not "so drunk he didn't know what was going on"(R. 9). Sergeant Jobe testified that accused was "hopelessly" drunk and beyond the reasoning stage when Weber approached him (R.19). Sergeant Habighurst testified that accused appeared to know what he was doing until after Weber asked him to leave and went to get the military police (R. 31). Sergeant Grigg testified that accused was drunk and "wasn't normal as when a person has full control of his faculties" (R. 39).

Following Weber's departure from the club, one of accused's companions and others present tried to persuade accused to leave (R. 20, 37). They moved into the adjoining room and an attempt was there made to lead accused from the club (R. 14, 37). Accused began to sob and said, "I'm sorry, fellows, I did not mean it. But wait a minute, fellows, I have something to say" (R. 14). At about this point he apparently lost control of himself and, in the words of one of the witnesses, fell into a fit of rage (R. 14). He swung his arms, broke away from those who were holding him, knocked over furniture, rolled on the floor, and beat his fists against and through the wall (R. 14, 20, 37). Those present attempted to restrain him. At times he became quiet and apparently lucid (R. 23). He would sob and say, "Sorry fellows, I didn't mean it" (R. 14, 27), then suddenly fall into another fit of violence (R. 14, 27). He kept repeating, "Mother, mother don't let them shoot me" (R. 27). All witnesses agreed that he did not appear to be rational during these periods of violence (R. 8, 16, 23, 39). Sergeant Weber returned to the club and joined in the effort to subdue accused (R. 16, 31). The officer of the day arrived but accused paid no attention to him. Finally, the officer of the day stunned accused by hitting him over the head with a pistol (R. 32). He was then placed in a vehicle and carried to a hospital. He continued his violent conduct at intervals at the hospital. He called loudly for his mother and several times for Sergeant Weber and said, "I wasn't doing anything until you got that damned MP lieutenant" (R. 33, 35). He was given a sedative and placed in a stright jacket (R. 32).

Major Marvin F. Greiber, Chief of the Neuro-Psychiatric Service, 234th General Hospital, examined accused at about 0900 hours, 2 March 1945 (R. 49). He was lying in bed and was very belligerent (R. 50). The witness stated that accused "recalled striking the first sergeant, becoming very aggressive to him, beating up the club" (R. 52). In the opinion of the witness, accused was free from any mental defect, disease or derangement and was able to distinguish between right and wrong and adhere to the right and refrain from the wrong (R. 51). He stated that accused's history demonstrated a constitutional psychopathic state and that his aggressiveness is brought to the surface by alcohol (R. 50, 51). When asked by the president of the court if accused would be able to control himself while under the influence of liquor, the witness replied, "I would say in this invividual case, when you take his basic character and then add all the stuff which

people drink around here, I don't believe he would be able to control himself. A good share of it wasn't malicious" (R. 53).

A member of the court examined the witness as follows (R. 53, 54):

"Q: A sanitarium or anything of that type would not be very effective, would it, Major?
A: Most of these individuals would behave very well in a hospital because they are in a protected environment. They may go along very well for six months or so after discharge, some little incident arises and then, bang! they're off again.

Q: Would a sanitarium have any effect of building a person's resistance to alcohol?
A: That's difficult to answer. In some cases, perhaps. The thing we have to contend with in cases of this kind is that it exists practically from childhood on--the maladjustment--building up behavior patterns which then become a fixed habit which he will follow when he gets in a jam. He realizes it, but has to follow this type of behavior by getting drunk or committing some overt act.

Q: Major, would such a condition in a soldier entitle him to consideration for possible discharge by a medical board?
A: Absolutely not. All you have to do is read the ARs--615-368 and 369: habits and traits of character.

Q: You would not consider this habit or trait of character of a man something which would be undesirable in the service?
A: The medical department has absolutely no jurisdiction in a case of that kind.

Q: Well, as a qualified expert in neuro-psychiatry, is it your opinion that a man of this type is detrimental to the service?
A: Yes. I believe he is detrimental to the service, and a detriment, not only to himself but to the morale of the organization to which he is a part. We have seen it repeatedly where we have had similar cases, and they just do not adjust. In a rare case, we get them to adjust--but that's a rare case."

4. Accused, on being advised of his rights, elected to remain silent. The defense introduced no evidence.

5. There is direct evidence that accused, at the time and place alleged, struck Master Sergeant Donald L. Weber on the shoulder with his fist (Spec. 1, Charge I) and did not obey the sergeant's order to remove himself from the Non-Commissioned Officers' Club, Northern Air

Service Command (Spec. 2, Charge I). It further appears that Sergeant Weber was then in the execution of his office (See CM 211996, 10 B.R. 193, and compilation of cases in CM 211978, 10 B.R. 179) and that the order was lawful. Accused manifestly was intoxicated at the time of the offenses. Therefore, a question arises whether the court was justified in concluding that he was not so drunk as to be incapable of understanding the quality of his acts involved in the assault or to entertain the specific intent involved in the offense of willful disobedience (cf. CM 223335, 13 B.R. 386). In this connection, it should be observed that in cases of this nature it is the exclusive function of the court and the reviewing authority to weigh the evidence and determine what facts are proved thereby. The function of the board of review in passing upon the sufficiency of the evidence in such cases is merely to determine whether there is in the record any substantial evidence which, if uncontradicted, would be sufficient to warrant the findings of guilty. (sec. 408 (2), Dig. Op. JAG, 1912-40).

There is competent evidence in this case that accused, at the time of his acts of assault and disobedience, was able to walk and carry on a connected conversation. He recognised Sergeant Weber, called him by name, and clearly indicated by his words and actions that he understood the meaning of the order. He apparently appreciated the seriousness of his predicament for, in the words of one of the witnesses, he "pleaded" with Sergeant Weber not to call the military police. His violent and apparently irrational conduct following the altercation with Sergeant Weber was interspersed by periods of lucidity during which he expressed regret for his behavior. His physical strength and coördination were not impaired, for he was able for some time successfully to resist the efforts of several men to evict him from the club. Even after his removal to the hospital he recognized people and attempted to rationalize his conduct, and on the following morning he was able to recall what had occurred. This evidence, it is believed, justified the court in inferring that accused was not so drunk as to be unable to entertain the knowledge and specific intent involved in the offense of which he was found guilty. The evidence as a whole is reasonably susceptible of a conclusion that accused's seemingly irrational acts of violence were primarily attributable to frustration and rage instead of the influence of intoxicants. The testimony of the psychiatrist that accused is a constitutional psychopath supports this view. In this connection, it is apparent that the opinion of the psychiatrist that accused was unable to control himself was not based on the theory that accused was insane or too drunk to entertain a specific intent. Instead, it was based on accused's psychopathic state and associated aggressiveness aggravated by the consumption of liquor (cf. CM 244490, 28 B.R. 323).

Paragraph 126a (p. 136) of the Manual for Courts-Martial cautions that evidence of drunkenness should be carefully scrutinized as drunkenness is easily simulated or may have been resorted to for the purpose of stimulating the nerves to the point of committing the act. Questions propounded by members of the court on examination of the witnesses disclose that the court was fully aware that accused's mental

capacity was the principal issue of fact in this case and that it carefully scrutinized the evidence with respect theretp. For this Board to disturb its finding of fact would be, in the words of another board of review, "a plain usurpation of power and frustrative of justice".

The Board is cognizant of a recent board of review opinion (CM 223336, 1 Bull. JAG 159) in which it was held, on somewhat similar facts, that the record of trial was legally sufficient to support only so much of a finding of guilty of a specification alleging willful disobedience under Article of War 65 as involves a finding of guilty of failure to obey under Article of War 96. The distinguishing feature between this case and the cited case is found in the following quotation from the latter:

> "* * * No witness testified that accused appeared to have the mental capacity willfully and intentionally to disobey the orders. * * *
>
> * * *
>
> "There is no evidence in the record of trial from which an inference might properly be drawn that accused, at the time of his acts, had mental capacity to understand the orders or that he was capable of entertaining the specific intent willfully and intentionally to disobey them. * * *"

Unlike the cited case, one witness in this case testified that accused, at the time of the assault and disobedience, was not "so drunk that he did not know what was going on" and another testified that he appeared to know what he was doing. This is tantamount to saying that accused possessed the mental capacity to entertain an intent willfully to disobey. As previously stated, these opinions are supported by facts. It is true that contradictory opinions and facts appear of record. However, it is not the function of this Board to judge the credibility of the witnesses or weigh the evidence. We cannot, in the light of the evidence, say that there is not a reasonable basis for the inference that accused entertained the requisite intent.

A comparison between CM 223336, supra, and what appears to be a companion case (CM 223335, 13 B.R. 383) is significant. The court found each accused guilty of willful disobedience under the 64th and 65th Articles of War. There is evidence that the two accused had together consumed a considerable quantity of liquor and were drunk at the time of the offenses. Each accused manifested violent rage. The accused in CM 223335 was "hollering and kind of crying and waving his arms around". As to CM 223335 the Board of Review found the record of trial legally sufficient to support the finding and sentence and, as to CM 223336, legally sufficient to support only a finding of guilty of failure to obey. Examination of the two opinions disclose that the principal distinction between the two cases is that in CM 223336 all the witnesses as to mental capacity testified, without

contradiction, that accused had lost control of his mental faculties because of his drunkenness; whereas, in CM 223335, there was some testimony, albeit contradicted, that accused had not so lost control. In neither case did the Board endeavor to weigh evidence. In CM 223-336 it held, in effect, that there was no substantial evidence to show specific intent. In CM 223335, where there was some substantial evidence showing specific intent, the Board declined to weigh it against the evidence to the contrary. It is considered that the same distinction lies between CM 223336 and the case now under consideration.

6. The testimony of the psychiatrist quoted at the end of paragraph 3, supra, was improper in that it went beyond the question of accused's mental capacity and into the wholly immaterial question of whether, in the opinion of the psychiatrist, accused is detrimental to the service and should be eliminated therefrom. The testimony patently did not prejudice accused's rights insofar as the findings of guilty are concerned. It seems reasonably clear that it was based on medical, instead of disciplinary, considerations and, as such, did not influence the court in imposing sentence. However, the testimony is somewhat duplicitous and might have been construed as an opinion that severe disciplinary punishment should be imposed. The fact that the court adjudged the maximum sentence for the offenses of which accused was found guilty, when considered in connection with the mitigating evidence as to accused's psychopathic state and drunkenness, lends some support to the view that the court did so construe the testimony and was influenced thereby.

It has been held that "* * * if the irregularity did not prejudice accused so far as the findings are concerned * * * there is no foundation for holding the sentence illegal and relief must come from the final authority in the military justice procedure--the confirming authority". (CM 232160, 18 B.R. 396; CM 243015, 27 B.R. 260) On this basis, the Board of Review is of the opinion that the record of trial can be purged of any possible effect of the error by a remission of a part of the confinement imposed.

7. The court was legally constituted and had jurisdiction of the person and subject matter. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence and to warrant execution of so much of the sentence as the reviewing authority may in his discretion deem just.

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

/s/ Itimous T. Valentine, Judge Advocate

/s/ Robert C. Van Ness, Judge Advocate

New Delhi, India
13 August 1945

Board of Review
CM IBT 581 (CT 30)

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| UNITED STATES | FOURTEENTH AIR FORCE |
| v | Trial by GCM convened at Kunming, China, 5, 6, 7 May 1945. Dishonorable discharge (suspended), total forfeitures, confinement at hard labor for 1 year. China Theater Stockade No. 1, APO 627, designated as place of confinement. |
| Private First Class Fred G. Mason, 36729381, 1211th Military Police Company (Avn). | |

OPINION of the BOARD OF REVIEW
O'BRIEN, VALENTINE and FONTRON, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the office of The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, India Burma Theater, and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Assistant Judge Advocate General.

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

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

Specification 1: In that Pfc Fred G. Mason, 1211th MP Company (Avn), did, at Kunming, China, on or about 24 January 1945, while posted as a sentinel, permit an unauthorized Chinese female to pass, in violation of lawful standing orders prohibiting the same.

Specification 2: (finding of not guilty)

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

Specification: In that Pfc Fred G. Mason, 1211th MP Company (Avn), did, at Kunming, China, on or about 24 January 1945, with intent to do him bodily harm, commit an assault upon Lo Chih-shuan, Special Duty

Brigade, Chinese Army, by striking him in the eyes with his fist.

CHARGE III: (finding of not guilty)

Specification: (finding of not guilty)

Accused pleaded not guilty to all Charges and Specifications. He was found guilty of Specification 1, Charge I, and Charge I; of the Specification, Charge II, and Charge II; and not guilty of Specification 2, Charge I, and of the Specification, Charge III, and Charge III. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 1 year. The reviewing authority approved the sentence but suspended the execution of the dishonorable discharge and designated the China Theater Stockade No. 1, APO 627, as the place of confinement. The proceedings were published in General Court-Martial Orders No. 18, Headquarters Fourteenth Air Force, APO 627, 26 May 1945.

3. Evidence for the Prosecution:

The prosecution introduced in evidence as Exhibit 1 Air Base Memorandum No. 26, dated 25 May 1944, issued from Air Base Headquarters, APO 627, a copy of which was distributed to 1211th Military Police Company on the base. This memorandum in pertinent part provides:

"* * * Military Police will permit no females to enter the Air Base unless they have identification cards or permits, or, in the case of female laborers, the proper arm bands. Woman found on the Air Base without proper identification will be detained and investigated by the Security Officer or, in his absence, the Provost Marshal or Officer of the Day. Chinese females will be turned over to the Station Master for further investigation if their presence on the base is not satisfactorily explained".

The injured party, Lo Chih-Shuan, who will hereafter be called "Lo", testified on three different occasions for the prosecution (R. 27, 113, 296). He stated he was a private in the 5th Company of the Chinese Special Regiment of the Chinese Air Force stationed at the airfield in Kunming (R. 27, 28). On the night of 24 January 1945 he was on guard duty at the intersection of the Kunming road and the airplane taxiway (R. 28). The accused was on guard duty at the same place (R. 28). A jeep approached from Kunming carrying a Chinese girl and one (R. 31) or two (R. 39) Americans. Acting on orders from his colonel he stopped the jeep and asked the girl if she possessed a pass (R. 31). The accused, an American military policeman, came to the jeep

and asked the woman to go to the guard "shack" with him, but Lo prevented her from going. She was then taken across the taxiway toward the Chinese colonel's office (R. 31). At this point two Americans arrived in a truck and asked the girl to get in it (R. 31, 32). He refused to release the girl and the two Americans in the truck called to the accused for help to secure possession of her (R. 32). Accused came over to the truck, struck Lo in the eye, pulled a pistol and fired one shot near his head. Lo did not touch accused before being struck by him (R. 32, 44). During this encounter the Chinese girl got into the truck and it disappeared in the direction of Hostel 6 located inside the air base (R. 33; Ex. 2). A Chinese MP was also on duty at the time and place the incident occurred. Both the Chinese MP and Lo were under orders to check all vehicles and Chinese that entered the post (R. 34). The Chinese MP could authorize any person to enter the airfield (R. 35) but Chinese civilians were required to have a pass (R. 43). The incident occurred about midnight but Lo did not have a watch and could not tell the exact time (R. 35). While he was talking to the Chinese girl a Chinese civilian came and stated that the girl was a member of Hostel 6 (R. 36). During the day his post was a short distance away from the gate but at night all three guards are supposed to remain together (R. 38). The Chinese girl wanted to go with accused but Lo prevented her from going (R. 41). He did not let her enter because she did not have a pass (R. 41) or any other identification (R. 42). The Chinese MP did not tell accused that the girl could enter (R. 43). Lo could not identify this girl (R. 45). The second time Lo testified he stated that about twenty minutes after being struck he was relieved from duty and reported to Lieutenant Tai Chao Lung (R. 114). He reported about thirty minutes after the incident (R. 114). Lo's right eye was injured by the blow and it was bloody and blue (R. 115). He went to the dispensary and was treated by an American doctor for a period of about two weeks (R. 115, 118). He reported to the officer the same as testified at the trial (R. 115-116). The third time this witness testified (for the prosecution in rebuttal) he stated that he went on duty at 2100 hours (R. 299) and the incident occurred about 2200 hours (R. 297). The Chinese MP did not speak to the woman when she arrived at the gate (R. 299) The two Americans in the truck did not argue about stopping the girl but just called accused. It could not have been one of the Americans in the truck who struck him. There was one American soldier waiting at the gate for a ride at the time of the incident (R. 299).

Lieutenant Colonel Harry M. Burke testified that as investigating officer he warned accused of his rights under Article of War 24 and thereafter accused made a statement under oath which was recorded in shorthand and written up (R. 50). (This was apparently not signed by accused (R. 48)). Accused told him it was the duty of Chinese military police to question Chinese entering the field but on occasions he questioned Chinese accompanying Americans because the Americans resented the Chinese guards interrogating their friends (R. 49). The Chinese girl had passed

through that post before and he was quite confident that she lived some place in the hostel area but he could not say definitely that she had a pass. He did not see a pass that night (R. 49). Accused denied hitting or assaulting any Chinese (R. 50). Accused told the investigating officer that the Chinese MP said the girl had a pass and indicated that it was all right for her to go through (R. 52).

Captain Walter I. Fowler, Jr., testified that he commands the military police posted at the airfield and that the sergeant of the guard and the corporal of the guard are responsible for giving the men their instructions, any instructions that come from the commanding officer or the first sergeant (R. 75). He was not assigned to the company until 21 February 1945 (R. 68). He did not recall ever having seen the specific directive involved which is attached as Exhibit 1 but had seen directives from the base command when he took over the company covering the same subject. There were no special or general orders posted in the guard shacks when he assumed command. He read over the base directives and memoranda and incorporated them with his own orders in his special orders which he then posted (R. 76).

Second Lieutenant Tai Chao Lung testified that Lo reported to him on the night of 24 January. Lo's eye was blue and swollen and the Lieutenant sent him to the dispensary (R. 126). Lo was on duty that night and his post was with the American and Chinese MPs at the crossroad of the road to Kunming and the airplane taxiway (R. 126).

Sergeant John Porcoro testified that on the night of 24 January he treated Lo at the dispensary for an eye injury. The eye was puffed and there was some discoloration. Lo returned for treatment daily for ten days (R. 128).

4. Evidence for the Accused:

Private First Class Adolph F. Ciesielski testified that he had known accused for twenty months and that his general reputation is very good (R. 138).

Private First Class William C. Brockman testified that he had known accused since September 1944 and his general reputation in the outfit is very good (R. 149, 150).

Private First Class Wayne M. Printy testified that he has known accused for two years (R. 155) and accused always does his duty, has been a regular fellow, hasn't any enemies and everyone that Printy knows speaks a good word for him. He does his duty as an MP should (R. 160). Printy admitted that he had been tried and convicted under the 96th Article of War for joyriding. (He was with accused when the incident occurred which resulted in an alleged offense of which the accused was found not guilty by this

court. The law member instructed the court that this evidence "bears purely and simply upon the credibility of the witness and not upon the guilt of accused".)

Technician Fifth Grade George W. Pritchard testified that he has known accused since March 1943 (R. 176). Accused's general reputation in his organization is very good and he performs his military duties in a very good manner (R. 181). If Chinese persons came to the gate the Chinese MP on guard would check them for their passes and determine whether or not they should come on the base and the American MP would stand by and let the Chinese guard take care of them. These were instructions given by their old commanding officer (R. 183). These were the instructions in effect in January (R. 182). If the Chinese were in an American vehicle the American MP was to assist the Chinese MP if he needed help. The Chinese MP always checks the passes (R. 189). Pritchard did not know the duties of the Chinese soldier but the Chinese MP is supposed to pass Chinese personnel (R. 195).

Private First Class Lindsey Collom testified that he has known accused for two years. Accused is well-liked by everyone and has no enemies within Collom's knowledge. He performs his duties as an MP should (R. 197, 198).

Corporal Stanley J. Blitek has known accused since May 1943 and he does his job very well (R. 203). Blitek was corporal of the guard in January and at that time they were told that the Chinese guard checked Chinese vehicles and the American MP the American vehicles. If the Chinese MP passed a Chinese person the American MP would let them go (R. 205, 207). Some civilians who lived within the area did not have passes and the Chinese MP would let them through if he recognized them (R. 208). If the Chinese refuse to let them pass, the American MP calls the corporal of the guard (R. 208).

Private Benjamin T. Paniagua has known accused for about one and one-half years and saw the accused on duty at Gate 3 on the evening of 24 January 1945. A Chinese MP was also on duty and there was a Chinese guard at the gate but the latter was off his post, which was about two hundred yards away (R. 219, 220). He was there at about 8:30 or 9:00 o'clock waiting for a ride. Two "GIs" and a Chinese girl walked up to the gate where the Chinese MP stopped the girl, spoke to her and waved her on through. When the girl and her companions got across the street the Chinese soldier walked over and stopped her (R. 221). Accused asked the Chinese MP "if she was all right" . The Chinese MP said she was and that she was going towards Hostel 6. He also said that the Chinese soldier was not supposed to be there nor "to be butting into that business" and that he had already okayed the girl (R. 223). He said in English that she was all right and was allowed on the base (R. 225). The witness and accused walked over and told the Chinese soldier not to bother her. Accused

then walked back and asked the Chinese MP, "Now, are you sure she's allowed on the base?" The Chinese MP said, "Yes, she is allowed on the base", and accused returned and told the American soldier to pay no attention to the Chinese soldier. The Americans kept on walking and the Chinese soldier kept on going with them. Accused never hit the Chinese soldier but he did touch him on the chest when he told the Chinese soldier to leave the girl alone (R. 225, 226). The witness and accused returned to the gate and the witness left (R. 226). When accused was talking to the Chinese soldier the latter backed up and tried to pull his rifle so accused took his gun and shot it in the air (R. 228). The witness admitted that he had told the investigating officer on a previous occasion that he did not know who fired the shot and that he had not heard a shot fired (R. 229, 230). He also admitted that when accused went back to talk to the Chinese MP he had not gone with him but that accused said that she was "okay" when he came back. He actually had not heard the last conversation between accused and the Chinese MP (R. 234, 235, 236). (Prosecution submitted to the court for direction the question of whether or not the testimony of this witness shall be investigated for matters of perjury (R. 239)).

Corporal William H. Melvin, a witness called by the prosecution and at the conclusion of his testimony made a defense witness, testified that the reputation of accused was pretty good (R. 58).

The accused having been apprised of his rights as a witness elected to be sworn and testified that he was twenty-two years old and entered the army 1 February 1943. He was never convicted of any offense prior to entering the army. After six weeks of basic training he was transferred to the 1211th Military Police Company, his present organization (R. 243). Around Christmas in 1944 he began to pull guard duty at the gates to the base and on the night of 24 January 1945 was on duty at Gate 3. His duties were to check on trip tickets and cargo in United States vehicles (R. 245). He and others had previously been instructed by the then company commander, the first sergeant, and the sergeant of the guard that the Chinese MP would check all Chinese personnel and grant or deny them admittance. These instructions had not been changed on the night of 24 January (R. 246). A Chinese MP was on duty at Gate 3 on this night and a Chinese soldier was at a sentry post about one hundred to one hundred fifty yards from the gate (R. 247). At about 9:00 o'clock two American soldiers accompanied by a Chinese girl walked up to the gate and the Chinese MP, after looking at the girl, waved her on through the gate. After the three had crossed the taxiway an argument ensued between them and the Chinese soldier guard. Accused then asked the Chinese MP if the girl was all right and upon being assured that she was, walked over to the place where the argument was being had. He asked the

cause of the trouble and the Americans stated that the guard wanted to take the girl away from them. The Chinese guard then began to argue with both the accused and the girl so he told the guard to wait a minute and returned to the Chinese MP. He was again assured by the Chinese MP that the girl was to be admitted to the base. Witness then returned and found the Chinese guard trying to pull the girl away from the Americans. Witness told the Americans to pay no attention to the Chinese guard and pushed the guard away but did not strike him. The guard then brought his rifle to port arms. Upon the American soldiers expressing fear that the guard would shoot someone, witness told them to walk away with the girl at the same time firing his gun into the air about five feet from the Chinese guard. The guard again ran up to grab the girl and again witness told the soldiers to keep on walking. After this he returned to his guard post. Private Paniagua was present and witnessed the transaction as related by witness. After the American soldiers left with the girl Paniagua obtained a ride into town. About an hour later the sergeant of the guard came to the gate with the Chinese guard who was crying and holding his eye. The sergeant of the guard asked accused if he had hit the Chinese guard and was told that he had not. Accused was relieved about 10:00 or 10:30 and taken to MP headquarters (R. 245-252).

On cross-examination accused stated that he did not examine the Chinese girl because the Chinese MP had checked her and said that it was all right for her to go on and that she lived in Hostel 6 (R. 262). He told the soldiers to walk off with the girl which they did, the Chinese guard following them, hollering at them in Chinese and trying to grab the girl (R. 263). He did not know the Chinese girl although he had seen her pass through his gate on several other occasions (R. 265).

In response to questions asked by the court accused said that he did not try to take the girl into the guard shack (R. 271); that he was unable to identify the witness Lo as the Chinese guard and that the last he saw of the girl, the American soldiers and the Chinese guard they were walking toward Hostel 6. (R. 272, 273)

5. Rebuttal evidence:

(a) Captain Fowler was recalled as a witness for the prosecution and testified that he was assigned as commanding officer of the unit on 21 February 1945. The sector commander told him that the 1211th Military Police Company was in a deplorable condition and that there was a definite clique in the organization that had to be broken up. One of the first things Captain Fowler did was to talk to various members of the unit including the sergeants and corporals of the guard to find out what men were in the clique, who were continual "goof offs" and who were not available for duty when they should be. From these conversations

he compiled a list of seven to ten men among whom the name of accused appeared. (The defense objected to the evidence concerning the clique but was overruled) (R. 283, 284). He named the members of the clique as Love, Paniagua, Printy, Mason, Killilea, Durant, Gawer and Armstrong. (The law member ruled so many of the names which designated witnesses who testified be stricken out. This rule was not to affect the applicability of this evidence to the accused as a matter of his credibility) (R. 284). Captain Fowler learned that accused's character was bad but he had no personal knowledge of the individuals involved in his investigation. He had talked to Dettman, Yocom, Filling, Leffel, Keenan and Blitek, six key men of the organization. He could not remember what each said but did remember the answers to his investigation gathered from them as a composite group (R. 285, 286).

Captain DeWitt Harry, Base Security Officer, a witness for the prosecution, testified that he was liaison officer with all Chinese units on the base, his duties being to post and act with the Chinese on the location of all guards and to co-ordinate the activities of the Chinese and American guards. The base is under control of the Chinese (R. 289, 290). It was the duty of the Chinese soldier guards (of whom Lo was one) to check, in co-operation with the Chinese MPs, all Chinese entering the base. No Chinese were allowed to enter the base without proper identification. The American MPs had no jurisdiction whatever over Chinese coming in or going out of the gates except to "back up" the Chinese MPs and Chinese soldier guards (R. 292, 293). The Chinese guard and Chinese MP on Gate 3 had what amounts to concurrent jurisdiction there (R. 295).

(b) Corporal James E. Yocom, a defense witness, testified that he had never had any conversation with Captain Fowler regarding the general reputation of the accused and that Captain Fowler had not asked him concerning same. On examination by the court, the witness testified that generally speaking the reputation of the accused was excellent (R. 302, 303).

Sergeant Duane W. Dettman, a defense witness, testified that he was the chief clerk of the outfit, that the general reputation of the accused in the organization was very good and that he had never talked with Captain Fowler with regard to the accused's reputation (R. 304, 305).

6. An extended discussion of the evidence is not deemed necessary except as it may pertain specifically to the matters hereafter discussed. It should here be noted, however, that the evidence adduced by the prosecution and the defense is directly in conflict, and that, taken as a whole, is not of such quantity or quality as to substantially compel a conviction. Such must be borne in mind in determining the questions presented by the record.

The accused introduced evidence showing his general reputation for good character and military efficiency. The rule concerning the admissibility in military trials of character evidence is set forth in paragraph 112b, Manual for Courts-Martial 1928, page 112, which provides:

> "The accused may introduce evidence of his own good character, including evidence of his military record and standing in order to show the probability of his innocence, and if he does so the prosecution may introduce evidence in rebuttal".

Whether the words "evidence of his own good character" mean as to the traits involved in the offense with which he is charged or as to good character in general is unnecessary to discuss in view of our opinion in this case. The prosecution attempted to rebut the evidence of good character and military efficiency of accused by testimony of Captain Fowler to the effect that he had talked to six of ninety-seven men in the organization and gathered the opinion from them that accused was a member of a clique, that he was a "goof-off", that he was not available for duty when he should be and that his character was bad. Insofar as this case is concerned we shall only discuss the question as to accused's reputation, as herein lies, in our opinion, error that together with other matters require disapproval of the findings and sentence. Character refers to the inherent qualities of a person while reputation refers to the estimate the community in general has formed as to character. In our opinion it is well settled that evidence of good character or bad character is limited to what the general opinion of the community is or, as in this case, the general opinion within the organization of which accused is a member. It cannot be established by individual opinion. It is stated in section 333, Wharton's Criminal Evidence that:

> "Reputation cannot be established by the opinion of witnesses as to the character of the defendant; it must be established by proof of the way the community regards the accused. It cannot be proved by a statement of one or two individuals but must be such as is generally current in the community * * *".

There are many forms of expression by which an effort has been made to define of what general reputation consists. Some of them are, common opinion, that in which there is general concurrence, prevailing opinion in that circle where one's character is best known, common report among those who have the best opportunity of judging of his habits and integrity, and common reputation among his neighbors and acquaintances. This does not mean, however, that the majority has voiced an opinion, as the reputation may be a general one even though the basis of the inference as to such reputation is gathered only from utterances of the minority

of the community. In Cunningham v. Underwood, 116 Federal Reporter 803 at page 811, the court stated:

> "The 'community' whose estimate of character is to be ascertained is, therefore, composed of those called by some jurists 'his neighbors', by others 'his associates or acquaintances', and by still others as those who are 'conversant' with him. The provable general reputation of one is, in a large sense, the prevailing estimate concerning the person inquired about entertained by the community thus defined. It must follow, therefore, that it is not necessary that a character witness shall be able to say that he knows what a majority, or any other particular number, of the persons conversant with the person inquired about say about him. If the witness has heard enough to enable him to say that he thinks he knows the prevailing opinion entertained of him by his acquaintances, he is competent to speak, subject to cross-examination as to source, extent and correctness of his information * * * ".

Wigmore on Evidence, Third Edition, section 1610, quotes from Thomas Hardy's trial as follows:

> "You cannot, when asking to character, ask, What has A. B. C. told you about this man's character? No; but, what is the general opinion concerning him? Character is the slow spreading influence of opinion, arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites into one general opinion, that general opinion is allowed to be given in evidence".

In CM 196371, Steenberg, 2 B. R. 349, the Board of Review quoted Greenleaf on Evidence 16th Ed. p. 586:

> "* * *A reputation involves the notion of a general estimate of the community as a whole - not what a few persons say, nor what many say, but what the community actually believes".

In Moore v. United States, 123 Federal Reporter Second Series, 207, after the defendant had offered evidence of good character the prosecution offered evidence in rebuttal thereof. One witness testified that the defendant had a reputation for violating the Internal Revenue Laws for about five years and that he knew that his reputation in the community in which he lived by hearsay. He stated that he had heard negroes who worked for defendant and who lived in the same county speak about him. There were only two negroes who told the witness about the defendant. He then gave the names of these two people to whom he had talked. Another rebuttal witness was allowed not only to testify as to the reputation of defendant but was also allowed to go into detail

as to what certain persons had said about him. The court in holding that this was error stated:

> "* * *Reputation is not what a few persons say or may think about the accused, it is what the community generally believes. * * *Moreover, as a general rule, it is error for a witness testifying as to reputation to quote what others have had to say".

Captain Fowler did not testify that the general reputation of accused was bad. His evidence was that he learned this from his conversation with the sector commander and the six men he mentioned, two of whom could not recall having conversed with him about accused, and another one of whom testified as to the good military record of accused. Since the witness, in talking to the men named, was merely seeking to ascertain who belonged to a "clique" the members of which were "goof offs" and who were not available for duty as they should be, it further seems obvious that he was testifying as to his opinion based upon what he was allegedly told as to accused's membership in the clique. Personal opinion is not competent to prove reputation. Nor can proof as to general reputation extend to particulars (sec. 172, Underhill's Criminal Evidence, p. 303). The rebuttal evidence as offered by the prosecution should have been limited to reputation as opposed to what may have been the character of accused gathered from his conversation with a limited number of men in the organization. It is of course elementary that the prosecution in rebutting evidence of good character is bound by the same limitations as the accused in offering evidence of good character. From the foregoing authorities it is clear that the reputation of accused cannot be proved by stating what others said about him but such proof must be general in nature, that is the witness must be able to state what is generally said regardless of his individual opinion and regardless of particular acts of conduct. Once he has stated what is generally said, then such witness may be cross-examined as to his means of knowledge, to whom he has talked, and what they have said. In view of this, we are of the opinion that the prosecution's rebuttal character evidence was incompetent. It failed to show general reputation but on the contrary was merely an expression of Captain Fowler's opinion based on interviews with six of ninety-seven men comprising the organization. Consequently its admission was error.

7. Captain Fowler testified that he prepared a "list" of the members of the "clique". He then named some of the members on such "list". After first overruling a defense objection to the witness naming the members of the "clique" the law member later ruled that the names of those who were witnesses in the case would be stricken but that this ruling did not affect the applicability of the evidence as a matter of credibility of the accused. Paragraph 124b, Manual for Courts-Martial, 1928, pro-

vides:

"Various Grounds--General lack of veracity. --Where impeachment of a witness on this ground is undertaken, the impeaching evidence must be limited to evidence of his general reputation for truth and veracity in the community in which he lives or pursues his ordinary profession or business. In the military service 'community' may include the witness's organization, post, or station. Personal opinion as to character is not admissible, except that a witness may, after testifying that he knows the reputation of the person in question as to truth and veracity in the community in which he resides or pursues his ordinary profession or business, and that such reputation is bad, be further asked whether or not from his knowledge of such reputation he would believe the person in question on oath. After such impeaching evidence, evidence that the witness's general reputation for truth and veracity in such community is good may be used in rebuttal.

"Conviction of crime.--Evidence of conviction of any crime is admissible for the purpose of impeachment where such crime either involves moral turpitude or is such as to affect the credibility of the witness. Proof of such conviction may be made by the original or admissible copy of the record thereof or by an admissible copy of the order promulgating the sentence. Before introducing such proof, the witness must first be questioned with reference to the conviction sought to be shown, in order that he may have an opportunity of denying or of admitting and explaining it. If the witness admits the conviction, other proof is unnecessary. Evidence relating to an offense not involving moral turpitude or affecting the credibility of the witness should be excluded".

Patently there is nothing in this evidence relating to conviction of any crime involving moral turpitude. Nor does such testimony question in any way the general reputation of accused for truth and veracity. There is nothing reprehensible per se in being a member of a "clique". While evidence that accused was a "goof off" and did not report for duty as he should have might, if properly presented, be competent to rebut evidence of his good military record, it no more establishes him as a stranger to truth than it establishes for him a generally malodorous reputation. We therefore conclude that the admission of such testimony for the purpose stated by the law member was error of such a nature as to unjustifiably impugn the credibility of accused's testimony and therefore prejudicial.

8. Before pleading to the charges and specifications the accused by written motion, Exhibit A, moved the court to strike

Specification 1 of Charge I on the ground that it was vague, indefinite and uncertain in that it did not name the Chinese female involved and did not set forth the standing orders alleged to have been violated. In the alternative and in the event the motion to strike was denied the accused moved that the prosecution be required to make the specification more definite and certain by setting out the name of the Chinese female and the order referred to. The motion was denied in its entirety. Since the specification did in fact allege an offense the motion to strike was properly overruled (CM 235407, 22 B. R. 32). However, it is our opinion that the court should properly have sustained the motion to make more definite and certain. In CM 122636, paragraph 454 (33), Digest of Opinions of The Judge Advocate General 1912-40, page 353, a case involving the disobedience of standing orders, it was said that "It would have been the better course to set forth the order referred to" but it was held that the error in framing the specification was not prejudicial in view of the plea of guilty and the fact that the order was not a direct command but a standing order. In CM 210015, Ruddy, 9 B. R. 201, a motion to strike was made on the ground that the specifications did not with sufficient particularity allege wherein certain certificates set forth were false. The specifications did allege the falsity of such certificates in their entirety but it was the theory of the prosecution as declared in the opening statement that they were false only in certain material respects. It was said in that case "Under the circumstances it would have been proper in the interest of clarity to amend the specifications to specify the particulars of the alleged falsity". It was further said, however, that the failure of the court to take corrective action was not shown to have in fact misled the accused to the prejudice of his substantial rights. From the above authorities it seems clear that the better procedure would have been to have sustained the alternative motion. Whether failure to do so can be said to constitute prejudicial error must depend upon the peculiar circumstances of this case. It must be noted that the evidence indicates that more than one order was involved. Captain Fowler testified that while he had not seen Memorandum 26 he had seen base memoranda and directives covering the same subject which he had digested and incorporated into special orders for the guard. From his testimony it is apparent that there was more than one order covering the admission of Chinese civilians to the air base. Upon offering Memorandum 26 in evidence, the trial judge advocate was asked whether it was the order alleged to have been violated, to which he replied it was an order which accused was charged with violating (R. 17). It would also appear from the testimony of Corporal Blitek, although he was a defense witness, that certain Chinese civilians living in hostels on the air base were permitted entry without possessing the three types of identification set forth in Memorandum 26. Under such circumstances it would seem that in justice to the accused the particular order or orders, with the violation of which he was charged, should have been set forth with particularity. While no continuance was requested after

denial of the defense motion, we fail to see how continuing the proceedings could have availed the defense. It was not time but information which accused sought and this the prosecution persisted in withholding.

9. The witness Lo testified that sometime after the incident at the gate had taken place he reported it to his officer. In response to questions asked him by the president of the court he stated that his report to the officer was the same as that to which he had testified at the trial and then recited in considerable detail what he had told in his report (R. 115, 116). This testimony was self-serving and incompetent. Nor was it admissible for purposes of corroboration. The witness not having been impeached, it was not permissible to corroborate his testimony by showing that he had made previous statements out of court in conformity with his testimony under oath (70 C.J. 789, 790; CM 209548, 9 B. R. 77).

10. In his final argument the trial judge advocate described the defense as "dreamed up" (R. 312) and referred to "dust" thrown by the defense (R. 311, 317). He also said that the injured party (Lo) was a witness before the court five times and related the same story each time with one immaterial exception (R. 312). Actually Lo appeared as a witness but three times and there was a material variance in his testimony as to time. It was further stated that the court must justify between the witness Lo, whose testimony was five times true, and a self-serving accused and a prevaricating pal (R. 321). The details of Captain Fowler's testimony was singled out for special attention and the court was again reminded that the deplorable conditions in the accused's company was due to the accused and members of his clique (R. 316); that it was the Captain's conclusion that the character of accused was bad (R. 317). The names of those members of the clique who had testified were again improperly impressed on the court despite the fact that those names had been stricken from the evidence (R. 316). It need hardly here be said that had such testimony remained in evidence it would have been highly prejudicial.

From the prosecution's final argument the court receives its final impression of the government's case against an accused. In any case, the trial of which extends over several days and in which a great deal of evidence is introduced, a summarization of the evidence together with the remarks made in reference thereto may well assume a relatively large importance in the impression of the case carried by the court into its deliberative session. Consequently, it is important that the trial judge advocate, in summarizing his case, be accurate in citing the evidence, scrupulously confining it to testimony of record, that he be temperate in his use of language and refrain from making unwarranted references and assumptions. This does not mean that he may not make such comment as the evidence may reasonably justify or that he may not expound his case with vigor. But his obligation to fairly, honestly and truly present the govern-

ment's case (CM ETO 2885, Nuttmann, 1944; Dig. Op. ETO, p. 703) extends to his presentation of the entire case including his final argument. It may be difficult to recall in detail all of the evidence introduced at a trial extending over a period of three days. It may also be conceded that in the heat of a hard-fought case it may not be easy for a prosecutor to remain unprejudiced. Nevertheless, his duty as an officer of the court remains the same.

In Winthrop's Military Law and Precedents, Second Edition, Volumes 1 and 2, Reprint 1920, it is said on pp. 193-4:

> "Duty as a minister of justice. It was remarked by the judge in a late case in the Central Criminal Court of London, that it is 'a general principle of criminal procedure that counsel for the prosecution should consider themselves not merely as advocates but as ministers of justice, and not as struggling for a verdict but as assistants in the ascertainment of truth according to law'. Similarly, in a leading criminal case in Michigan, the court observe:-- 'A public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty'. So, O'Brien says of the judge advocate;--'He is to use no undue means to secure the conviction rather than the acquittal of the accused'.* * *
>
> "* * *And in a later case it is remarked:--'The only legitimate object of the prosecution is to show the whole transaction as it was, whether its tendency is to establish guilt or innocence. The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice and he has no right to sacrifice this to any pride of professional success'. * * *"

The remarks of the trial judge advocate were improper and not consonant with the above principles. Whether this or any one of the other errors previously noted would, if standing alone, constitute error of such prejudicial nature as would necessitate holding the record legally insufficient need not here be determined. Each is but one of several errors the cumulative effect of which, considering the contradictory nature of the evidence, makes it impossible to say that the substantial rights of the accused were not prejudiced or that he was accorded that fair and impartial trial which our system of military justice contemplates (CM 200989, 5 B.R. 11, 40; CM 210404, 9 B.R. 271, 274).

11. The record discloses that the accused at the time of the trial was 23 years of age. He was inducted at Chicago, Illinois, 1 February 1943 and had no prior service.

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

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

/s/ Itimous T. Valentino, Judge Advocate

/s/ John F. Fontron, Judge Advocate

CM IBT 581; CT 30 (Mason, Fred G.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 18 August 1945.

To: Commanding General, China Theater, APO 879, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (Pub. No. 325, 75th Cong.) and by the act of 1 August 1942 (Pub. No. 693, 77th Cong.) is the record of trial by general court-martial in the case of Private First Class Fred G. Mason, 36729381, 1211th Military Police Company (Aviation), together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma. This Branch Office is also empowered to perform for the United States Forces in the China Theater the duties which The Judge Advocate General and the Boards of Review in his office would otherwise be required to perform in respect of all cases not requiring approval or confirmation by the President.

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

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

/s/ William J. Bacon
/t/ WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

2 Incls.
Record of Trial
Action Sheet

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(Findings and sentence vacated. GCMO 2, USFCT, 8 Sep 1945)

New Delhi, India
10 July 1945

Board of Review
CM IBT 607

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| UNITED STATES<br><br>v.<br><br>Private Percy D. Pugh, 34173050, 3303rd Quartermaster Truck Company, 36th Quartermaster Battalion Mobile. | Appointing Authority: Commanding General, Services of Supply India Burma Theater.<br>Reviewing Authority: Commanding General, United States Forces, India Burma Theater.<br><br>Trial by GCM convened at APO 689, % Postmaster New York, N. Y., 21 May 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 2 years. Disciplinary Barracks. |

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

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

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

CHARGE: Violation of the 94th Article of War.

Specification 1: (Disapproved by reviewing authority)

Specification 2: In that Private Percy D. Pugh, 3303rd Quartermaster Truck Company, did, at Ledo, Assam, India, on or about 8 February 1945, feloniously take, steal, and carry away one Overcoat, wool O.D., one shirt, wool O.D. and one pr trousers, wool O.D. of the value of about $22.44, property of the United States furnished and intended for the Military Service thereof.

Specification 3: (Disapproved by reviewing authority)

Specification 4: In that Private Percy D. Pugh, 3303rd Quartermaster Truck Company did, at Ledo Assam, India, on or about 2 March 1945, feloniously take, steal, and carry away one pr trousers, wool O.D. one shirt, wool O.D. and one jacket, field of the value of about $14.67, property of the United States furnished and intended for the Military Service thereof.

Specification 5: In that Private Percy D. Pugh, 3303rd Quartermaster Truck Company did, at Ledo Assam, India, on or about 9 March 1945, feloniously take, steal, and carry away one shirt, wool O.D. and one pr trousers, wool O.D. of the value of about $8.57, property of the United States furnished and intended for the Military Service thereof.

Accused pleaded not guilty to the Charge and Specifications and was found guilty of all of them. Evidence of one previous conviction was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for three years. The reviewing authority approved only so much of the findings as finds the accused guilty of Specifications 2, 4 and 5 of the Charge and of the Charge. Only so much of the sentence as provided for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for two years was approved. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement. The order directing the execution of the sentence was withheld and the record of trial was forwarded pursuant to Article of War 50-1/2.

3. On or about the afternoon of 8 March 1945, Corporal Durant, who four or five days before had left for Nanti on convoy, returned to his station and observed that his overcoat, OD trousers, OD shirt, khaki shirt and pants, a field jacket and some underclothes were missing (R. 12). These clothes were marked with his initials and the last four digits of his serial number (R. 13). He caught accused, who lived in the same tent, delving into his barracks bag and upon being asked "what he was doing in it", accused said it was his. Durant called attention to the fact that it had Durant's name on it and accused said, "I'm sorry, I thought it was mine". At a later date Lieutenant Sisney looked in the foot locker of accused and Durant's field jacket was at the bottom of it. On the night of 8 March, Durant,

Corporal Peterson and accused were sitting in their tent and accused "owned he took the clothes at that time". About two nights later he admitted taking Durant's, Edwards's, Peterson's and Corporal Thomas's clothes. The latter were present at the time this statement was made by accused. Accused said he sold the clothes. Durant never wore any of accused's clothes and he did not believe accused ever wore his as he was not "supposed to" (R. 14, 15, 16, 17).

On 5 March Corporal Peterson "went on convoy to Shim" and when he returned the next day his OD overcoat, OD shirt and OD trousers were missing. Accused lived in the same tent. On the morning of 9 March, while Durant was present, Peterson asked accused "to get my clothes". Accused said no and Peterson replied, "Well, if we go to the Chinese camp and find out you sold them it would be too bad". Accused then admitted taking them (R. 19). Later the same morning accused brought in an OD shirt and OD pair of trousers. These were not Peterson's. Peterson laid them on the bed when Sergeant Cofield walked into the tent and he did not know whether Cofield or Pugh took them (R. 23). They were marked with the name "R. Brown" and number "305111" (R. 20, 21). They were marked Prosecution's Exhibits 1 and 2 for identification. Accused brought these in after Sergeant Cofield told him "to get those clothes he had taken away by 8:00 o'clock or go to jail" (R. 23).

On or about 8 March 1945, Corporal Chapman missed an OD shirt, OD pants, khaki shirt, khaki pants and overcoat. Accused lived across the walkway from Chapman (R. 25). After reporting the loss to Sergeant Cofield, at about 9:00 o'clock at night he found accused in a basha with some natives and another soldier (R. 26). Accused would not come to the company area so Chapman got another soldier and brought accused to the first sergeant's tent. He denied knowing anything about the clothes and then went to another tent. Chapman and Wadsworth followed him. Wadsworth said, "if he would tell about the clothes it would make it easier for him". Accused and Wadsworth went outside, talked, and then called Chapman. Accused stated "he got the clothes" (R. 27). Chapman admitted on cross examination that he had hit accused in the head when he went to the basha the second time to get him (R. 28, 29), but did not threaten him after returning to the company area (R.30). Accused said that he would get the clothes back the next day (R.34). The next morning accused brought an OD shirt and a pair of OD pants to accused's tent and told Chapman they were Chapman's clothes. Chapman looked for his serial number but the clothes did not belong to him (R. 35, 38). He saw the name "Walker" in the pants but did not see anything in the shirt (R. 38). From the tent of accused they went to the "Chinaman's" and accused asked for the clothes back. There were "a few overcoats by the main pile", but they

wouldn't let Chapman see them. About nine or ten o'clock (witness could not recall whether it was the same day) the "inspector" called Chapman to his office to initial the clothes. Chapman identified the exhibits marked for identification as the ones he initialed in the inspector's office. The pants had "W-5111" and the name "R. Walker" printed in them. He did not see any name or number on the shirt when he made the identification at the trial (R. 35, 36, 37, 38). (There is no showing that these were identified as the same pants and shirt accused first showed Chapman.)

Accused took the stand to testify as to threats made by Chapman, Peterson and Wadsworth. On the night of 8 March accused went to Sergeant Cofield's tent with Chapman and on the way he denied knowing about any clothes. About two hundred yards from the tent Chapman said, "If you don't talk about this and say you didn't get this stuff I am going to hit you in the head". Chapman then hit him and said, "If you don't tell the truth that you got the clothes I'm going to hit you in the head". Chapman hit him again but still accused denied taking the clothes. Chapman again hit him. They then went into Sergeant Cofield's tent and Wadsworth, Johnson, Cofield and the supply sergeant were there. Accused testified that no one threatened him inside the tent. He then stated that Wadsworth said, "Pugh, did you take the clothes? If you took the clothes you tell the truth or you'll get killed". Accused denied confessing to Wadsworth but admitted that he did to Sergeant Cofield (R. 32, 34).

First Sergeant Cofield is in the same company as accused. On or about 8 March, Chapman, Wadsworth and accused came to his tent and Chapman said accused had taken his clothes. Accused denied it. About half an hour later they came back and accused admitted taking the clothes. The next morning Lieutenant Sisney and Cofield found a jacket marked "L D 7762" in the foot locker of accused. Durant identified the jacket as belonging to him. Cofield went to Peterson's tent and picked up the shirt and pants accused attempted to give to Peterson. He identified the marked exhibits as the clothes and they were introduced in evidence. He checked with the 3304th Quartermaster Truck Company and found they had a soldier named Ralph Walker and the last four digits of his serial number were 5111. He did not ask about the shirt (R. 46-49).

Corporal Ralph Walker missed a pair of OD trousers on 10 March 1945. The identification mark in them was "RW-5111" and "W-5111". He had the pants the day before. He identified Exhibit 2 as belonging to him and testified that he received them from the Quartermaster Warehouse, Fort Benning, Georgia. He and Private Brown occupied the same tent.

Private Rufus Brown testified that he missed an OD shirt with

his name "R. Brown" in it. He identified Exhibit 1 as belonging to him (R. 39, 44).

Agent Frank A. Edelman, Criminal Investigation Division, took a sworn statement (Exhibit 3) from accused. Before doing so he read and explained the 24th Article of War. Agent Edelman did not explain to accused that previous confessions made by him to Cofield, Peterson and Chapman could not be used against him and that if accused chose to remain silent his silence could not be used against him (R. 50-52).

It was stipulated between the trial judge advocate, defense counsel and accused that the values set out in the respective specifications were as alleged. It was further stipulated that the articles mentioned in the several specifications were all property of the United States Government and were issued for use in the military service thereof.

4. The accused, having had his rights explained to him, elected to remain silent and no evidence was introduced by the defense.

5. The Acting Staff Judge Advocate was of the opinion that the oral confessions to Sergeant Cofield and Corporal Chapman were not properly in evidence because of improper inducement. He also believed that the written confession should not have been admitted because the evidence did not show that the prior improper inducements did not continue and that the subsequent confession was not the result of the same influence which rendered the prior confessions inadmissible. In accordance with the judge advocate's recommendation as to the exclusion of these confessions, the reviewing authority approved only Specifications 2, 4 and 5. For that reason we will disregard the mentioned confessions in this opinion except as they may constitute error prejudicial to the substantial rights of the accused as to Specifications 2, 4 and 5.

The proof shows that both Chapman and Peterson missed an OD overcoat, an OD shirt and an OD pair of trousers. From the record it is evident that Specification 2 refers to clothing taken from the possession of either Peterson or Chapman. As later pointed out, it is obvious that Specifications 4 and 5 refer to clothes taken from the possession of persons other than Peterson or Chapman. Although accused lived in the same tent with Peterson and would have opportunity to take the clothing which the latter missed, that circumstance alone would be insufficient to warrant a finding of guilty. Nor do we think that the added fact that accused brought a shirt and a pair of pants to Peterson stating that they were the latter's warrants such conclusion in view of the surrounding circumstances. We agree with the Acting Staff Judge Advocate that accused's confession concerning Peterson's clothes was not voluntary and was the result of prior improper

influence used upon him. Subsequently, Sergeant Cofield told him "to get those clothes he had taken away by 8:00 o'clock or go to jail". It may well be that he thought he could not make his position worse, having already, under duress, admitted the taking, by attempting to replace some of the articles after a threat of being incarcerated. Although such threat is not available as a defense for the larceny of clothes belonging to Brown and Walker, yet it is a circumstance which, under all the facts, does not make the proof of theft of Peterson's clothes compelling. The foregoing is equally applicable to the clothes of Chapman. We therefore hold the record of trial legally insufficient to support the findings of guilty as to Specification 2.

6. From the record as a whole it is evident that Specification 4 refers to clothes taken from the possession of Durant. Although several persons, including Durant, missed a shirt and pair of pants, among other things, Durant was the only one who had a field jacket taken, which is included as one of the items of clothing mentioned in that specification. We are unable to determine from the record whether accused's first confession to Durant in the presence of Peterson concerning Durant's clothing was before or after the coercive acts of Chapman which the Acting Staff Judge Advocate believed induced the confession to Sergeant Cofield. In view of this we are excluding such confession in reaching a determination of the legal sufficiency of this record. Accused was a tent mate of Durant and as such clearly had the opportunity to commit the theft of the clothing issued to Durant. One of the articles, the field jacket, was recovered from the bottom of accused's foot locker, and the same day Durant returned from convoy he caught accused searching his barracks bag.

"Possession of the fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and, though only prima facie evidence of guilt, may be of controlling weight unless explained by the circumstances or accounted for in some way consistent with innocence" (Wilson v. U.S., 40 L.Ed. 1090).

"Evidence of recent unexplained possession of stolen goods raises a presumption of guilt of larceny. Such possession must be conscious and exclusive * * *" (CM CBI 231 Cousins).

It is stated in 36 Corpus Juris, page 875:

"In most jurisdictions, if the possession is recent, exclusive, and unexplained, the presumption of guilt is sufficient to sustain a conviction; but in a few states unexplained possession, although recent, is not alone sufficient to do so. The matter is of little real importance,

however, as it is infrequent that the case is devoid of other evidence of guilt, and it is everywhere recognized that slight corroborative evidence of other inculpatory circumstances will support a conviction. Thus the fact that accused was present at the place where the theft occurred, or in the immediate vicinity, or had an opportunity to have committed the theft, * * * are all circumstances, the proof of any one of which in addition to the fact of recent, exclusive possession, has been held to warrant a conviction".

The presumption is one of fact rather than law, and is one which would warrant a finding of guilty by the court martial in its capacity as the trier of fact (see 36 C.J. p. 873). Applying the foregoing principles, the facts support a finding of guilty of larceny of the field jacket.

"The possession of part of the stolen property warrants the inference that accused stole all of it" (36 C.J. p. 870; see also 32 Am. Jur., p. 1053).

Under all the circumstances the evidence warrants the inference of guilt of theft from Durant and is, excluding the confession made to him, compelling in nature. If there was error in admitting accused's confession to Durant, we are unable to say that such was prejudicial to his substantial rights.

7. It has been held that the allegation of dates in larceny charges ordinarily do not have to be made or proved precisely, but it is significant that the theft charged in Specification 5 was alleged to have occurred on 9 March 1945, a date after the various other items of clothing had been missed by the persons possessing them. It appears from the evidence that it was on that date that accused attempted to return a shirt and pair of pants to Peterson and Chapman. These two items, Exhibits 1 and 2, were later identified as those of Brown and Walker. We believe, therefore, that the intendment of the pleader is apparent from the record and that it was his design that Specification 5 refer to the shirt stolen from Brown and the trousers from Walker.

The record is not clear as to the identification of Exhibits 1 and 2. When Prosecution's Exhibits 1 and 2 were marked for identification Corporal Peterson testified that they were the shirt and trousers brought to him by accused, that both were marked with the name "R. Brown" and the pants also had number "305111" marked in them. Accused also called Corporal Chapman and showed him a shirt and pair of trousers but they did not belong to Chapman. When the trial judge advocate showed the trousers, which had been marked Prosecution's Exhibit 1 for identification, Chapman testified that they had the name "R. Walker" printed in them and also the marking "W-5111" and that he

did not see any name or serial number in the shirt. Sergeant Cofield testified that Exhibits 1 and 2 were the shirt and pants he picked up in Peterson's tent. He did not testify as to any markings in the shirt and only by inference that Exhibit 2 had the marking "RW-5111". Rufus Brown identified Exhibit 1 as his property by the name "R. Brown" printed in it and Walker identified Exhibit 2 as his by the markings "RW-5111" and "W-5111". Although the evidence is somewhat conflicting as to the markings, yet, having the exhibits physically before them and from the testimony taken as a whole, the court was justified in concluding that accused took Brown's shirt and Walker's pants and had given them to Peterson as being the property he had taken from the latter.

8. From the foregoing it appears that there is only competent compelling proof of guilt of Specifications 4 and 5 of the Charge and the Charge. The thefts alleged in those specifications were separate transactions each of which involved amounts of less than $20, the maximum punishment by confinement for each offense being six months.

9. The Board of Review is, therefore, of the opinion and accordingly holds that the record is legally insufficient to support the finding of guilty of Specification 2, legally sufficient to support the finding of guilty of Specifications 4 and 5 of the Charge and the Charge, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year.

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

/s/ Itimous T. Valentine, Judge Advocate

/s/ Robert C. Van Ness, Judge Advocate

CM IBT 607 (PUGH, Percy D.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USF, IBT, APO 885, U. S. Army, 13 July 1945.

TO: The Commanding General, USF, IBT, APO 885.

1. In the case of Private Percy D. Pugh, 34173050, 3303rd Quartermaster Truck Company, 36th Quartermaster Battalion Mobile, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally insufficient to support the finding of guilty of Specification 2, legally sufficient to support the findings of guilty of Specifications 4 and 5 of the Charge and the Charge, and legally sufficient to support only so much of the sentence as involves dishonorable discharge, total forfeitures and confinement at hard labor for one year, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 607).

/s/ William J. Bacon
/t/ WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

New Delhi, India
14 July 1945

Board of Review
CM IBT 618

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| UNITED STATES | )ADVANCE SECTION, INDIA BURMA THEATER |
| v | )Trial by GCM convened at APO 689, % Postmaster, New York, N.Y., 4 June 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 20 years. United States Disciplinary Barracks. |
| Technician 5th Grade Mose Carrington, 34418158, 3307th Quartermaster Truck Company, 39th Quartermaster Battalion Mobile. | |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Technician Fifth Grade Mose Carrington, 3307th Quartermaster Truck Company, 39th Quartermaster Battalion Mobile, did, at Warazup, Burma, on or about 16 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation, kill one Technician Fifth Grade Henry Vinson, ASN 32191838, 3307th Quartermaster Truck Company, 39th Quartermaster Battalion Mobile, APO 689, a human being by stabbing him with a knife.

Accused pleaded not guilty to and was found guilty of the Charge and the Specification thereunder. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor

for the term of his natural life. The reviewing authority approved only so much of the sentence as provides for dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 20 years. The United States Disciplinary Barracks nearest the port of debarkation in the United States was designated as the place of confinement. The order directing execution of the sentence was withheld and the record of trial forwarded for action under Article of War 50-1/2.

3. The evidence for the prosecution is substantially as follows:

The accused and Technician Fifth Grade Henry Vinson, both of the 3307th Quartermaster Truck Company, were truck drivers in a convoy which stopped for the night at Warazup, Burma, between 2115 and 2145, hours, 16 April 1945 (R. 6, 10, 16, 26). Accused's truck was the second truck back of Vinson's, and shortly after the convoy stopped the two soldiers were seen standing in front of the latter truck, the lights of which were burning (R. 6). They were arguing and swearing at each other because Vinson had called accused a coolie (R. 7, 11). Accused said, "You don't be calling me that", and he drew a scout knife, opened it, and threatened to cut Vinson's throat (R. 7). Vinson said, "You are not going to cut anyone's throat. Furthermore, if you put that knife down I'll fight you like a man" (R. 7), or words to that effect (R. 17). Accused handed the knife and a flashlight to a bystander (Sergeant Oliver Williams) (R. 7, 15), and accused and Vinson started fighting (R. 7, 17). After striking a few blows, they began to wrestle and fell to the ground (R. 7, 17, 26). The testimony of two of the eyewitnesses is conflicting as to whom was on top (R. 10, 20, 24), and a third witness stated that "Vinson had the best of Carrington" (R. 26, 31). Accused was the larger of the two men (R. 19, 28). He did not use a knife while they were on the ground (R. 12, 20, 21, 29). They fought from thirty or forty seconds to two minutes (R. 7, 17, 26), then bystanders pulled them apart (R. 7, 17, 26, 29). Vinson was on his feet first (R. 7). Accused argued with men in the crowd after he got up (R. 8) and he did not move away (R. 21, 22, 27). There was blood over one of accused's eyes and bruises on his face (R. 24, 31). After they had been separated, Vinson started to walk away, looking down and brushing dirt from his clothes, with his back to accused (R. 7, 8, 17, 26, 27). When Vinson was four to nine feet away from accused and with his back toward him (R. 14, 21), accused stepped forward, drew a "PX" knife with a five or six inch blade from his pocket, and stabbed Vinson with an overhand blow (R. 8, 18, 27). According to the estimates of the various witnesses, this occurred from nine seconds to one minute after the two had been separated (R. 8, 18, 27, 31). When a bystander inquired if he was cut, Vinson said, "What did the man hit me with, a can, or was it something else?" (R. 8). He was bleeding and gasping for breath (R. 8). A medical officer who attended him immediately afterward found that he had a

"large incised wound in the left chest which was billowing out blood and air" (R. 49). He was taken to an Army hospital, where he died at 1325 hours, 18 April 1945 (R. 39). Medical officers who attended him at the hospital and performed an autopsy stated, in substance, that the wound was the cause of death (R. 39, 46).

On 18 April 1945, accused was interviewed by two agents of the Criminal Investigation Division and, after being advised of his rights under Article of War 24, accused made a voluntary statement relating his version of the stabbing. This was received in evidence as Exhibit 1 (R. 35). He said, in substance, that he had learned that his wife was going to have a baby of which he was not the father. He worried about this so much that everything got on his nerves and he became angry when the men teased him. He had trouble during the day because whoever was driving Vincent's (sic) truck would not let him into his place in the convoy. The men called him a recruit because he was a new man in the company. Shortly after the convoy stopped on the night of 16 April he remonstrated with one man for calling him a recruit. Later, as he walked past Vinson's truck, he saw Vinson with a hammer in his hand. Accused was carrying a bottle of beer, a can of chocolate drink, and a pocketknife with the "beer opener" part open. Vinson called him a recruit and accused told him not to call him that, that it made him mad. Vinson put the hammer in the truck and said, "Ain't I been funny with you and each other all along". Accused replied, "Yes, but don't call me no recruit". Vinson called him a recruit again and said, "Do you want to fight". Accused said that he did. A sergeant said, "You all better not do that", and accused answered, "These boys have been calling me recruit and I have been begging them not to call me 'recruit'". Vinson wanted to fight, so accused handed the pocketknife to the sergeant. He walked to where Vinson was standing and Vinson struck him first, knocking him down. He was dizzy and Vinson continued to strike him. Sergeant Williams told them to stop, but Vinson was on top and kept hitting. Accused "caught a lock" on Vinson's neck and threw him down but someone twisted his arm and broke the hold. Vinson then beat him on the face and followed when he tried to get away. Accused then "grabbed for a knife that I had on my left side and I took a swing at him and stuck him". Vinson said he was going to get even if it was the last thing he did, and he stopped fighting. Accused further stated that he stabbed Vinson because he was hit so many times that he "got mad all at once", that he tried to get away twice and when he did get away he could hardly see and so used his knife.(Accused referred to Vinson as "Vincent" throughout his testimony.)

4. The accused was properly advised of his rights and elected to remain silent. No evidence was presented by the defense.

5. The uncontradicted evidence shows that accused stabbed and killed Vinson during or immediately after mutual combat resulting from a sudden quarrel. The only suggestion of justification or excuse for the homicide is found in accused's contention in his confession that he acted in self-defense. As to this, the following authorities are opposite:

> "Where a person voluntarily participates in a contest or mutual combat for purposes other than protection, he cannot justify or excuse the killing of his adversary in the course of such conflict on the ground of self-defense, regardless of what extremity or imminent peril he may be reduced to in the progress of the combat, unless, before the homicide is committed, he withdraws and endeavors in good faith to decline further conflict, and, either by word or act, makes that fact known to his adversary, or unless the combat is entered into through mistake, as in the case of two persons taking each other for burglars" (40 C.J.S. pp. 996, 997).

> "As a general rule, the doctrine of self-defense cannot be invoked to excuse a killing done in mutual combat willingly entered into, although the mere fact that one who kills another who seems to be about to make a murderous assault upon him was willing to enter into a fight with the decedent with deadly weapons does not destroy his right to reply on self-defense as justification for the killing, if he acted solely for the protection of his own life, and not to inflict harm upon his adversary" (26 Am. Jur. p. 243).

There is no evidence that accused entered the combat to protect himself or that he made known to his adversary any intent he may have had to withdraw. He therefore may not justify or excuse the homicide on the ground of self defense. No other ground of justification or excuse is suggested by the evidence. It follows that the homicide was unlawful, that is, that it was either murder or manslaughter.

In determining whether, under the evidence, the court was justified in finding accused guilty of murder, the following quotations of law pertaining to mutual combat appear applicable:

> "A homicide is voluntary manslaughter, rather than murder, where it results from mutual combat, or the excitement and heat of passion arising therefrom, even though accused may not have attempted to retire from the conflict, provided the killing was not due to malice, but to the heat of passion aroused by the combat. So it may be manslaughter where the homicide is committed after the combat has ter-

minated but before the passion had subsided, although, if not under the influence of passion so aroused, it is murder.

"However, if accused or both accused and deceased entered the combat with the intention of killing, the heat of passion engendered by the mutual combat will not reduce the homicide to manslaughter. Likewise if accused entered the combat dangerously armed and took an unfair advantage of deceased, malice is evidenced and the homicide is not reduced to manslaughter, although, if accused did not intend to use the deadly weapon when he began the contest, but used it in the heat of passion in consequence of an attack made on him, it is manslaughter" (40 C. J. S. pp. 912, 913).

"* * *In general, however, a quarrel leading to a fight with deadly weapons, in the course of which death is caused in passion, will reduce the homicide to manslaughter. But even if the combat is not with deadly weapons, and one takes the life of the other in sudden heat, even with the use of a deadly weapon, it is still only manslaughter. No matter how disproportionate the violence is to the provocation (provided the provocation is such as is calculated to cause heat of blood and does cause it), the homicide will be manslaughter only. One who brings on or voluntarily enters into an affray or combat cannot, as has already been said, justify the taking of life in self-defense in the continuance thereof, although his life may be put in peril; but if he does thus kill he is guilty of manslaughter and not murder. So one is not excused in killing after a murderous assault on him is discontinued, but his act, if in heat of blood, will be manslaughter only" (McClain on Criminal Law, Vol. I, pp. 307, 308).

"If, after an interchange of blows on equal terms, one of the parties, on a sudden, and without any such intention at the commencement of the affray, snatch up a deadly weapon and kill the other party with it, such killing will be only manslaughter. But if a party, under color of fighting upon equal terms, used from the beginning of the contest a deadly weapon without the knowledge of the other party, and kill the other party with such weapon; or if at the beginning of the contest he prepares 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" (Wharton's Criminal Law, Vol. 1, 12th Ed., pp. 816, 817).

It is extremely doubtful that there is evidence in this case from which it may reasonably be inferred that accused entered the combat with the intention of killing. To the contrary, the fact that he voluntarily relinquished the knife he was holding when the quarrel commenced is evidence that he had no such intent. Under all the circumstances, the fact that accused carried on his person another knife does not indicate that he intended to take an unfair advantage by using that knife in the affray. So far as the evidence discloses, the latter knife was of a type ordinarily carried by soldiers and there is no evidence that he acquired or carried it in anticipation of fighting with deceased. Therefore, his mere possession of it at the time can hardly be said to be significant. It follows that the conviction of murder may not be supported on the basis of accused's intent at the time of his entry into the combat.

In view of the foregoing, the finding of guilty of murder must be supported, if at all, on the basis that sufficient cooling time intervened between the mutual combat and the stabbing. In this connection, the following quotations of law are pertinent:

> "* * *where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists" (Par. 149a, p. 166, MCM).

> "Therefore, if such time has elapsed after the provocation as that a reasonable person would have regained self-control, then the act must be deemed malicious and not the result of the provocation, and, therefore, murder. In other words, if there has been sufficient time for the passion to cool, the provocation will not mitigate a subsequent killing to manslaughter. The question is not whether the blow was actually struck in a continuance of the passion, but whether there had been a reasonable time for the passion to cool in the case of an ordinary person, or whether the defendant did actually commit the homicide in cold blood. This must depend on the circumstances of the case, and is a question for the jury" (McClain on Criminal Law, Vol. I, pp. 313, 314).

> "What constitutes 'cooling time', as it ordinarily is termed, depends on the nature of man and the laws of the human mind, as well as on the nature and circumstances of the provocation, the extent to which the passions have been aroused and the nature of the act causing the provocation, and therefore, no precise time can be laid down by the court as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control. The question is not only whether the de-

fendant's passion in fact cooled, but also whether there was sufficient time in which the passion of a reasonable man would cool. If, in fact, the defendant's passion did cool, then the length of time intervening is immaterial. But if, in fact, it did not cool, yet if such time intervened between the provocation and the killing that the passion of the average man would have cooled and his reason resumed its sway, then there is no reduction of the homicide to manslaughter. The question is one of reasonable time, depending on all the circumstances of the particular case, and the law has not defined, and cannot, without gross injustice, define the precise time which shall be deemed reasonable" (26 Am. Jur. p. 171).

"Cooling time intervening, giving the reason an opportunity and time to resume its throne, a homicide will cease to be manslaughter and become murder. Cooling time is always a question of reasonable time, and depends upon all the circumstances of the particular case. Where the law has not defined, and cannot, without gross injustice, define, the precise time which shall be deemed reasonable, the question is one for the jury; but where the law has defined what shall be a reasonable time, the question of such reasonable time--the facts being found by the jury--is one of law for the court. Where the question of reasonable time is one of fact for the jury, the court cannot take it from the jury by assuming to decide it as a question of law, without confounding the respective provinces of court and jury" (Wharton's Criminal Law, Vol. 1, sec. 426).

"* * * It [is] a question of fact for the court as to whether there was sufficient time for malice to be substituted for passion" (CM 221640, 13 B.R. 208).

There is substantial evidence in this case that accused and deceased had been dragged from the ground and completely separate The evidence is obscure as to the exact time that elapsed between the separation and the fatal assault, but it is clear that it was sufficient for the deceased to turn away from accused and to be occupied in brushing off his clothes. The bystanders apparently thought that the fight had ceased, for they no longer attempt to hold accused. Further, there is evidence that the accused ceased to struggle, stood fast, and argued with bystanders as if he, too, considered the fight was ended. It is believed that these facts, when considered in connection with accused's voluntary entry into the fight, its brief duration, and the brutal and wholly unfair nature of the assault with the knife, justify the conclusion that any heat of passion engendered by the mutual combat had subsided and that the killing was in cold blood. This

case is clearly distinguishable from those manslaughter cases in which an accused, while in actual conflict, resorts to a dangerous weapon. Here, order had been restored, albeit momentarily. The deceased, by his conduct, clearly indicated his complete withdrawal. Under all the circumstances, the accused, when judged by the standards of the ordinary man, should have heard the voice of reason.

Malice, the essential element of murder, may be presumed from the use of the deadly weapon. Although a pocketknife may not inherently be a dangerous weapon, it becomes one when, as in this case, it is used in a manner likely to and does cause death (CM 223574, 14 B. R. 35).

For the foregoing reasons, the Board concludes that the court was justified in finding accused guilty of murder.

6. The record discloses that the accused is 29 years of age. He was inducted at Fort Benning, Georgia on 10 October 1942 and had no prior service.

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

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

/s/ Itimous T. Valentine, Judge Advocate

/s/ Robert C. Van Ness, Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
28 July 1945

Board of Review
CM IBT 622 (CT 37)

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| UNITED STATES | ) CHINESE COMBAT COMMAND |
| v | ) Trial by GCM convened at APO 627, % Postmaster, New York, N.Y., 5 June 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 10 years. United States Disciplinary Barracks |
| Technician Fifth Grade Mah G. Shim, 39411014, Hq. CCC(Prov), USF, CT., on DS to PAC, SOS, USF, CT. | |

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

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

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

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

Specification 1: In that T/5 Mah G. Shim, Hq, CCC(PROV), USF, CT., did, without proper leave, absent himself from the guard house at Paoshan, China, from about 26 February 1945, until apprehended on 7 March 1945 at Panchao, China.

Specification 2: In that T/5 Mah G. Shim, Hq, CCC(PROV), USF, CT., did, without proper leave, absent himself from the guard house at Paoshan, China, from about 16 March 1945, until apprehended on 14 April 1945 at Yunnanyi, China.

Specification 3: In that T/5 Mah G. Shim, Hq. CCC(PROV), USF, CT., did, without proper leave, absent himself from his station at Paoshan, China from about 31 January 1945 to about 17 February 1945.

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

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

Specification 1: In that T/5 Mah G. Shim, Hq. CCC(PROV), USF, CT., having been duly placed in confinement in Paoshan, China on or about 17 February 1945, did, at Paoshan China on or about 26 February 1945 escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that T/5 Mah G. Shim, Hq. CCC(PROV), USF, CT. having been duly placed in confinement in Paoshan, China on or about 7 March 1945, did, at Paoshan, China on or about 16 March 1945, escape from said confinement before he was set at liberty by proper authority.

CHARGE III: Violation of the 84th Article of War.

Specification 1: In that T/5 Mah G. Shim, Hq, CCC(PROV), USF, CT. did, at Paoshan, China on or about 14 January, unlawfully sell to Lum Fou Lai a carbine of the value of $31.75, issued for use in the military service of the United States.

Specification 2: In that T/5 Mah G. Shim, Hq, CCC(PROV), USF, CT., did, at Paoshan, China on or about 21 January 1945, unlawfully sell to Wong Fook Lie a carbine of the value of $31.75, issued for use in the military service of the United States.

Specification 3: (disapproved by reviewing authority)

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

Specification 1: In that T/5 Mah G. Shim, Hq. CCC, (PROV), USF, CT. did, at Paoshan, China on or about 29 December 1944, feloniously take, steal and carry away two carbines of the value of about $63.50, property of the United States furnished and intended for the military service thereof.

Specification 2: In that T/5 Mah G. Shim, Hq, CCC(PROV), USF, CT. did, at Paoshan, China on or about 16 March 1945 feloniously take, steal and carry away one Thompson sub-machine gun of the value of about $72.00, property of the United States furnished and intended for the military service thereof.

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

Specification 1: In that T/5 Mah G. Shim, Hq. CCC(PROV), USF, CT., did, at Paoshan, China on or about 26 February 1945, assault T/5 Alexander R. Mortimer, a sentinel in the execution of his duty, by striking him on the neck and body with his fist.

Specification 2: In that T/5 Mah G. Shim, Hq. CCC(PROV) USF, CT., did, at Pan Chao, China, on or about 7 March 1945 feloniously receive, have and conceal one .45 caliber automatic pistol of the value of about $45.00 of the goods and chattels of the United States, then lately before feloniously stolen, taken and carried away; he, the said T/5 Mah G. Shim, then well knowing the said goods and chattels to have been so feloniously stolen, taken and carried away.

Accused pleaded not guilty to all charges and specifications and was found guilty of all of them except Specification 3, Charge III of which he was found guilty except the words "sell to an unauthorized person (name unknown)", substituting therefor the words "dispose of", of the substituted words, guilty, of the excepted words, not guilty. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 10 years. The reviewing authority disapproved the finding of guilty of Specification 3 of Charge III, approved the sentence and designated the United States Disciplinary Barracks nearest the port of debarkation as the place of confinement. The record of trial was forwarded for action pursuant to Article of War 50½.

3. Evidence for the prosecution:

On the night of 30 January 1945 accused was brought to the office of Major Podlich, Provost Marshal of the Paoshan Area Command (R. 7, 8). He was given a preliminary questioning and "told to stay that night in the room next to the office". This room was used as the guardhouse. Accused was seen several times the next morning by Technician Fourth Grade Ayervais but at 1230 hours, when the Provost Marshal wanted to see accused, it was discovered that he was not in the guardroom and that the wooden bars over the window were broken. A search was made in the area and in and around the Third Echelon Shop, where accused was attached, but he could not be found. Between 31 January

and 17 February 1945 searches were also made in the town of Paoshan both during the day and the night but these were likewise unsuccessful. On 17 February 1945 accused was brought into Paoshan by two military policemen (R. 7, 8).

On 26 February 1945 Ayervais saw accused during most of the day when the latter "was under confinement" (R. 8, 9). At 1700 or 1800 hours he took accused to dinner and then turned him over to Corporal Mortimer who was to guard him until 2000 hours. Ayervais was called to the office from the picture show at about 2130 hours and upon his arrival looked in the guardhouse but accused was not there. The window in the guardroom was open and the screen was ripped off (R. 8). The next time Ayervais saw accused was in the Provost Marshal's office on 7 March 1945. During the period from 26 February to 7 March Ayervais was assigned to that office and it was on the latter date that accused was returned (R. 9). On or about 15 or 16 March 1945 he saw accused in the guardhouse (R. 9). In the early morning of 17 March he was awakened by a commotion in the corridor. He looked in the guardhouse and of the two prisoners, Jick Gee and accused, the latter was not there. A search throughout the Paoshan area, in the fields and on the road was made on the morning of 17 March but accused could not be found (R. 10). The next time Ayervais saw accused was at the trial.(R. 10).

On 26 February when he turned accused over to Corporal Mortimer he also gave the latter his pistol, No. 1122997, but when he came back from the show the pistol was missing and was not returned by Mortimer. It was stipulated that if Mortimer were present he would testify under oath as follows:

> "The 26th of February 1945 I was assigned to guard T/5 Mah Guey Shim, 39411914, and Private First Class Jick Gee, 32634403, from the hours of 1800 to 2000.
>
> "I brought my writing paper along but ceased writing as both prisoners were restless and made me feel uneasy. They requested reading material which I did not supply. They talked about the movie being shown in the Compound at the time. Finally Gee asked to be taken to the latrine. At first I refused but Gee said he had to go as he had not been all day. It was 1905 hours when we left the guard room for the latrine. I took both prisoners. Upon returning to the guard room both prisoners went to the foot of their bunks and bent over as if to arrange their blankets. At

the same time I sat down at the table, placing the gun to my right on the table behind a case of candles (the case is approximately six inches high). The table was between us; it is about three feet wide. At the instant that I sat down and placed the gun on the table Shim whirled around, struck me in the throat, wrapped his left arm around my neck, punched me in the small of the right side of my back and pulled me backward and downward. At the same time Gee whirled around and reached across the table and over the box for the pistol. Shim let go of me, raced to the windows, opened them, climbed up and started through the open window. Gee had the gun, backed away, pointing it at me and said, "Corporal", motioning toward the door. I found myself at the door, opened it, backed out, and called for help. No one answered my call so I ran over to the movie and immediately found Captain Robert F. Podlich, Provost Marshal, and told him what had happened.

"The pistol taken was a .45 caliber automatic, 1122997, belonging to T/4 Theodore R. Ayervais, 32855844".

On the 7th or 8th of March Major Podlich returned the pistol (R. 10; Exs. 1, 2).

It was stipulated that if Major Podlich were present he would testify under oath as follows:

"I was Provost Marshal at Paoshan, China, from 25 November 1944 to 22 March 1945.

"I know the accused; he is in the Military Service of the United States; his name is T/5 Mah Guey Shim; his organization is Headquarters, Chinese Combat Command (Prov), APO 627. I was Provost Marshal of the Paoshan Area from 25 November 1944 to 22 March 1945. On 7 March 1945 T/5 Shim was apprehended in Panchao, China, by Lieutenant George P. Kelley, Corporal James J. Plummer, and myself. T/5 Shim was confined at the Guardhouse at Paoshan pending preferment of charges.

"On 16 March 1945 Staff Sergeant Custer Cornett, Jr. woke me at 0500 hours and reported that T/5 Shim had escaped. A thorough search was made of the surrounding area, but no trace of him was found. It was found that the Thompson Sub-Machine Gun issued to the guards was missing.

"On or about 7 March 1945. Kung Pin Nan, a Chinese

Civilian, living in Panchao, China, came to my office and turned over to me a .45 caliber automatic pistol, M 1911A1, Serial No. 1122997. This pistol had been issued to T/4 Theodore R. Ayervais, 32855844, of my office and was returned to him on 8 March 1945".

Of the several stipulations made, prior to the acceptance of the first one in evidence the defense counsel stated:

"* * *The accused has been informed down to the most infinite detail exactly what the meaning and effect of these stipulations are. He has full understanding of the effect they will have on the results of the findings of the court".

It was stipulated that if Technician Fifth Grade Alvin O. Hexum were present he would testify under oath as follows:

"Sometime during the evening of 29 December 1944 while I was at the movies my carbine was taken from my quarters at the 3rd Echelon Shop in the M.T.S. Compound.

"I did not find out that the carbine was gone until morning when T/5 Farrington found his was missing. We live in the same room and came in after the show and did not leave till breakfast the next morning. The weapon was issued to me by the U.S. Government. It was not my personal property, but belonged to the U.S. Government. T/5 Mah Guey Shim was working in M.T.S. Compound during time of loss of weapon".

It was stipulated that if Technician Fifth Grade Billy L. Farrington were present he would testify under oath as follows:

"After breakfast on or about 30 December 1944 I decided to clean my carbine. I went in and found the carbine gone. I called T/5 Hexum, my roommate, and we found that his was missing also.

"As we had fired our carbines the day before I know that it was in my room just before going to the show. This weapon was issued to me by the U. S. Government. It was not my personal property but belonged to the U. S. Government".

It was stipulated that if Technician Fourth Grade William G. Roby were present he would testify under oath as follows:

"I know the accused. He is a member of the Military Service of the United States. His name is T/5 Mah Guey Shim. At about 1200 hours, 20 January 1945, I cleaned my carbine. There were no parts missing then. The next morning, 21 January 1945, about 0830 hours, I noticed that the metal piece to the rear of the sight had been taken from it. I reported the theft to Lieutenant Todd. At the time I was stationed at the Compound of the 3rd Echelon Shop, M.T.S., with the 181st. T/5 Shim was working during that time at this Compound".

It was stipulated that if Jick Gee, general prisoner, China Theater Stockade No. 1, APO 627, were present he would testify as follows:

"Between the 6th and 8th of January 1945 Mah Guey Shim and Captain Wong came to my house in Sil Ba Man. Shim told me that a part of one of the carbines was missing and that he could not sell it. He said that he had sold one and had gotten a gold bracelet for it. On 1 February 1945 he met me at Paoshan. He went to Lu Chan Boa with me. That night he told me he had stolen the part needed for the carbine he had left and some ammunition. He said that he had sold the carbine for $120,000.00 CN. He did not say to whom he had sold the gun".

Prior to the acceptance in evidence of the last stipulation the following occurred:

"Law Member: Does the accused understand what that stipulation is and agree that would be the testimony of that witness if he were present here?

Defense: Yes, sir, the accused understands that.

Member: Will you tell us in your own words what you think that papers says?

Accused: Jick Gee (no further answer).

Member: What would he say if he were here?

Defense: That is a very embarassing question, sir.

Member: I will withdraw it.

Law Member: You do agree that he would say what is in that paper if he were here?

Accused: I don't know sir.

Member: What did the Captain just read?

Accused: What did he read?

Defense: If the court please, I don't think he should have to answer what was read.

Law Member: I think he can answer that.

Defense: The defense has no objection to the court inquiring whether he understands what the stipulation is, but does object specifically to that question for the reason that stipulations are not confessions on his part but is the testimony that these witnesses would give if here in person. We accept the stipulation as such, but do not admit them to be true.

Member: There is no objection to the court to that effect.

Defense: There is an implied one. The defense does not object to the court inquiring whether he knows the nature of the document but objects to asking him to state the matters that are stated in it. That would be asking him to testify to the truth of the matters.

Law Member: Do you agree that this is the stipulation of the testimony that the witness would give if he were present here?

Accused: Do you mean what he says in that paper?

Law Member: Do you agree to that being a correct statement of what that witness would testify if he were present here?

Defense: I think that I can phrase so he can understand. Do you think that if Jick Gee came in court he would say what the Captain read from the paper; you know that he might be able to say what was read?

Accused: Yes, sir.

Defense: Do you have any objection to that as his statement?

Member: I think he should be asked if he wants the witness to be called.

Law Member: Where is this witness?

Prosecution: In China Theater Stockade No. 1, APO 627.

Law Member: Does the accused desire to have Jick Gee brought in to testify in person rather than have his statement read?

Accused: No, sir.

Law Member: You don't care to have him called in person?
Accused: No, sir.

Law Member: As it appears that the accused is not fully aware of all that is going on and as there is an indication that an interpreter is needed, I will ask him to call on an interpreter to explain anything the accused may not understand.

Defense: On behalf of the accused, no interpreter is necessary.

Law Member: Shim, do you desire to have an interpreter here to answer any questions you do not understand?

Accused: I believe I understand.

Law Member: You understand what is going on?

Accused: Yes, sir.

Law Member: A point has been raised that where any doubt exists as to the accused understanding what is involved in these stipulations and there is some doubt as to the accused's knowledge of his constitutional rights, the court would like to have the president rule whether or not they will be accepted.

The court was closed and upon being opened the court announced that the stipulations would be accepted subject to the usual right of reconsidering its decision any time prior to voting on the findings" (R. 13-14).

It was stipulated that if Captain Edward J. Herrnstein, Jr., CMP, Chinese Combat Command (Prov), the investigating officer in this case, were present he would testify as follows:

"On 24 March 1945 the accused, Technician Fifth Grade Mah Guey Shim, 39411914, Headquarters Chinese Combat Command, APO 627, c/o Postmaster, New York City, New York, having been advised of his rights under the 24th Article of War by Captain Herrnstein, to wit: that he would not be compelled to incriminate himself, or to answer any question the answer to which might tend to incriminate himself, or to answer any question not material to the issue when such answer might tend to degrade him, did voluntarily make the following statement under oath duly administered to him:

"At 7 P. M. on or about 29 December 1944 I stole two carbines from M.T.S. Compound where I worked. I sold one to Lum Fou Lai for CN $60,000. About a week later, Captain Wong Fook Lia at the Chekcing Station at Panchao offered me CN $120,000 for the other carbine and I accepted. Delivery was made several days later. One part of the rear sight was missing so I stole the necessary part off one of the carbines at the M.T.S. Compound.

"On or about 31 January 1945 I left without authority. About 17 February 1945 I was picked up by the Military Police near Yao, Kilo 615, Burma Road. I was then confined at the Stockade in Paoshan.

"On about the 26th of February 1945 I and Jick Gee, another prisoner, attacked the guard, T/5 Mortimer. I grabbed the guard and Jick Gee grabbed his gun. We escaped.

"About 7 March 1945 I was picked up by the Military Police at Paoshan. Just before being captured I had given a pistol to a civilian named Kung Pui Nan. He was going to sell it for me, but I was picked up before I could see him again. This was the pistol which Jick Gee had taken from the guard when we escaped on 26 February 1945.

"On 16 March 1945 I was confined to the Stockade at Paoshan. At 0500 I picked the lock on the handcuffs and walked out. I took a Thompson Sub-Machine Gun with me. A Chinese MP, Lung Gee Fak, who picked me up told me he would let me go if I would give him the Tommy Gun. This I did. I told him I would have to have money for it so he gave me CN $32,000 to go to Kunming.

"On 14 April 1945 I was picked up in Yunnanyi".

It was further stipulated that Captain Herrnstein would testify as follows:

"On 5 May 1945 the accused, Technician Fifth Grade Mah Guey Shim, 39411914, Headquarters, Chinese Combat Command (Prov), APO 627, c/o Postmaster, New York City, New York, having been advised of his rights under the 24th Article of War by Captain Herrnstein, to wit: that he would not be compelled to incriminate himself, or to answer any questions the answer to which might tend to incriminate himself, or to answer any question not material to the issue when such answer might tend to degrade him, did voluntarily make the following statement under oath duly administered to him:

"On 29 January 1945 I was picked up for questioning by the Military Police. I was confined. I got out of the window of the room where I was confined and went to Panchao.

"On or about 17 February 1945 I was picked up while riding in a Chinese truck on the Burma Road and taken back to the Stockade.

"On or about 26 February 1945 I and Jick Gee, a fellow prisoner of mine, attacked the guard. I grabbed the guard and Jick Gee grabbed his pistol. We escaped. On our way to Chen Kung we were picked up again.

"When I was returned to the Stockade, I gave some signed statements to Captain Podlich. They were the truth.

"On the night of 16 March 1945 I found that I could open the handcuffs, did so, and escaped again.

"I stayed around Paoshan for a week after selling the Tommy Gun which I took when I escaped to a Chinese MP for CN $32,000. I went to Kunming and decided to go to Paoshan.

"I stole two carbines last December".

Prior to the acceptance in evidence of this stipulation the following transpired:

"Law Member: Is that a confession by the accused?

Prosecution: Yes, sir.

Law Member: I would like to ask him a few questions concerning the manner in which the confession was obtained by Captain Herrnstein.

Prosecution: If it please the court, I think that the prosecution will bring that out.

Defense: I think it would be highly improper to let the prosecution assume that. I suggest that the court ask him under what conditions he made the confession.

Law Member: Mah Guey Shim, you have agreed to a stipulation there as to the testimony that would be given by Captain Herrnstein if he were present. Did you make this statement to him?

Accused: Yes, sir.

Law Member: This statement purports to be a confession made by you to Captain Herrnstein in which you stated certain facts about the charges and specifications on which you are being tried. I want to ask you this question: Did Captain Herrnstein explain to you your rights under the 24th Article of War that you were not required to make any statement about these matters?

Accused: Yes, sir.

Law Member: He explained that to you?

Accused: Yes, sir.

Law Member: You fully understood his explanation of your rights before you made any statement to him?

Accused: Yes, sir.

Law Member: After his explanation of your rights, and understanding that you did not have to make any statement, did you make of your own free will, free and voluntarily of your own accord, this statement concerning the things with which you are charged?

Defense: If it please the court, now you are compelling him to testify to the truth of the statements made by him.

Law Member: No, I wanted to get the conditions under which the statements were made to Captain Herrnstein, and wanted to know if this statement is true as alleged to be the testimony that Captain Herrnstein would give in court, and if the statements were made to Captain Herrnstein voluntarily without force or compulsion on his part.

Defense: I withdraw my objection.

Law Member; Were the statements made to Captain Herrnstein freely and voluntarily after you were warned of your rights under the 24th Article of War that you need not answer any question that might incriminate you and that any statement you made might be used against you?

Defense: May I break that down for him, sir? Did Captain Herrnstein explain to you that you were not forced to make any statement? Did he tell you that you did not have to say anything?

Accused: Yes, sir.

Law Member: He told you that any statements that you made would be made of your own free will and because you wanted to make them?

Accused: He told me to make them.

Law Member: Did he force you to make them?

Accused: No, sir.

Law Member: Was there any promise of reward offered to you if you would make any statement?

Accused: No, sir, I did not know him.

Law Member: Did you tell him you wanted to make a statement?

Accused: I did not know who he was.

Law Member: He did not force you to make it and he told you you did not have to make any statement, is that right?

Accused: Yes, sir.

The stipulation, dated 30 May 1945, agreed by and between the prosecution, the defense, and the accused, regarding the testimony Captain Edward J. Herrnstein, Jr., CMP, would give concerning a confession made by the accused to him on 24 March 1945, was read by the prosecution and accepted in evidence by the court, and is appended to the record of trial as Prosecution's Exhibit 7 (R. 15-16).

"Prosecution: The prosecution offers in evidence a stipulation agreed by and between the prosecution, the defense, and the accused to be the testimony Captain Edward J. Herrnstein, Jr., CMP, would give if he were present in court regarding a confession made by the accused on 5 May 1945.

Law Member: I ask you the same question concerning this statement, did you make this statement after you were warned of your rights under the 24th Article of War of your own free will and accord?

Accused: Yes, sir.

Law Member: Does the accused have any objection to any of the statements in the stipulation?

Defense: The accused has no objection" (R. 16).

It was stipulated:

"That the value of the carbine issued for use in the Military Service of the United States referred to in Specifications 1 and 2, Charge III, and Specification 1, Charge IV, at the time alleged therein was $31.75.

"That the value of the Thompson Sub-Machine Gun issued for use in the Military Service of the United States referred to in Specification 3, Charge III, and Specification 2, Charge IV, at the time alleged therein was $72.00".

and,

"* * *that the value of the .45 caliber automatic pistol of the type used in the military service of the United States referred to in Specification 2, Charge V, at the time alleged therein was $35.00" (R. 16-17)

4. The accused having had his rights explained to him elected to remain silent.

5. Several stipulations were made and accepted in evidence. Although most of these concerned the testimony that would be given by certain persons, if present, and did not admit the truth of such testimony, yet, in effect, they practically amounted to a confession after accused had pleaded not guilty. As to some of the offenses charged, the stipulations made out a prima facie case against accused. Under the provisions of paragraph 126b, Manual for Courts Martial, 1928, such should not ordinarily be accepted by the court. The language of the Manual, however, leaves this question to the sound discretion of the court and in the absence of the abuse of such discretion, we cannot say there is error. The record reveals that defense counsel had "informed [accused] down to the most infinite detail exactly what the meaning and effect of these stipulations are. He has full understanding of the effect they will have on the results of the findings of the court". From the proceedings it is clearly evident that accused was not ill advised by incompetent counsel and did know the meaning and effect of such procedure. We are, therefore, of the opinion that the court, after due inquiry, did not abuse its discretion in the acceptance of such stipulations.

6. Probably the most serious question occurred when the court interrogated accused in its endeavor to determine his knowledge of and agreement to the stipulation as to the testimony of Captain Herrnstein. There can be no doubt that the court attempted and intended to cloak accused with its full measure of protection in regard to his rights and understanding. It is not improper for the court to interrogate an accused as to his knowledge and understanding of any stipulation. However, such questioning should be strictly limited thereto. To proceed further would, in many instances, infringe upon and violate the right of accused under Article of War 24. Captain Herrnstein's stipulated testimony reveals that he warned accused under Article of War 24 and that a confession was freely and voluntarily made to him. Although not under oath, accused was questioned as to that phase of Captain Herrnstein's stipulated testimony. By having accused admit the free and voluntary nature of the confession, the bounds of proper interrogation would ordinarily be exceeded and it would constitute an invasion of the right of accused not to be compelled to be a witness against himself. In connection with the privilege of accused as to non-self-incrimination the following appears in Dig. Op. BOJAG, ETO, sec. 451(2), CM ETO 2297, Johnson, et al:

> (C) Accused as Witnesses for Prosecution: Each accused was called to the stand as a witness for the prosecution, and was informed that he could decline to answer incriminating questions. Each accused replied that he had no objection to testifying under oath, and thereafter testified on behalf of the prosecution. Each later repeated the substance

of his testimony as a sworn witness on his own behalf. (a) Privileges and immunities Clause, 5th Amendment, U.S. Constitution: While it has been held in the federal courts that the Fifth Amendment does not require a jury in trials by military courts and military commissions, it has also been held 'that the due process and double jeopardy clauses of the Amendment apply to a defendant in criminal proceedings in a Federal military court. Considering the fact that the 'non-self-incrimination' clause is intermediate to the 'double jeopardy' and 'due process' clauses * * *, it is logical to conclude that the privilege of 'non-self-incrimination' is also applicable to an accused on trial before a Federal military court. It is manifest, however, that the Supreme Court has not specifically decided the point and that it remains an 'open question', but the tendency of judicial thought is to apply the three enumerated guarantees of the Fifth Amendment directly to an accused on trial in Federal military courts.' (b) Relationship of AW 24: The word 'witness' as used in AW 24 also includes an accused. The Article is the statutory equivalent of the Fifth Amendment in regard to non-self-incrimination. Therefore, rights and immunities under AW 24 of an accused on trial before a Federal military court 'are identical with rights and immunities of a defendant on trial before a Federal civil court.' (c) Violation of Accuseds' Rights under AW 24: The guaranty against self-incrimination prohibits the prosecution from calling an accused to the stand as a witness in his behalf in open court and before the jury. The trial judge advocate seriously erred when he called these accused to the stand as his witnesses. 'He placed them in the position of being compelled to testify for fear of adverse inferences if they refused the demands. Their appearances on the witness stand were in no sense voluntary. Voluntary action presupposes freedom of choice. The voir dire examinations * * * could not neutralize or remove the prejudicial effect. * * * The examinations came after the trial judge advocate had violated their rights by his demand that they appear as witnesses. It was the demand which inflicted the injury.' Acquiescence did not excuse this violation of AW 24".

And in sec. 451(50) CM ETO 3931, Marquez, the following appears:

"* * *(1) Facts Surrounding Accused's Confession: A CID agent obtained accused's statement in the presence of

another agent and a superintendent of police. He testified that a prior warning had been given, and that there had been no coercion, hope of reward or fear of punishment. Thereafter, the defense put accused on the stand for the limited purpose of telling the manner in which the statement had been obtained. Accused testified that the agent in effect told him he had killed the victim, that he knew he had killed him, and that there was no use in lying and getting other boys in trouble for what he had done. Accused's answers were written down. While his questioners did not lay hands on him, he stated they had acted 'pretty rough', and he was afraid and intiminated. His rights were explained to him after the agent had written his statement. Accused was not told that anything would happen to him if he did not sign it. He signed the statement after he had read it and had been given his AW 24 rights.. On cross-examination of accused after the latter had concluded telling how the confession was taken, the trial judge advocate asked 'Was the statement you made true?' Accused replied, 'Yes, sir.' The defense did not object. Thereafter, accused's confession (containing a clause that his AW 24 rights had been explained to him) was admitted into evidence. (2) Propriety of the Confession: 'On the preliminary question of the admissibility of the confession the testimony of accused to show undue influence was properly offered and received * * *. Since accused became a witness on his own behalf for an expressly limited purpose which excluded inquiry into the issue of his guilt or innocence * * *', it was improper for the trial judge advocate to have asked whether his statement was true. His affirmative answer was a confession of guilt in open court 'and constituted an invasion of his privilege to remain silent * * *, which privilege he significantly elected to assert both at the time he appeared as a witness for the limited purpose and later when his rights were explained to him.' Failure of his counsel to object did not constitute a waiver in the circumstances. The improper question and answer may have influenced the law member in ruling the confession to be voluntary, and the court in finding accused to be guilty. 'Testimonial worthlessness and unreliability constitute one of the underlying and fundamental principles on which involuntary confessions are rejected. * * * It cannot be said that the testimony of the agent * * * and accused, independently of the latter's admission of the truth of his statement, contain legal evidence of such quantity and quality as practically to compel a finding that the

statement was voluntarily given. * * * The admission of the confession was therefore an error and the sufficiency of the evidence to support the finding of guilty by the court independently of the evidence illegally received must be determined * * *".

See also CM 244490, Peace, 28 B.R. 309; CM 224444, Wanner, 14 B.R. 143; CM 234756, Merrill, 21 B.R. 155; CM 232661, Nelson, 19 B.R. 157.

Ordinarily, we believe, the foregoing would be applicable in principle to interrogation by the court as well as the prosecution and whether or not accused was under oath, but, in this particular instance, it is our opinion that such questioning was invited by accused's counsel when he made the following statement: "I suggest that the court ask him under what conditions he made the confession". It is particularly clear that the law member strictly limited his questions to that phase and studiously avoided asking accused anything concerning the truth of the confession. Under these circumstances we believe that accused waived his privilege of non-self-incrimination.

7. In regard to Specification 2 of Charge V we find no evidence outside the confession that accused ever received, had or concealed the .45 caliber automatic pistol mentioned therein. It is an elementary principle that an accused can not be convicted upon his confession without the production of evidence that corroborates the confession and which touches the corpus delicti. We are likewise unable to find in the record outside the confession any evidence of the corpus delicti as to Specifications 1 and 2 of Charge III.

"That the corpus delicti of the offense of wrongful sale of Government property in violation of A.W. 84 is not established by evidence of the fact that the property was missing, and that it was fatal error to admit a confession of the sale where there was no other evidence of the corpus delicti..

"Where a soldier was charged with unlawfully selling blankets in violation of A.W. 84 and the sole evidence pointing to the guilt of accused was his own confession, Held, that it was not proper for the court to consider the confession with respect to the sale of the property without some other evidence of the corpus delicti. An accused cannot be legally convicted upon his unsupported confession. The mere fact that the property was missing and that accused had an opportunity to take it does not constitute the

corroborative evidence necessary to make consideration of this confession proper" (Dig.Op.JAG, 1912-40, sec. 395(11)).

8. After a careful review of the record of trial we are of the opinion that the evidence is legally sufficient to support the findings of guilty of the remaining charges and specifications and therefore deem further discussion of them unnecessary. However, it is noted that the initial absence alleged in Specifications 1 and 2 of Charge I involved the identical act which constituted the escape from confinement alleged in Specifications 1 and 2, Charge II and Charge II. Therefore, it would have been preferable to omit the latter specifications and charge (See CM ETO 8706, Twist).

9. The court was legally constituted and had jurisdiction of the person and the offenses. Except as noted, no errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally insufficient to support the findings of guilty of Specifications 1 and 2 of Charge III and Charge III and Specification 2 of Charge V, legally sufficient to support the findings of guilty of Specifications 1, 2 and 3 of Charge I and Charge I, Specifications 1 and 2 of Charge II, and Charge II, Specifications 1 and 2 of Charge IV and Charge IV, Specification 1 of Charge V, and Charge V, and legally sufficient to support the sentence.

(Temporary duty), Judge Advocate
John G. O'Brien

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

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

CM IBT 622 (CT 37) (Shim, Mah Guey) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL WITH USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 21 August 1945.

To: Commanding General, China Theater, APO 879, U. S. Army.

1. The record of trial and accompanying papers in the case of Technician Fifth Grade Mah Guey Shim, 39411014, Headquarters Chinese Combat Command (Provisional), United States Forces, China Theater, together with the holding of the Board of Review, are transmitted herewith pursuant to Article of War 50½ for your action.

2. The Charges and Specifications upon which accused was tried and convicted are fully set out in the holding of the Board of Review, and in its opinion the record of trial was found legally sufficient to support the sentence and all the findings except the findings of guilty as to Specification 1 and 2 of Charge III and Charge III and Specification 2 of Charge V. In view of the recommended disposition of this case it is deemed unnecessary to set forth the Charges and Specifications and the findings relating thereto in greater detail.

3. I do not believe the accused in this case received a fair and impartial trial as contemplated by Congress in enacting the Articles of War and by the President in promulgating the procedure to be followed before a Courts-Martial as is set forth in the Manual for Courts-Martial. The basic principles of American Jurisprudence are integral parts of trials before Courts-Martial. The burden of proof is on the prosecution to convict by competent evidence. The accused is entitled to remain silent and to be represented by counsel who defends his cause within the limits of recognized rules of procedure. As I view the record in this case several fundamental rights that should have been accorded accused were denied to him. The prosecution appeared at the trial prepared to prove its case almost in toto with stipulations which in effect were confessions by accused of his guilt despite the fact that the accused plead not guilty. Accused is of Chinese descent, and the record shows that the law member during the trial became so conscious of accused's limitations and his inability to understand what was transpiring at the trial that he wanted an interpreter called so accused could understand what was occurring. While the record shows that as to the several stipulations introduced in evidence, accused's counsel stated that accused was fully informed as to the effect of each, the record proper refutes such statements as plainly appears when the law member interrogated accused as to his agreement to the stipulation contained in Prosecution's Exhibit 6. Accused's answers to the law member's questions at that time show a complete lack of rational under-

standing of what was occurring in regard to the stipulations (R.12, 13, 14). The Board of Review correctly states that ordinarily the stipulations in this case should not have been received; but, the opinion further states as there is nothing in the record to show accused was ill advised by incompetent counsel and knew the meaning and effect of such procedure, their reception was a matter for the sound discretion of the court. With this holding I cannot agree. To me the entire record shows that defense counsel failed to exercise toward accused that care for his defense that any prudent defense counsel should have shown. Outright stipulations of guilt cannot be a proper defense. Also, I believe the record clearly refutes any presumption that accused fully understood the meaning and effect of such procedure.

4. A very serious and injurious wrong was committed to the prejudice of accused by the law member when he questioned accused regarding the confessions theretofore made to Captain Edward J. Herrnstein, Jr., CMP (R. 14). Accused was not on the stand as a witness and never appeared as such throughout the trial. He expressly exercised his privilege to remain silent when his rights to testify were explained to him (R.17). Up until the introduction of accused's confession the record consisted in a large part of the stipulations above discussed. A study of the proceedings that took place at the time of the admission of the two confessions leads me to but one conclusion, and that is that accused, though not a witness, was forced to give evidence against himself. The law member elicited from him evidence that in effect amounted to a confession in open court that he had voluntarily made the confessions to the officer and that they were in fact true. Evidently the court, prior to the questioning, was not satisfied with the proof of the voluntary nature of the confessions. If it was, accused would not have been called upon to give evidence showing their admissibility. Again the Board of Review in its opinion says that ordinarily such conduct on the part of the law member is error and cites authority for its reason. The authorities there cited fully sustain the view I here set forth. As to this particular case the opinion holds accused's counsel invited the interrogation and accused waived his privilege of non-self-incrimination. The record of trial leads me to believe that accused did not waive that right. It certainly was not explained to him that he could refuse to answer. The fact that defense counsel joined in the proceedings and helped to develop this inadmissible testimony only further serves to show the lack of proper defense. It has been held more than once that accused will not be made to suffer for the incompetence and unskillfulness of defense counsel (CM 200989, 5 B.R. 11; CM 210404, 9 B.R. 265 SPJGH-M 230826, 18 B.R. 53; Bull. JAG, 1945, p. 173). That the accused on trial before a Courts-Martial is privileged to remain silent and refrain from incriminating himself is such a well founded right that authority to that effect need not be

cited. The question for determination is whether or not accused's substantial rights have been injuriously affected.

5. The Board of Review and I are not in disagreement as to the principles of law involved. We differ only in how they should be applied to this case. I believe the Board of Review reached its decision by strained reasoning when it found the facts in this case to be such as to place it without the general and accepted rules of law ordinarily applicable to a condition as presented here for review. I would not say that the errors revealed in this record are such that they always require disapproval. In some cases the record might affirmatively show that no substantial injury resulted to accused. But in the instant case it cannot be said with certainty that accused's substantial rights were not injuriously affected. The findings and sentence might have been quite different if defense counsel had not agreed to the many stipulations of guilt and the court had not required accused to say, in effect, in open court that he was guilty. It readily appears that the matter is one of speculation; and thus, it becomes impossible to say just to what extent the findings and sentence were influenced by the errors. It is apparent then that accused's substantial rights have been injuriously affected. He has been denied a proper defense and deprived of his right to remain silent. Trials before Courts-Martial, like all other courts of justice, require that accused be convicted by competent evidence after a fair trial according to established rules of procedure. I do not believe this conviction was the result of such a trial. For that reason I am compelled to recommend disapproval of the findings and the sentence.

6. A form of action designed to accomplish this result is inclosed for your signature if you agree with the recommendation.

7. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 622; CT 37).

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

2 Incls:
Record of Trial
Action Sheet

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(Findings of guilty of Specifications 1 and 2 of Charge III and Charge III, and Specifications 1 and 2 of Charge IV and Charge IV, and Specifications 1 and 2 of Charge V and Charge V disapproved. Only so much of sentence as provides for dishonorable discharge, total forfeitures and confinement for five years approved. Sentence ordered executed. GCMO 4, USFCT, 4 Oct 1945)

New Delhi, India
17 July 1945



Board of Review
CM IBT 626 (CT)

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| UNITED STATES | ) | FOURTEENTH AIR FORCE |
| v | ) | Trial by GCM convened at Kunming, China, 22 June 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 18 months. |
| Private William C. Garrity, 33250200, 907th Engineer Air Force Headquarters Company. | ) | |

HOLDING of the Board of Review
O'BRIEN, VALENTINE and VAN NESS, Judge Advocates

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

2. We deem it unnecessary to set forth the evidence as the record of trial clearly justifies a finding that accused was absent without leave during the period alleged. The offenses alleged in Specifications 1 and 2 of the Charge were both based on the same period of absence. Both incidents were, in our opinion, within the language of the Manual "substantially one transaction". Whether or not such specifications were a duplication or multiplication, we believe to be immaterial in view of the fact that the record clearly reveals that the court considered the offense of accused as one act only and adjudged the sentence accordingly. Though both specifications involve the same act, there has been no multiple or duplicitous punishment resulting in prejudice to accused. We are, therefore, of the opinion that the record of trial is legally sufficient to support the sentence.

(Temporary Duty) John G. O'Brien, Judge Advocate

/s/ Itimous T. Valentine, Judge Advocate

/s/ Robert C. Van Ness, Judge Advocate

New Delhi, India
3 September 1945

Board of Review
CM IBT 630

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| UNITED STATES<br><br>v.<br><br>Private HOWARD THOMAS, 38496007;<br>Private JOE MILES, 36791122;<br>Private EARL SEARCY, 34756962;<br>Private JOHN H. PALMER, 34677174;<br>all of the 2261st Quartermaster Truck Company | ) | INDIA BURMA AIR SERVICE COMMAND<br><br>Trial by GCM convened at APO 214, % Postmaster, New York, N.Y., 12-13 June 1945. Sentence as to Thomas, dishonorable discharge, total forfeitures, confinement at hard labor for 10 years; as to Searcy and Palmer, dishonorable discharge, total forfeitures, confinement at hard labor for 4 years; as to Miles, dishonorable discharge, total forfeitures, confinement at hard labor for 2 years. |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Privates Howard Thomas, Earl Searcy, John H. Palmer and Joe Miles, all of the 2261st Quartermaster Truck Company, acting jointly, and in pursuance of a common intent, did at or near Cox's Bazar in Bengal, India, on or about 25 April 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Khrain Dan, a human being, by shooting him with a rifle.

Each of the accused pleaded not guilty of the charge and specification and each of the accused, by exceptions and substitutions, was found guilty of voluntary manslaughter in violation of the 93rd Article of War. The court sentenced each of accused as follows: Thomas, dishonorable discharge, total forfeitures and confinement at hard labor for 10 years; Searcy, dishonorable discharge, total forfeitures and confinement at hard labor for 4 years; Palmer, dishonorable discharge, total forfeitures and confinement at hard labor for 4 years; Miles, dishonorable discharge, total forfeitures and confinement at hard labor for 2 years. The reviewing authority approved the sentences but directed that the execution thereof be withheld and the record of trial was forwarded for action under Article of War 50½.

3. Evidence for the prosecution:

It was stipulated and agreed between the prosecution and the defense, with all the accused concurring, that the accused are serving in the armed forces of the United States of America and were present at the trial of the case (R. 19) that Khrain Dan, a human being, also known as Khraindan, died on or about 25 April 1945 at or near Cox's Bazaar, Bengal, India (R. 19); that on and after 25 April 1945 the village of Cox's Bazaar and the region surrounding the village north of the main or Ramu Road, was out-of-bounds to all American troops (R. 20); that M1 rifle No. 896930, which was later received in evidence as Prosecution's Exhibit B (R. 26) was properly issued to the accused Thomas (R. 21); that a .30 caliber cartridge case was picked up on the night of the shooting about 15 yards from the point where Khrain Dan was shot.

It was further stipulated that B. Searl is a qualified ballistics expert, that he examined the above mentioned .30 caliber cartridge case, and that if he were present as a witness he would testify that the cartridge case was fired from M1 rifle, No. 896930 (R. 21).

It was stipulated that if Captain Paul R. Lurie and Anil Kumar Roy, M.B., were present they would testify as follows: Captain Paul R. Lurie, Medical Corps, 327th Airdrome Squadron, was, on 25 April, performing the duties of Squadron surgeon. On that date, at approximately 2340 hours, he examined the body of a youth which he found face down supported by two closely growing trees in the rear of a dwelling in the residential area eastern section of Cox's Bazaar. Beneath the body he found a pool of mixed clotted and liquid blood but no trail leading to the body. Death was apparently due to a high velocity projectile which entered through a wound approximately 1.5 cm in diameter located in the left lumbar region. The wound of exit was in the right lower quadrant and was about 7 cm in its widest diameter with evisceration of omentum and intestine. Death had probably occured within an hour of the examination (R. 19-20).

Anil Kumar Roy, M.B., who is Sub-divisional Medical Officer, Chittagong Division, is a properly licensed medical officer for the Government of India. and on 26 April 1945 at about 1200 hours he performed an autopsy on a body identified to him as that of Khrain Dan by a Bengal police constable and a brother of deceased. The body was that of a Burmese male, 24 years of age, of average build. The pupils were equal and rigor mortis was present all over the body. A circular wound, three-fourths of an inch in diameter, with clean cut inverted edges was found. On the left side of the back at the level of the second lumbar vertebra 2-1/2 inches lateral to the midline the wound of exit was located. The latter was a circular wound with everted lacrated edges and was 2 inches in diameter. Both wounds were on an approximate level. No tatooing appeared around either of these wounds. About 12 inches of the large bowel was prolapsed through the wound of exit. The heart was empty. Except as indicated, all organs of the body were found to be normal. Death resulted from homicdal injuries which were inflicted anti-mortem and may have been caused by a gunshot wound (R. 21).

Chester W. Baum, a truck driver of the 2261st Quartermaster Truck Company, testified that he is acquainted with accused and identified each of them by pointing them out in the court room. Baum and the accused, who are members of the same organization, were on the base at about 6:00 o'clock on 25 April 1945 when they decided to go hunting (R. 9-10). Searcy had a carbine and Thomas an M1 rifle. They went to the 505th Enlisted men's Club, which was just across the road from the base, and they each got a double shot of whiskey and of gin (R. 10, 15). After having the drinks they went in a truck driven by Baum to a tea room in Cox's Bazaar where they drank three bottles of Indian gin (R. 16). They parked the truck in a lane adjacent to the tea room. The time was about 8:00 o'clock (R. 12). At the tea room they talked to a little Indian boy whose name they did not know and of whom they inquired for "bebes" (R. 12). Upon being told by the boy that there were no "bebes" there they went a second time to the tea room (R. 12) after which they all got in the truck and went down the Ramu Road to cool off Palmer who had become highly intoxicated (R. 14-16). After going about a mile or two up the Ramu Road they turned around and came back to the bazaar area (R. 14). At this point Baum told accused he was going back to camp but they declined to accompany him. Accordingly, Baum got into the truck and went back to camp, leaving accused in the bazaar with the M1 and carbine (R. 13-14). Baum did not see in which direction accused went when he left them. This was about 8:30 (R. 13). Baum had never before been hunting with accused although he had been with some other boys. The truck used by accused and Baum for the trip to the bazaar was named "Lucky Star" and had as the last three digits of its serial number the figures 988 (R. 18). Baum never looked at the trip ticket but put it in his pocket and drove away. The accused were talking loudly when they went back in the tea room (R. 17).

Corporal Alois N. Payne (R. 21), 2261st Quartermaster Truck Company, 61st Air Service Command, testified that on 25 April he was at the detachment office of his organization in Cox's Bazaar as clerk and motor vehicle dispatcher. While on duty he did all the dispatching (R. 22-23). At about 6:00 o'clock of that evening the two and a half ton GMC six by six truck named "Lucky Star", which had 988 as the last three figures of its serial number, was not dispatched by him after it was brought in and put on the line (R. 22). At about 2:30 or 3:00 o'clock the next morning the motor of this truck was found by Corporal Payne to be warm, indicating that it had been driven since 6:00 o'clock (R. 23). This truck was last dispatched to Lieutenant Miller, air freight, with Willie McClain as driver. Chester W. Baum was assistant driver (R. 24).

At about 8:00 p.m., 25 April 1945, Sekander, a Mohammedan, came into Cox's Bazaar where he saw four colored soldiers. He was, however, able to identify at the trial only Thomas as one of the four (R. 55-56). One of the four men seen by Sekander had a rifle and another had what to him looked like a gun. Thomas gave Sekander some money with which to purchase wine (R. 56). Later in his testimony Sekander said that the colored soldiers had a rifle and three shotguns (R. 56-57). He pointed out Thomas as the person who had the rifle. Thomas and the other three colored soldiers with him asked Sekander for "bebes". Upon being told that none could be furnished, Thomas and the others went to the bazaar where they picked up a Mog woman on the truck. Sekander then went away (R. 57-58). Accused were drinking in the bazaar (R. 58). According to Sekander there were only four soldiers in the bazaar on the evening in question (R. 60).

On the evening of 25 April, Mai Loon walked from the bazaar to his home, arriving there about 9:00 or 9:30 p.m. He saw four colored men pass his house but was unable to tell whether they were soldiers or civilians (R. 60, 61). Two of them were carrying guns of something which they carried under their arms (R. 62-63). About 15 or 30 minutes later he heard some noise and the sound of a gun. He followed a crowd of people toward the bazaar from which direction the sound of the gunshot came (R. 64). He saw the body of Khrain Dan "dead by shot" (R. 64). The body was near his house.

On 25 April Maung Baoo, Cox's Bazaar (R. 65), was at his home in the east side of the bazaar (R. 66-68) about 300 yards from the fish market. About 9:00 p.m. four colored military men entered his house uninvited. Two of them had guns (R. 67-68). One of those military men pointed a gun at Maung Baoo and said, "We want bebe". Maung Baoo replied that he wasn't that kind of a man. Some one of the four said, "he is a good man", and after so saying they bade Maung Baoo good night and left the house (R. 68). About 3 or 4 minutes later he heard very loud shouting (R. 71-72-73) and a shot (R. 69, 74), the sound of which came from the palm forest on the east side of his house (R. 70, 75). After the shot was heard Maung Baoo went to see for himself and found near the palm forest the dead body of Khrain Dan. There was a hole through him and "some blood in his backside" (R. 71). The body was lying about 35 feet from the nearest house (R. 70). All the villagers were gathered around but not of them had guns or heavy sticks (R. 71). The body of Khrain Dan was lying in an open space. It took Maung Baoo 15 or 20 minutes to walk to the point where he found the dead man after he heard the shots (R. 71).

Mohammed Abdulla was on his way back to Cox's Bazaar just after 8:00 p.m. on 25 April 1945 when he met four Abyssinians or negro soldiers, one of whom had a rifle. Mohammed Abdulla pointed out in court and identified Palmer as one of the four soldiers. One of these soldiers pointed the M1 rifle with the muzzle within about 18 inches of Mohammed Abdulla's body and threatened to shoot him in the chest. Another of the soldiers grabbed Mohammed Abdulla by the shirt and asked for a "bebe" (R. 76-77). Mohammed Abdulla then got frightened and ran away (R. 78, 79). When told that no "bebes" were available from that source the soldiers used a flashlight, saw a "bebe" going in front of them and ran after her (R. 76). It was then about 8:45 p.m. About 30 minutes later Mohammed Abdulla heard the sound of shouts in Mog language and noises (R. 78). At the time of the assault upon him as well as the time he heard the noise of shouts Mohammad Abdulla was at his home and observed that the sounds came from the north side of his house from a distance of about 100 yards. Just after or during the shouting he heard the sound of a gunshot (R. 77). At this point four additional colored soldiers were seated with accused in the court room and the seating arrangement changed. Mohammed Abdulla again pointed out Palmer as the man who caught him by the shirt (R. 78).

Maung Thaoo was at his home in Tadipara, a part of Cox's Bazaar, on the 25th of April 1945 at about 9:00 o'clock when some soldiers went to his house and attempted to break in through the door (R. 80). These four soldiers first knocked on the door, then opened it and asked for "bebes" (R. 83, 84). One of them had a gun. Maung Thaoo became frightened, left his house by another door and the soldiers ran after him while he called to his relatives and the villag-

are for help. (R. 81-82). Maung Thaoo ran up to a garden in which there were trees "just like a coconut tree". At this point he heard the noise of men calling and the sound of a shot. After about 15 minutes Maung Thaoo went back to near his house (R. 82, 84). On the way back from the garden he met four villagers including Bimaung (R. 82). He also saw the dead body of Khrain Dan and observed that it was covered with blood. None of the villagers had a gun nor was there a waapon near the dead body of Khrain Dan. The body was within 10 yards of the house of Khrain Dan. (R. 83).

Bimaung of Tadipara, who resides in a section of Cox's Bazaar (R. 80), was at his house, which is located about 150 yards from the residence of the witness, Maung Thaoo, on 25 April 1945. At about 9:00 or 9:30 O'clock he heard noise and a shot at the tadi patch. He went to the tadi patch or garden which is about 15 yards from the house of Maung Thaoo. There was a crowd of villagers at the tadi patch. They were shouting, "Run away, run away * * *" in the Mog language. Bimaung was with about six villagers among whom was Khrain Dan, Bari, Photonuaoo and Chenphlaphaw, none of whom had guns or any other kind of weapon (R. 87). They saw four black men dressed, "Just like khaki" in the tadi patch. One or two had a gun. At this time the Villagers were shouting, "come and help us, come and help us". The "black soldiers" were about 25 yards away from Bimaung and Khrain Dan (R. 88). The four black men were not civilians. Bimaung saw one of the soldiers kill Khrain Dan. When Khrain Dan saw the soldiers he ran in another direction and that is when one of the soldiers shot and killed him. At the time of the shooting Bimaung was only one yard from Khrain Dan. The only word deceased uttered after being shot was "father" (R. 89). Khrain Dan had no weapon when he was shot. There was some moonlight at the time of the shooting (R. 92-93).

All four defendants were identified in court by Kermit C. Bashook, Criminal Investigation Division Agent (R. 26-27).

After being fully warned of his right (R. 27-28-29), Searcy, on the 30th of April, made a voluntary statement (R. 27-30) in which he said that he was a truck driver of the 2261st Quartermaster Truck Company and that he was regularly assigned to a two and a half ton six by six truck, the last four digits of whose serial number are 2233. On 25 April 1945 he finished his daily duties at 5:00 p.m. and turned his truck into the motor pool, delivered the trip ticket to the dispatcher, and Alois Payne and he went to supper. After supper he and all the other accused together with Chester Baum decided to go hunting. Chester Baum got his truck, "Lucky Star", which was regularly assigned to him, and by the use of Palmer's trip ticket drove the truck to pick up some boxes for Chittagong. Searcy took his carbine with only two rounds of ammunition while Thomas took his M1 with six rounds. Those weapons were put in the truck and all of the accused were driven by Baum across the road to the 505th Enlisted Man's Bar where they each had two double shots of gin. About 7:45 the five left in the truck with Baum still driving and went over to a place where South African soldiers live. They there bought a bottle of gin and each took a drink. They then started toward Ramu Road. They crossed this road and went to the bazaar where the truck was parked so it faced east, the direction from which they had come. All five men got out and went into a tea shop which was located west of the square. Here Palmer induced an Indian to purchase a bottle of gin for him. From this bottle each took a drink and were shortly thereafter joined by a South African soldier who helped them

finish the bottle. About 9:00 o'clock they left the tea room and in company with an Indian boy went back to the truck. Thomas asked this boy for a "bebe" to which the boy replied, "No bebe". An Indian crawled up in the truck and was told to get out. At this point the Indian boy called to the attention of the five the fact that the Indian who had crawled into the truck was a "bebe". The truck was driven off with all accused in it and onto the main road where they discussed the matter and decided not to go hunting as planned. Baum then said he would go back to camp if the hunting trip was off, but he drove the truck back to the bazaar at the suggestion of Thomas. Here Thomas gave an Indian a bottle and five rupees and the Indian brought back a bottle of gin. This bottle was also consumed by Baum and accused. By this time all five were pretty high but appeared to know what they were doing. Here again Baum said he was going back to camp. The weapons were still in the truck. They drove on up an alley which leads away from the bazaar to the main road and stopped the truck but in a few minutes drove on to the main road where Thomas told Baum to stop again. Accused got off and Thomas and Searcy each took his weapon. The four accused then walked back about 150 or 200 yards and stopped. Thomas and Palmer walked off up an alley-way from the main road leaving Miles and Searcy seated on the side of the road. Miles and Searcy then heard a shot and heard a bullet sing the sound of which came from the north side of the main road. It was then about 9:30 or 10:00 o'clock in the evening. About 5 minutes later Thomas and Palmer came out with Thomas carrying the gun. Searcy had his gun with him at the time. Palmer had no gun. Thomas then came back and said, "Come on back down the alley -- I know something". All four walked down to where they saw an Indian man standing in the doorway. A conversation followed between Thomas and the Indian and as the four accused moved into a pathway two Indians who were in an adjoining house ran away. As they went a little further they heard the multitude of Indians out in the bushes. Miles and Searcy here left the other accused and returned to camp. At the place in the bazaar that smelled like fish Thomas loaded his gun. Some short distance further on Thomas grabbed hold of an Indian's shirt collar and asked, "What are you doing out here?" Searcy got scared and expressed the desire to go back to camp but at that time Thomas pointed his gun at the Indian's stomach and said, "I'm an MP". When Searcy expressed the desire to return to camp Thomas replied, "You-all ain't going anywhere--you-all come down here with me and you-all coming back with me". From there they went on to another house and Thomas told Palmer to knock on the door. Palmer finally knocked on the door and all the people in and around the house ran away. Thomas pushed Palmer and said, "Go ahead and see what's there". From here they went to another house and when the people in this house knew accused were coming they also ran, some of them through the back door and around from the side. Again Thomas shoved Palmer through the house and Palmer said, "There ain't nobody in there". Thomas gave the order to leave and then added, "Come on, then", and pushed the four in front and followed them across a patch containing tall palm trees. They could hear but could not see Indians. Searcy said to Thomas, "let's get out of here". Thomas replied, "No, you ain't going anywhere--your staying with me". At this time Thomas was carring his gun in a ready position. As they got into the little clearing in the palm tree patch behind a native house, Thomas put his gun against his shoulder. Miles, Palmer and Searcy were standing there with him. He pulled the trigger and fired towards the people whose vocies could be heard in the palm trees and who could be heard moving about. This was about 8:30 p.m. After the shot was fired Thomas pulled the bolt back and

reloaded his rifle. They then left the clearing by a path around the house, Palmer said, "Keep on across the main road", and walked behind the others with his rifle pointed at them. They stopped to talk to a man and Miles ran away and went back to camp. Searcy told Thomas that he should not have fired the shot because it would make trouble for all of them. After the shot Searcy could hear a man who appeared to be in agony saying, "Oh,oh,oh". He did not report the incident to anyone (Pros. Ex. C).

On May 1 1945 Miles made a voluntary statement (R. 33-36) which was received in evidence as Prosecution's Exhibit D (R. 37). This statement substantially corroborates that of Searcy. However, there is sufficient divergence to require a summarization of the main part of this statement. Miles denied taking a drink at the 505th Enlised Man's Bar. According to his statement, when Baum and accused reached the bazaar Miles declined to get out of the truck with the others. The accused went to the bazaar for the sole purpose of getting "jig-jig". Thomas and Searcy left the others, Searcy carrying his carbine. After about 10 minutes they returned to the truck. All five went down the road to a tea shop where Palmer and Thomas ordered a bottle of gin for which Palmer paid five rupees. After they consumed it, Palmer bought and they drank another bottle of gin. A little Indian boy was with them at this time in the shop. At this time Miles decided to get away from the others and thereby stay out of trouble. While they were discussing the question of obtaining some "jig-jig" Baum took the truck and went back to camp. Searcy had his carbine and as they were walking around some houses Thomas loaded his rifle. When they reached one house Palmer asked a man standing in the door for "bebe" to which the man answered, "I am a good man there are no bebes here". Palmer and Thomas walked inside the gate and soon returned with the Indian who said that the night before some fellows had been down there making trouble. Thomas told this Indian he was an American MP and wanted to see things right. Next they went to the adjoining house and the Indians, upon hearing them, ran out through the back door and were followed by the accused into the thicket to the north end of the house. This thicket contained trees with long leaves. In this thicket, at about 9:00 o'clock, Miles heard the gunfire and saw Thomas pull the bolt back and reload. Miles was at this time only about 15 feet from Thomas. Accused then cut through the thicket around the far side of one of the houses and between two others along a footpath which they followed out to the main road. Following the road they came to another house. Thomas and Palmer went in while Miles and Searcy went on to camp. In the bazaar Thomas, Palmer and Searcy said they didn't want Miles with them again. To this Miles answered that he did not want to go with them anywhere else. Miles was interested in "jig-jig" and nothing else. He did not report the shooting.

After being warned of his rights, Palmer made a voluntary statement which was received in evidence as Prosecution's Exhibit E (R. 44). Palmer's statement likewise fairly corroborated Searcy's but requires summarization of main portions. At the tea shop in the bazaar Thomas requested an Indian boy to supply him or tell them where they could locate a "bebe". This was after the truck had gone back to camp. They were in the bazaar on the night in question for the purpose of obtaining "jig-jig". After the accused had gone about 50 yards from the bazaar, Palmer held his flashlight so that Thomas could see how

to load his rifle. After loading the rifle Thomas put the safety on. They then turned left and continued toward the east and walked about 25 or 30 feet from the end of the bazaar where they met an Indian whom Thomas asked for "bebe". The Indian responded, "There are no bebes here". Thomas told this native, "I am an MP". The Indian pointed away from his house and said there were "bebes" up further. Accused followed this tip and proceeded up to the front of another house where they met an Indian who said he was a government contractor. Thomas countered with the statement that he was an MP going around to see that everything was all right. Thomas then asked this Indian for "bebes" but was told that the Indian was a respectable man and a contractor. At another house Thomas knocked on the door and the women ran out the back door. Accused followed the fleeing women about 20 yards into a patch of bamboo trees upon which were long leaves. One or two of the women were shouting as they went into the patch and accused heard natives coming from the south and east. The natives came nearer and scattered through the bamboo. Palmer saw no weapon in the possession of the natives. Accused moved three or four paces into the bamboo and squatted in a little clearing. The natives were about 25 yards away. Thomas was the leader of the group. Miles and Searcy said, "lets see if we can get out of the place", About ten seconds later Thomas fired his gun toward the people in the bamboo patch. This was about 9:30. At the time the gun was fired Thomas set the butt against his shoulder with the muzzle pointed slightly downward. Palmer was at this time within about 4 yards of Thomas. Thomas said he saw a man fall. Miles and Searcy then disappeared. Palmer walked into the yard of the house from which the women fled, knocked on the door and flashed his light in the room. What frightened the women was the fact that Palmer knocked on the door and asked for "bebes" which was his way of asking for sexual gratification. He did not report the shooting.

Thomas, on 1 May 1945 (R. 44, 45, 46, 47, 48, 49, 50 and 51), made a voluntary statement which was received in evidence as Prosecution's Exhibit F (R. 52-53) and is summarized as follows: M1 rifle No. 896930 was issued to Thomas as his weapon. On 25 April 1945 he took this weapon and together with Palmer and Searcy, and in a truck driven by Baum, went to the 505th Enlisted Man's Bar where they each had two double drinks of rum and whiskey. Searcy had his carbine with him. About 7:45 p.m. they were joined by Miles and all five got into the truck and were driven by Baum down to the intersection of the hill road and the main or Ramu Road where a West African soldier provided them with two bottles of gin. Baum then suggested that they go to the bazaar to get "jig-jig". Baum asked if the truck could be taken into the bazaar and was told by Thomas that it could be. They drove the truck into the bazaar and turned around so it faced the direction from which they came. Next they went into a tea shop where they drank two bottles of gin and talked to an Indian boy in an effort to obtain "bebes". This Indian boy followed them back to the truck. Palmer, Searcy, Baum and Thomas left the truck and went east through some natives huts. The natives fled from the huts and Thomas said that no "jig-jig" was available there because the women were afraid of them. Miles at this time was left with the truck. It was here that Baum decided to and did go back to camp. Thomas got his rifle out of the truck; Searcy already had his carbine with him. After the truck left the four accused went back toward the east. They walked about 25 or 30 yards and Searcy asked Thomas if he had loaded his rifle whereupon Thomas took a bullet out

of his pocket and Searcy helped him load his rifle. They walked east of the market to a place where people were seated near two houses on a ridge. As accused approached and were seen, the people ran. Thomas remarked, "They are afraid of us". Thomas then said he had to have "jig-jig" that night. Each time they passed a house the occupants would run before accused got there. At the next house the people started to run and holler. They were going in the same direction as accused. Near this spot was a thick place with a lot of trees on which were big wide leaves. Accused heard the Indians coming through there. Searcy suggested that Thomas fire his gun. Thomas put his gun in a ready position. There were people in front of and behind accused when Thomas fired the shot. Thomas could see the people behind him and hear those in front of him. He did not think there was any person right where he fired the shot. After the shooting accused headed for the alleyway which led out into the main road which they crossed and went up to the round house. Here Searcy and Miles left Thomas and Palmer and went back to camp. At this time they heard some one hollering. Again Palmer asked an Indian for "jig-jig". Again no "jig-jig" was forthcoming. Thomas and Palmer walked away but continued to hear people. From this point they went to camp and to bed and slept until the usual time the next morning but did not report the incident to anybody. In the patch where the shooting occurred no attack was made upon accused before Thomas fired the shot. Thomas did not fire the shot because the Indians attacked him but because Searcy told him to. None of the Indians made an effort to stop accused or prevent them from leaving the area before the shot was fired. Thomas did not intend to kill the man but fired the shot to make them get back.

As each statement of the accused was offered and received in evidence the trial judge advocate or law member duly warned and instructed the court that each statement was evidence only against the person making that statement and should in no event be considered as against any of theother accused (R. 32, 39, 44, 46 53).

4. Evidence for the defense:

First Sergeant William W. Rice, 2661st Quartermaster Truck Company, testified to the good character of all accused. He also said that each of accused was a good worker except Palmer whose work he described as a little above fair (R. 95-96).

Thomas after being duly warned of his rights elected to make an unswaorn statement through his counsel (R. 96). He stated in substance that on the afternoon of 25 April the accused decided to go hunting. They, together with Chester W. Baum, at about 5:30 or 5:45, went in a truck driven by Baum, who had a trip ticket, to deliver a box to the 505th Engineering Section. On the way they stopped at the 505th Enlisted Men's Club where they each had double shots of both gin and whiskey. Thomas had in his possession several rounds of ammunition. From here they drove to Jagir's Tea Room in Cox's Bazaar where they consumed three bottles of gin. By this time Palmer was feeling "rather loaded" and to air him out the accused were driven by Baum out of the Bazaar about two miles. They decided to return to town and get some women. After returning, Baum decided to go back to camp. The others sought a "bebo" or prostitute by inquiring of different individuals in the Bazaar (R. 97,98). Finally they were told that a prostitute could be found in an easterly direction from the square. They headed that way and at this time were in a drunken condition "but weren't acting in a particularly

boisterous manner". They asked several passing people where a "bebe" could be found. They also knocked on the doors of several houses inquiring for "bebes" (R. 98, 99). Upon being told that "bebes" were not available "We merely left with out any trouble, without threatening anyone, and went to the next available residence". When they got to the scene of the shooting they knocked on the door and "Before we even had a chance to open the door and enter the domicile of the person who lived there, he and the woman with him ran out the back door. We at that time hadn't threatened the man, hadn't even asked him what we wanted". The man and woman were hollering and screaming as they went out back of the house toward the thicket. "We walked around the house--not so much to follow the man and his wife, but in an attempt to follow the lane we thought might take us out of the immediate vicinity" (R. 99). In the darkness accused could not see but it became apparent that there were a good number of men around--some in front and some in back. These men could be heard moving and talking but could not be seen by accused. As the people began to close in on all sides accused got worried and in his drunken condition Thomas took his gun off his shoulder to a port arms position. The accused did not see a way out of the thicket. Thomas took the safety off the rifle in order to scare the people and the gun went off accidentally. A man in the background hollered and one of the accused exclaimed, "My God. You've hit someone". Thomas became panic stricken and looked for a way out of the thicket. A "hubbub" had arisen in the thicket and accused found it pretty easy to leave the thicket (R. 99). Thomas expressed regret at the shooting and said that they had no intention of imposing on anybody or doing anything else which they were not entitled by law to do "except find a prostitute in the village" (R. 99). At the time they left the thicket accused knew exactly what had happened and was sorry for it (R. 100). The court was warned that matters which they were entitled to consider in this unsworn statement could be considered only against Thomas and not against either of the other accused (R. 97).

Miles, Palmer and Searcy, after being duly warned of their rights, elected to make an unsworn statement through their counsel (R. 100). According to this statement, on the afternoon of 25 April they each had guns in their possession but Searcy was the only one who had any ammunition. Searcy, therefore, took along several rounds of ammunition with his carbine (R. 100-101). They had theretofore decided to go hunting. They went to the 505th Engineering Section to deliver a radio. From there they went to the 505th Enlisted Men's Service Club where they had a couple of double shots of whiskey and gin. After hanging around there for a while they decided that, instead of immediately going hunting, they would go in to town where they could get some more to drink. They then went to town on a truck driven by Baum and stopped at the bazaar area of Cox's Bazaar, a place which they had never before attended after 6:00 o'clock in the evening. They were not aware of the fact that the bazaar area was out-of-bounds. After several inquires, Thomas took the party to Jagir's Tea Room where they bought and cousumed three bottles of gin in short order. Private Palmer then became ill and was driven in company with the others several miles out of town to get some fresh air. Here accused decided that instead of going immediately hunting they would go back to town to see if they could find some women. They were pretty drunk. When they got back to town Private Baum decided to and did go back to the squadron area leaving the accused in town without a truck. Accused didn't care about being left in town. They asked serveal people where they could find a woman or "bebe" and were

available. Finally some Indian told Thomas that a woman could be found to the east of the bazaar area and accused proceeded in that direction looking for the "bebe". At that time accused were drunk "in the manner in which individuals usually are drunk". They raised their voices slightly but didn't stagger nor did they molest any individuals whom they met. The only comment made to people as they passed along the street was an inquiry for a "bebe". In most cases the inquiries yielded no results while in others they were pointed in the general easterly direction. Along the route they stopped at several houses and asked the occupants therein for a "bebe". In each case they were told no, whereupon they immediately left without molesting anyone. Finally they reached the house where the shooting took place and knocked on the door. Just as they knocked on the door and before they asked the occupants of the house any questions the occupants fled out the back door. Accused did not know exactly what had happened but were suddenly aware that whoever had gone out the back door was hollering and yelling in a language which accused were unable to understand. Presently it became apparent that there were quite a number of local inhabitants directly around the house. In an effort to leave the immediate vicinity accused walked around the back of the house and along the pathway which they thought would take them away from the place but it led them into the middle of a palm thicket where it was dark. Accused became acutely aware that there were people in front and in back of them who could be heard moving and talking. Apparently there was a good number so assembled. Accused whispered among themselves, discussing and wondering how they could get away. In the midst of their conversation the gun went off. Inquiry was made of Thomas as to what he had done and he explained that he became scared since the people were crowding in, and in an effort to put the gun in a more handy position it had gone off. The accused then decided that it was only natural that they should get away from there as soon as possible and in short order got away. Accused went in to town for the purpose of getting drunk and in this condition forgot about the hunting expedition. They were also attempting to find themselves a woman that night but had no intention of harming anybody (R. 101-102).

5. The evidence shows that on 25 April 1945 accused left camp between 7:00 and 8:00 o'clock in a truck driven by Chester W. Baum for which he had no proper trip ticket. Their plan was to go hunting. Thomas carried his rifle and Searcy his carbine with only a small quantity of ammunition for each. Shortly after leaving the area they took a double shot of intoxicating beverage and proceeded to a tea shop in Cox's Bazaar where they consumed a considerable quantity of Indian gin. They began to search for "bebes" or prostitutes. By this time one of their number had become so intoxicated that he required fresh air and for that purpose was driven in the truck, along with his companions, for a distance of one or two miles from town. Soon after that they drove back to the bazaar. The hunting trip was abandoned and Baum took the truck back to camp, leaving accused in the bazaar with the two weapons. Their search for "bebes" was intensified. Soon thereafter accused started out from the portion of the bazaar in which the tea room was located and, at a distance of 25 or 40 yards, Thomas loaded his rifle with the aid of Palmer who held a flashlight. Searcy's carbine was already loaded. Then was begun a militant search for prostitutes which led them to the houses of a number of Indians at each of which they expressed a desire for "bebes". At the homes of some Indians they inquired for prostitutes but did no more. At other they forced entrance into the compounds and into the houses, in many cases frightening the residents who fled, hollering and yelling and seeking refuge in the

nearby bamboo jungles of tadi patch. Accused were talking loudly and generally conducted themselves so as to frighten all natives with whom they came in contact. Upon meeting an Indian one of the accused pointed the rifle at him in a threatening manner with the mizzle only 18 inches from his body and indicated an intention to shoot his chest, while another accused grabbed his shirt and demanded "bebos". The Indian fled in fright and accused ran after him. Here accused spied a native woman and gave chase. At another house they attempted to break and enter, and at another nearby house they frightened the occupants who ran away calling for help from the villagers while accused pursued them. At still another place along the route one of the accused pointed a rifle at another Indian from whom they demanded prostitutes. This riotous conduct continued up until the time of the fatal shooting.

All of the evidence discloses that accused were together at all times during these assaults, breaches of peace and riotous conduct. Not all of the Indian witnesses were able to identify them although they were described as four colored persons in uniform or dressed in what appeared to be khaki, and at another time were referred to as Abyssinian or negro soldiers. One Indian witness identified Palmer and another Thomas. There is direct evidence from at least one Indian witness to the effort that he was within a few feet of Khrain Dan and saw one of the four accused shoot and kill him as he attempted to flee from a point in the bamboo jungle near his home. By the pre-trial statements and by the unsworn statements, each accused puts himself in company with the other three at all times from the hour they left camp area until after the fatal shooting.

Thomas admits firing the fatal shot but claims that his rifle was accidentally discharged. However, he admits the loading of his gun, the search for "bebos" or prostitutes, as well as his presence in the bamboo jungle where natives were in front of him and behind him talking and moving about. He contended in one of his statements that although those natives displayed no arms nor made threats or otherwise gave evidence of danger, that he brought his rifle to a port arms position and in an effort to frighten the Indians away removed the safety and thereupon the rifle went off accidentally after which he heard sounds from an Indian man indicating that he was injured by the shot. At another time he admitted that he fired the rifle from the bamboo jungle, not because of his fear of the Indians or for threats against him, but because Searcy told him to fire the shot in order to frighten them away. In the statements of each of the other accused ~~and in the joint unsworn statement~~ they each admit being present with Thomas from the time they left the camp area through the series of assaults and other misconduct, up to and including the time of the firing of the fatal shot, during which time one of their number supplied a flashlight so that Thomas could load his gun as they left the bazaar, and Searcy carried his carbine all the while.

From all the evidence it appears that accused were together in the with a loaded rifle and loaded carbine in the presence of a number of villagers whom by their conduct they had excited, frightened and disturbed, and in this situation Thomas fired the fatal shot. All of the evidence taken and considered together fairly proves that accused, from the time they entered the bazaar up to and including the time of the shooting, were bent upon mischief and were entirely heedless of the rights and safety of the people with whom they came in contact. During this time they committed numerous assaults and disorders and engaged in conduct of a

riotous character calculated to disturb the peace of the villagers and of the community around about. Measuring the entire situation from the standpoint of Thomas and in the light of all the circumstances disclosed by the evidence, including that of the native witness who saw one of the accused fire the shot which ended the life of Khrain Dan as he ran in fright from the presence of the soldiers, as well as the admission of Thomas that he fired the shot not because of fear or danger, but upon the advice of Searcy, it is obvious that there were no threats of serious bodily harm of injury to Thomas or any of his companions. On the contrary it is established that Thomas and his companions were the aggressors not only on the occasion of the shooting, but throughout the evening. There is not an iota of evidence that any assault was attempted upon accused in the bamboo jungle or at any other time. All of the Indians in the jungle as well as those encountered along the way from the bazaar assumed and maintained a non-belligerent attitude and attempted no harm to anybody. It also fairly appears from the evidence that Thomas intentionally fired the shot which resulted in the death of deceased. His aim was good and death resulted promptly. Intent, design, premeditation, and intent to kill are to be inferred or presumed from the use of an M1 rifle employed in the manner disclosed by this evidence. There is no circumstances of explanation or mitigation. The weapon was aimed at a vital part of the body of Khrain Dan.

> "* * * When, in a prosecution for homicide, it is shown that the accused used a deadly weapon in the commission of the homicide which is the subject of the prosecution, the law infers or presumes from the use of such weapon, in the absence of circumstances of explanation or mitigation the existence of the mental element - intent, malice, design, premeditation, or whatever term may be used to express it - which is essential to culpable homicide. Thus, when a deadly weapon is used in the usual and natural manner in which such weapon would produce death, such as intentionally shooting another with a gun, the presumption of the intent to kill arises, although when the weapon is used in a manner not naturally calculated to produce death, the question of intent to kill becomes one of fact. Where it appears in a prosecution for murder that the accused fired the fatal shot, the weapon being aimed at a vital part of the body, and that death ensued as a natural and probable result, the presumption of fact as to the intention to take human life, in the absence of explanatory circumstances or evidence, makes a prima facie case for the prosecution. The state need not negative any probability that the offense was the result of an accident, or that there were circumstances reducing the homicide below that of murder or excusing or justifying him altogether" (26 Am. Jur., par. 305, p. 360).

The evidence adduced at the trial would have justified the conviction of Thomas for murder under Article of War 92. This record is, therefore, legally sufficient to support the findings as to Thomas of guilty of voluntary manslaughter which offense is lesser than and included in murder (CM ETO 9745, Adams, et al).

We now turn to the criminal responsibility of Searcy, Palmer and Miles. They were properly convicted of voluntary manslaughter only if their conduct with and relation to Thomas was sufficient to make them responsible for his action in firing the fatal shot. On this question the evidence shows that during the

entire evening's enterprise they, together with Thomas, were joint venturers in which each played his part and undoubtedly expected to share in the fruits of their endeavor. One of them had a carbine and all of them took part in the search for "bebes" or prostitutes and in the assaults committed on the way to the fatal scene, including the chasing of natives who fled in fear at their approach. At no time does it appear from the evidence that any effort was made by any of the accused to restrain Thomas in any of his assaults or to do anything which would deter or prevent him from firing the fatal shot. They all joined in the boisterous conduct and hostile demonstration as well as the breaches of the peace and riotous conduct which naturally and necessarily gave Thomas the right to believe that they were not only together but were standing together for mutual protection and mutual conquest.. The pertinent law is thus stated:

> "All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. Thus, if several persons come armed to a house with intent to commit an affray or a personal outrage (such affray or outrage having bloodshed as a probable incident), and a homicide ensues while the assailants are engaged in such illegal proceedings, then even those who may not actually participate in any overt act of outrage will be principals in the homicide" (par. 258, Wharton's Criminal Law, 12th Ed. Vol. 1, pp. 343, 344).

Parker, Judge, in his charge to the jury in the case of United States v. Boyd, Federal Reporter, Volume 45, page 852 et. seq., states:

> "* * *Now, first, as to the proposition or state of case where there is an agreement of conspiracy entered into by a number of persons to commit a crime or do any unlawful act, and in the course of the commission of it a person is killed, if the unlawful act or crime agreed to be done was dangerous to life, or likely to inflict great bodily harm upon the person or persons who were the objects of this crime, or it was homicidal in its character; that is, a crime which from its nature, and the way it was committed jeopardizes the life of the party upon whom it was sought to be committed; from its nature and the way it was to be carried out or committed, or it was of a character that from the way it was committed it would likely inflict great violence upon the persons of those or of the one upon whom it was to be committed; I say when a number of persons have entered into an agreement to commit a crime of that kind, and they proceed to its accomplishment, and the crime is of that character that it will necessarily or probably require the use of force and violence which may result in the unlawful taking or endangering of life, because of the nature of the act and the way it is done, - every party to such an agreement who participates in the act that is sought to be done, which is the primary purpose of those who entered into it, such as robbery, every party, I say, who has entered into that agreement, and who enters upon the commission of the crime in the execution or commission of which the life of some one is taken is responsible, or will be guilty of the crime growing out of the killing, although it may be done by one of the accomplices * * *".

"* * *But, if the act agreed to be done or entered upon by a number of persons is an act which, from its nature, and the way it is usually executed would endanger human life by it execution, they are all responsible for the taking of that life, upon the principle that is self-evident in the law, and is founded in justice and reason, that every man who has arrived at the years of discretion must be held to have intended the necessary, natural, or probable consequences of his acts. If a number of men agree to do an act which, from its nature or the way it is to be done, is an act that will put human life in jeopardy, then the putting of human life in jeopardy, or the destruction of human life, is a necessary and a natural and a probable consequence of the act agreed to be done by the party, and upon the principle of the law I have already announced to you it is but equal and exact justice that all who enter upon an enterprise of that kind should be responsible for the death of an innocent person that transpires because of the execution of the enterprise then entered upon, and because that enterprise is one that would naturally and reasonably produce that result".

"* * *The association of the parties together, the fact of their participation in a common design, the fact of their being associated together at that place, and being there all at that time, are facts and circumstances that may be taken into consideration to show this undertaking that was entered into by them. It is not necessary to show it was entered into by so many formal words. It may be tacitly entered into. If a man, with the understanding that another purposes to rob a third, joins him, goes to the place where the attempted robbery is made, and is there for the purpose of aiding him, he agrees to it just as much as though he had entered into an obligation in writing to assist him. It is an agreement in the law * * *". (underscoring supplied)

Again it is said:

The rule holding one responsible for a homicide committed by his confederate in furtherance of a common design has been applied where the common object or purpose was to commit or perpetrate an assault involving the element or consideration of danger to life; a breach of the peace, particularly if involving personal violence of the use of deadly weapons * * *". (40 C.J.S. pp. 845, 846).

"* * * The actual perpetrator is considered as the agent of his associates and his act is their act; and under such rule, according to the authorities, his intent is imputable to the others. Responsibility attaches although the taking of life was not specifically intended or contemplated by the parties or involved in the plan, or was even forbidden by accused; and the fact that accused regretted that the killing had occurred in no way lessens his responsibility.

"A common design need not have existed for any particular length of time before the commission of the homicide; it is sufficient if there was a community of purpose between accused and the direct actor at the time the homicide was committed" (40 C.J.S. pp. 844, 845).

From the conduct of the accused as disclosed by all the evidence in this case the court was justified in concluding that accused were creating and participating in a riot. The pertinent law upon this question is thus stated:

"A riot is the tumultuous disturbance of the public peace by an unlawful assembly of three or more persons in the execution of some private object" (Wharton's Criminal Law, Vol. 2, sec. 1860, p. 2191).

In Lewis v. State of Georgia, 58 S.E. 1070, it was said:

"Three men were held guilty of the offense of riot for they assembled in front of a citizen's house in the night time and in loud voices cursed him and threatened him, frightening the members of his family by firing a gun".

All four accused were not only present during all of the hostile demonstrations in which the carbine and rifle were displayed and at least two assaults thereby were committed, but actively participated in frightening and pursuing the members of many native families along the route from the bazaar to the locale of the fatal shooting. Their voices were described as loud and their conduct was boisterous, threatening and dangerous and did in fact disturb the peace of a large number of residents in that section of the town.

The conduct of accused was unlawful and the fact that the crimes in which they jointly participated was less than a felony can avail them nothing. The fact that Thomas fired the shot does not exculpate his associates who jointly and knowingly participated in the series of crimes leading up to the fatal assault (CM ETO 9745 Adams, et al).

The evidence adduced in this case is clearly susceptible of the finding that Thomas, who was armed with an M1 rifle, and Searcy, who was armed with a carbine, together with the two other accused, went to an out-of-bounds area in search of intoxicants and illicit intercourse and there jointly embarked on a riotous course of conduct involving many simple assaults, of a battery and at least two assaults with a deadly weapon. The evidence further indicates that each party not only acquiesced in the others misconduct but actually incited and encouraged the others to further wrongdoing by their presence and participation in the general unlawful behavior. Under these circumstances the court was justified in finding that there was a community of purpose among and between the accused from the time they reached the tea room in the bazaar up to and including the time of the shooting, and that this community of purpose was not innocent in nature but involved not only a search for illicit intercourse but also hostile demonstrations which frightened and terrified the people around about. Therefore, under the authorities above quoted, the act of one of accused in the furtherance of the common design became the act of each of them. Thus the assault of Thomas and Palmer upon Mohammed Abdulla and various trespasses in which all took part under all the circumstances clearly involves danger to human life and was the act of each and all the defendents and continued up to the time of the fatal shooting. All were equally responsible for the criminal acts of Thomas. The two who had no weapons can not be heard to say that they were unarmed and therefore did not intend that Thomas should resort to the taking of human life. They all knew that

Thomas had a dangerous weapon and that he loaded it at the commencement of their riotous conduct. Likewise they all knew that Searcy had a loaded carbine, both of which were calculated and equipped to produce fatal blows upon any person they desired to injure. All were bound to have known that the fatal shooting was only the culmination and direct consequence of the violence and riotous conduct in which all had freely participated (40 C.J.S. p. 845) (cf. State v. Darling, 216 Mo., 450, 115 S.W. 1002; CM IBT 240 Frazer).

From all the evidence, including the legitimate inference to be drawn therefrom, the court was justified also in finding Searcy, Palmer and Miles also guilty of voluntary manslaughter.

6. The charge sheet shows the following data of accused: Thomas was 31 years of age when the charges were filed and was inducted 5 July 1943; Miles was 28-7/12 years of age and was inducted 23 July 1943; Searcy was 27-2/12 years of age and was inducted 24 July 1943; Palmer was 21-4/12 years of age and was inducted 1 July 1943.

7. The court was legally constituted and had jurisdiction of the subject matter and of the persons of the accused. No errors injuriously affecting the substantial rights of accused or either of them appears in the record. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence. The record does not designate the place of confinement but the accompanying papers indicate an intention on the part of the reviewing authority to confine Thomas and Searcy in the United States Disciplinary Barracks and Palmer and Miles in a Rehabilitation Center.

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

/s/ Timous T. Valentine, Judge Advocate

/s/ John F. Fontron, Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
24 August 1945

Board of Review
CM CBI 637 (CT 45)

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| UNITED STATES<br><br>v<br><br>Private John V. Brennan, 31142-118, 1712th Signal, 14th USAAF (AAF) Signal Corps, and<br><br>Private James F. Cooper, 35680-244, Burma Road Engineers, Services of Supply, United States Forces, China Theater Corps of Engineers. | SERVICES OF SUPPLY, CHINA THEATER<br><br>Trial by GCM convened at Kunming, China, 29 May 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for life, as to each accused. United States Penitentiary. |

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

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

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

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

Specification: In that Private John V. Brennan, 1712th Signal 14th USAAF (AAF), Signal Corps, and Private James F. Cooper, Burma Road Engineers, Services of Supply, United States Forces, China Theater, acting jointly, and in pursuance of a common intent, did at or near Kunming, China, on or about 23 April, 1945, feloniously take, steal, and carry away one water buffalo, value of over fifty ($50.00) dollars, the property of the family of Chang Tseng Shih.

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

Specification: In that Private John V. Brennan, 1712th Signal 14th USAAF (AAF), Signal Corps, and Private James F. Cooper, Burma Road Engineers, Services of Supply, United States Forces, China Theater, acting jointly, and in pursuance of a common intent, did at or near Kunming, China, on or about 23 April, 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Chang Tseng Shih, a human being, by beating her with their fists.

Both accused pleaded not guilty to and were found guilty of all charges and specifications. Evidence was introduced of three previous convictions against Brennan and two against Cooper. The accused were sentenced to be shot to death with musketry, all of the members of the court concurring therein. The sentences as to each were approved by the reviewing authority and the record of trial was forwarded to the Commanding General, United States Forces, China Theater, for action pursuant to Article of War 48. The confirming authority, as to each accused, confirmed the sentence but commuted it to dishonorable discharge, forfeiture of all pay and allowances due or to become due and confinement at hard labor for life. The United States Penitentiary nearest the port of debarkation was designated as the place of confinement for each accused. The order of execution of sentence was withheld and the record of trial was forwarded to this office pursuant to Article of War 50½.

3. The evidence for the prosecution is substantially as follows:

At the time of the events herein involved the two accused were patients in the 95th Station Hospital (R. 15). Sometime between 1500 and 1600 hours, 23 April 1945, while dressed in hospital pajamas and dressing robes, they left the hospital and walked to the Chinese village of Hsiao Hsui, a distance of 1.2 miles away (R. 15; Exs. 2 and 3). They drank gin on the way from the hospital and more liquor was purchased and consumed at the village (Exs. 2 and 3). After roaming about the village and its vicinity for some time, they started back to the hospital and came upon a water buffalo tied in a field near the road (Exs. 2 and 3). What occurred at this point is related in the testimony of two Chinese witnesses, namely, Chang Kuo Si,

the son or son-in-law of the deceased, and his wife, Mrs. Chang Chang Shih.

Chang Kuo Si, a resident of Hsiao Hsui village, testified that on the day in question he returned from work and saw the two accused riding on his buffalo by the side of a brook near his house. (It was stipulated that the value of the buffalo is more than fifty dollars ($50) (R. 29). He asked them to return the buffalo but they continued to ride on, and when he followed them, Brennan jumped down and beat him on the head, chest and arms. He washed away his blood in the brook and the two accused rode on. The witness's mother (Chang Tseng Shih, the deceased, age 71) and wife then appeared on the scene and ran after the buffalo. The "tall person" (stipulated to be Brennan (R. 9)) struck Chang Tseng Shih and the "shorter one" (Cooper (R. 9)) struck Mrs. Chang Chang Shih. The witness followed, but tried to run away when the accused chased him. They beat him and his wife again. Chang Tseng Shih was left behind and both accused struck her. They then dragged her body from the field to the roadside (R. 7, 8).

Mrs. Chang Chang Shih testified that at about 1630 hours, 23 April 1945, on hearing that her husband was in trouble, she rushed out of her house to the nearby brook. She found her husband there but not the buffalo. She followed the highway out and saw the two accused. Brennan was riding the buffalo and Cooper was pulling it. When she got near the buffalo one of the accused "jumped down" and slapped her in the face. Chang Tseng Shih followed the buffalo and Brennan slapped her in the face. Cooper seized and beat the witness. The witness's husband approached, whereupon her assailant released her and pursued him. The witness yelled for help. She did not see Cooper strike Chang Tseng Shih. Brennan struck Chang Tseng Shih with his clenched fist. The witness was about thirty steps away at the time. Chang Tseng Shih was seventy-one years of age and was in good health but had a "swollen neck". After the disturbance, Chang Chang Shih found Chang Tseng Shih's body at the side of the road (R. 10-14).

Captain Felix A. Schrenk, MC, whose expected testimony was stipulated (Ex. 1; R. 14, 15), stated that at 2130 hours, 23 April 1945, he was ordered by the hospital adjutant to report to a nearby Chinese village "where a Chinese woman had been allegedly assaulted by two patients of the 95th Station Hospital". He there found a Chinese woman lying on a hospital stretcher. "Her face was blood smeared. Brief external inspection of the body

did not reveal any other signs of violence". He pronounced her dead. The cause of death was undetermined. "Pvt. John Brennan, a patient on Ward 3 of the hospital, was at the scene of the incident in hospital pajamas and bathrobe. He showed definite signs of alcoholic intoxication, alcoholic breath, and staggering gait. He appeared to be oriented". "Upon returning to the hospital the [witness], together with Captain Rosenthal, aroused Pvt. James F. Cooper, who at that time was lying in his bed in Ward 11, apparently sound asleep. Upon awakening he immediately was perfectly clear and well-oriented, not giving the impression of a person being aroused out of a deep sleep. There were traces of blood and dirt on his hands, pajamas and bathrobe. There was an alcoholic odor on his breath, but otherwise he did not show any evidence of being under the influence of intoxicating liquor. He was rational and oriented. He was turned over to Captain Rosenthal".

Major Murray Benson, MC, whose qualifications as a medical witness were conceded by the defense (R. 16), testified that on about 1500 hours, 24 April 1945, at the 95th Station Hospital, APO 279, he performed an autopsy on the body of Chang Tseng Shih, a Chinese female about seventy years of age and weighing about one hundred pounds. She was well developed but poorly nourished. There was a moderate amount of black hair on the head with many streaks of gray. The thyroid was remarkably enlarged and she had a large goiter. There was a large hemorrhage about this gland. The gland, which normally weighs thirty grams, weighed one thousand grams. There was blood on the left side of the head, a hemorrhage in the region of the left side of the skull, black and blue marks about the right side of the face, and her lips were black and blue. There was no fracture of the skull and no infection or hemorrhage of the brain. The heart, spleen, liver, pancreas and other internal organs were normal. Her general state of health prior to death was, in the opinion of the witness, "pretty good" and she would probably have continued in good health. He testified that, in his opinion, it was possible that death might have occurred from natural causes, that "given an emotional upheaval in a woman of seventy, an enlarged goiter will produce alarming symptoms; now, if in addition to that emotional upset you add tremor or hemorrhage, she would die". The hemorrhage and ecchymosis on deceased's body could have been caused by a blow from a fist or blunt instrument, and, because the hemorrhage of the goiter was so diffuse, it could have been caused by a blow or fall (R. 16-20). The following are excerpts from the examination of this witness:

"Q. I'll read the hypothetical question again. Assuming that Chang Tseng Shih, the deceased in this case, had received hemorrhage in the region of the left parietal and squamous temporal bones, ecchymoses about the right orbital and right frontal regions, and ecchymoses about the upper and lower lips as a result of direct blows by a fist or some blunt object; and assuming that she had received a severe contusion and hemorrhage beneath the left frontalis muscle due to a fall or to a direct blow; and assuming that she had received a massive hemorrhage in the thyroid gland due to a fall or to direct blows; and assuming that she had received multiple contusions about the face as a result of direct blows from a fist or some blunt object; in your opinion, what is your best opinion as to whether or not death resulted from the physiological effects of these injuries?

A. Well, we can say, and I think I've said it before, that these injuries with the emotional upheaval can initiate one of the nerves in the neck to produce such alarming symptoms as to produce death eventually.

Q. Then death would have been caused directly or indirectly?

A. Not directly. Not directly, but they can initiate the symptoms indirectly.

Q. In your opinion, did they cause death indirectly in this case?

A. I think indirectly, not directly.

RE-CROSS EXAMINATION

Questions by the Defense:

Q. Once again, Doctor, I'll ask you to state to the Court whether or not in your opinion, there is a reasonable possibility that this woman died of natural causes.

A. Always a reasonable possibility.

* * * * *

Q. I believe you testified, Major Benson, that death in this case was either physiological or obstructive, is that right?

A. That is right.

Q. Will you explain to the Court just how death could have been caused from physiological effects?

A. Well, it's a little technical but I will try. Right about the neck is a large artery called the common carotid artery. As it bifurcates to form the internal and external carotid arteries, there is a slight bulge, just at the bifurcation which we call the carotid sinus, a small swelling. Now that sinus is very sensitive; it also contains a nerve called the carotid sinus nerve. That nerve makes contact with the ninth nerve to the brain. Now any pressure--we have done that in Court--just put your finger there and the man will go unconscious. Any pressure in that area, any injury to that area, any emotional upheaval will effect that, setting off a train of symptoms, physiological symptoms which will produce a shock, and if you don't do anything for that patient, that patient could go right on and die. It is also a known fact that in old people with large goiters, these people are super-sensitive. Why, we don't know. That just happens to be super-sensitive so that any irritation may set off something in that sinus and produce lots of damage. Now that is physiological. In the obstructive we would have to say that this large goiter she had pressed on her trachea and suffocated her. The autopsy showed no signs of suffocation, so I think we can throw that out. I say she didn't have a direct cause of death.

Q. Were these physiological symptoms you mentioned present in this case?

A. I don't know. She would have to be seen living to see that; she would have to be seen alive. She had the large goiter, we know that.

Q. And she was seventy-one years old.

A. Those are facts.

FURTHER RE-RE-CROSS EXAMINATION

Questions by the Defense:

Q. This chain of events you have related here is a thing that may have happened, is that correct?

A. That is right.

Q. You cannot state to this Court that it did happen?

A. Not in this particular case."

It was stipulated between the accused Brennan, the defense and the prosecution that a statement (Pros. Ex. 2), dated 24 April 1945, was signed by Brennan voluntarily after explanation of his rights under Article of War 24 (R. 27). Similar stipulations were made as to Prosecution's Exhibit 3 (R. 28), a statement signed by Cooper, dated 29 April 1945, and Prosecution's Exhibit 4, a statement signed by Brennan, dated 15 May 1945 (R. 28). The three statements were admitted in evidence, the court being advised that each statement should be considered as evidence only against the accused who gave it (R. 27, 28).

The accused Brennan, in Prosecution's Exhibit 2, stated in substance that he and Cooper left the hospital at about 1500 hours. Cooper had a bottle of Chinese gin, which they drank. They procured some Chinese vodka and rum at one village and ate at a Chinese friend's house in another village. They visited a Chinese camp. On leaving the village Cooper met an old Chinese woman with a goiter. He offered her money to have sexual intercourse with him. She agreed and they went to the end of the village. Brennan had a buffalo. He followed Cooper and the woman. The latter two had an argument and Cooper struck her in the mouth with his fist while she was sitting down, drawing blood. Brennan then hit Cooper on the nose with his fist, drawing blood. After that Cooper "wake up and realize everything", and he went back to the old lady. Brennan returned to where he left the buffalo and tried to catch it but it ran away. He returned to where he had left Cooper but he was gone. The old lady lay in a ditch and there were a lot of Chinese people around. Brennan was afraid of trouble and ran across the field back to Ward 3. On arriving there he missed some money, so he borrowed a flashlight and returned to the village. He saw two captains and asked one of them to give him an armed guard as he thought there might be trouble. The old lady was still alive when he arrived at the village. The captain put him in an ambulance with the first sergeant and guard and he was taken to Ward 11 where he found Cooper. He and Cooper together drank a bottle of gin, one of vodka and one of rum during the period in question.

The accused Cooper, in Prosecution's Exhibit 3, stated, in substance, that on 23 April 1945, he was a patient at the 95th Station Hospital where he was being examined for his mental condition. He and Brennan had been prisoners in a stockade in March and April. At about 1530 or 1600 hours, 23 April 1945, he met Brennan at the receiving office and offered him a drink from a bottle of gin. They then went to a place in a Chinese village where Brennan said they could get something to eat. Brennan ate there, and they both consumed some vodka, rum and rice wine that was purchased with Brennan's money. They left the village about 1800 hours and walked up the road toward the hospital, intending to find a place to buy more liquor. On the way they saw a buffalo tied in a field beside the road. Brennan untied the buffalo and they both got on it. They were "just going to ride the buffalo back to the hospital", but fell off after riding a short distance. Four or five Chinese came up to them talking and making signs indicating they wanted the buffalo back. Cooper was willing to let them have it but Brennan was not and asked them to buy more "jingbow juice". The Chinese tried to take the buffalo away from them. Brennan started to swing wildly, as hard as he could, hitting several of the Chinese and making them bleed. He hit all he could reach, both men and women, and he hit Cooper on the nose when he tried to stop him. Some of the people ran toward the village. Brennan ran after them and the buffalo. He was fighting with one of the Chinese, slugging and throwing her around. Cooper then left Brennan and was walking toward the hospital when he met some hospital guards. He asked the guards to protect him as the Chinese were still following him. He was taken to Ward 11 and went to bed after taking a sedative. After he fell asleep some officers came and turned him over to the Criminal Investigation Division. Cooper did not hit any of the Chinese, nor did he solicit any women for intercourse. Brennan "propositioned" every Chinese woman they saw in the village. Later, when they were confined in the stockade, Brennan told Cooper to say that he did not see the former hit anyone and to stick with him and they would protect each other. Brennan was very nervous and Cooper was afraid of him.

The accused Brennan, in Prosecution's Exhibit 4, stated, in substance, that, after leaving the hospital and drinking some gin that Cooper had, they went to a Chinese village where Cooper without success solicited intercourse of some women. They then went to a village nearer the hospital where they bought rum and vodka. Brennan ate at a Chinese house, but Cooper did not eat and continued drinking. They proceeded to a Chinese barracks

where there was an officer and a few soldiers with whom they boxed. Cooper "was running around untying the buffalo that was tied there". The officer considered it "quite a joke". When they started to leave, Brennan suggested taking the buffalo for transportation. He shoved the "old man" and Cooper hit him about the face and body. Brennan also chased a younger lady but did not hit her. After chasing her he went back and "Cooper had hit the old lady" who was on the ground. She was bleeding and it "looked" as if Cooper was trying to have intercourse with her. Brennan tried to pull Cooper off her and blows were traded between him and Cooper. Cooper "was like a nut and didn't realize what he was doing". They tried to sit the old lady up on a bank and left her on the side of the road mumbling something in Chinese. Brennan left Cooper at the side of the road, chased a crowd of Chinese that had collected, and got the buffalo. On returning to where he had left Cooper he found that there were several Chinese around the woman and the Cooper was gone. He left the buffalo and started to walk across a field, but on being followed by the Chinese, began to run. He fell down a few times as he was "feeling pretty good". On arriving at his ward, he found that his wallet containing $17.85 in gold was missing. He borrowed a flashlight and started back to look for it. He met a captain he knew and on returning to the scene with the officer and the guard came across the old woman. The body had been moved but he said nothing about it at the time. Brennan felt her pulse, which was feeble, and he opened her eyes and saw a response. He was "feeling good but not so drunk [he] didn't know what was going on". After Brennan spoke to Lieutenant Plotkin (who signed Pros. Ex. 2 as a witness) about the case, Plotkin told him that if he pleaded guilty to manslaughter they "might get off with a trip to the States and a couple of years". Brennan gave them the story to the best of his knowledge and said he wasn't interested in a D.D. or a trip to the States. On thinking it over he was willing to sign a statement to that effect as he knew that they "both raised hell in the village that afternoon but had no intentions of killing anyone". However, "Cooper didn't want to" when Brennan asked him about it. Cooper said Captain Slyvan was going to clear him as he (Cooper) couldn't remember what happened. Quoting Brennan: "But if Capt. Slyvan should clear him, I felt very nervous about the situation as I had brought the liquor and he can't remember anything and my going back to the village naturally they'll all blame me. But as drunk as I was, I know it was Cooper who hit the old lady with the extra large goiter and I don't believe he expected her to die. I believe she died from a heart ailment".

4. The evidence for the defense is substantially as follows:

Major Milton E. Wertz testified that about two weeks after the date of the alleged offense, while engaged in an investigation of the case, he interviewed Mr. Chang at the 95th Station Hospital. The accused were present. Mr. Chang replied in the negative when asked by Major Wertz whether, since the date of the offense, he had seen either of the persons alleged to have assaulted his mother-in-law. Mr. Chang stated his eyesight was not good, and, on further inquiry, stated that he had seen neither of the accused on the date of the interview. The accused at this time were sitting three or four feet from Mr. Chang. When Mr. Chang was asked to relate what he actually saw, he said that when he came from the fields he saw two Americans riding off on his family's water buffalo. He ran after them and told them in Chinese to please give it back. One of the Americans jumped off and struck him on the nose causing it to bleed. He washed the blood off in a creek. His mother ran after the Americans and tried to get back the buffalo and the taller of the two began to beat her. It was necessary to "pump" Mr. Chang to get him to tell a clear story. In the words of the witness, "If I'm not mistaken, we finally got out of him that he didn't himself actually see any blows struck". The witness wrote down everything that Mr. Chang said he had the ability to see. On cross-examination it appeared that the interview was conducted through an interpreter and that the witness does not understand Chinese. He identified a written statement, bearing his signature and Chang Kuo Si's thumbprint, as one he had typed after he had written down what Chang Kuo Si said he saw and in which it is stated, "Two men were striking my mother and struck her for quite some time". On re-direct examination the witness said, "He (Mr. Chang) gave me any number of stories. What I have written down there is the substance of what I finally concluded was what he actually saw" (R. 24-27).

Each of the accused having been advised of his rights under Article of War 24, the accused Cooper elected to be sworn as a witness and Brennan remained silent. Cooper testified that he was one of the two men present at the occurrence on 23 April 1945. He admitted riding the buffalo but stated that they "were just intending on taking a little ride and turning the buffalo loose" and had no other intent in mind. He was a patient in the hospital and went to the village to get some more to drink. They had several bottles of "jing bao", strong Chinese rice whiskey, and were "pretty well drunk" and "staggery". He struck the man

and woman standing together because they were trying to get hold of their buffalo and wanted it back. It did not enter his head that he might kill someone. After they finished riding the buffalo they were going to turn it loose and return to the hospital. He fell off the buffalo and went back to talk to the man and woman. Brennan and the buffalo went on down further and he stayed talking to the people. Someone was grabbing at the buffalo and when he saw Brennan fall off he went down there. They were not there very long and left when it was starting to get dark. He stayed at the hospital that night as he had intended to do when they started on the trip (R. 31-33). On cross-examination Cooper stated that the buffalo was alongside the road in a field when they first saw it. Brennan untied it and Cooper got on it. The Chinese made a fuss and started running after the buffalo and pulling at it. It was clear they wanted it back but he was not impressed by that. He "smacked" the man, but not with his fist, and was trying to hold the woman. He remembered saying in his statement (Pros. Ex. 3) that he did not hit any of the Chinese people that night. However, he did hit them. He couldn't "tell very much who they were". They were going to ride the buffalo "back towards--close to the hospital", then turn it loose. He was a musician in civil life and semi-professional fly weight boxer (R. 33-35).

5. In Cooper's statement of 29 April 1945 (Pros. Ex. 3) it is stated, "I had been there [95th Station Hospital] about one week and was being examined by the doctors for my mental condition". There is no other intimation of possible insanity in the record and insanity was not raised as a defense. The miscellaneous papers accompanying the record of trial include a "Psychiatric Evaluation", dated 24 April 1945, signed by Captain M. M. Sylvan, MC, Chief, Neuropsychiatric Section, in which it appears that Cooper was admitted to the 95th Station Hospital on 14 April 1945 for psychiatric examination at the request of his commanding officer because of a history of intermittent drunkenness, disorderly conduct and inefficiency. The report states that despite certain described emotional difficulties Cooper knows right from wrong and is able to adhere to the right. Diagnosis: "(1) Psychiatric personality, manifested by emotional instability and chronic alcoholism. (2) Psychoneurosis, anxiety type, moderately severe, manifested by functional gastro-intestinal symptoms, insomnia, irritability, and nervousness". It is considered that, under these circumstances, the court was not required to inquire into accused Cooper's sanity (CM 249921, 32 B.R. 234)(CM 193543, 2 B.R. 89; sec. 395(36), Dig. Op. JAG 1912-40)(CM IBT 649, McGhee).

6. Although the evidence shows that both accused had been drinking and were to some extent under the influence of intoxicants, it fairly appears that they were not so drunk as to be unable to entertain a specific intent as to offenses in which specific intent is an element.

7. Specification, Charge I, and Charge I:

Larceny, as defined in the Manual for Courts-Martial, is the taking and carrying away by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with intent to deprive such owner permanently of his property therein.

> "Unless such felonious intent exist at the time of the taking and carrying away there is no larceny except as noted in this paragraph. For example, the act of riding off on another's horse without permission, with intent to ride a short distance and then to return it, is a trespass but not a larceny, because the intent to deprive the owner permanently of his property is not present".(par. 149g (p. 173), MCM 1928)

There can be no doubt that the first four elements of proof of larceny as set out in the Manual, that is, taking, carrying away, ownership and value are established by the evidence. The taking and carrying away by the accused jointly is manifest. There is evidence that the buffalo belonged to the family of Chang Tseng Shih and value was stipulated. But does the proof meet the requirements of the fifth element, that is, do the facts and circumstances of the case indicate that the taking and carrying away were with a fraudulent intent to deprive the owner permanently of his property or interest in the goods or of their value or a part of their value? In this connection it should be observed that the evidence as a whole negatives any intent on the part of accused to sell the buffalo, destroy it or permanently retain it in their possession. Therefore, as suggested by the reviews of the Staff Judge Advocate and Theater Judge Advocate, the requisite felonious intent must be predicated, if at all, on accused's temporary use and intent to abandon.

The early common law view as to this question is exemplified in Russell on Crimes and Misdemeanors, Vol. II, page 1185, as follows:

"On an indictment for horse stealing, it appeared that the horse was taken by the prisoner out of a stable near where he lived, with a bridle, and ridden by him to Bewdley on his way to Birmingham, a distance of forty miles, where he left the horse at an inn, and it was contended that the prisoner, wishing to see Birmingham, merely took the horse to assist him along the road. Atcherly, Serjeant, told the jury that 'if a person, without leave or authority, takes a horse for frolic, or any purpose, without intent to steal, he is not guilty of felony. This intent must be gathered from the circumstances, especially from the disposition to sell the animal. In this case the prisoner does not appear to have ever offered the horse for sale; but when he arrived at the inn at Bewdley, he had the horse fed, and then went to sleep elsewhere, and, moreover, he returned to the neighbourhood whence he took the horse and where he was well known'" [citing R. v Addis, 1 Cox 78].

The view of modern authorities on the subject is indicated by the following:

"There must be an intention to deprive the owner permanently of his property, and taking for a mere temporary use will not constitute larceny. Thus, it has been held that one who, for the purpose of escaping with stolen property, takes a horse not intending to keep it but only to use it temporarily, is not guilty of larceny of the horse. So it has been held as to other similar temporary appropriations. But some recent cases give to this doctrine a more reasonable interpretation, and hold that if the person taking the property does not intend that it shall be returned to the owner, but to abandon it after his temporary use is ended, thus, so far as he is concerned, intending to deprive the owner permanently of his property, the act will be larceny, even though the owner subsequently recovers possession" (sec. 566 (pp. 570, 571), McClain on Criminal Law).

"There is apparent disagreement on the question whether the felonious intent essential to larceny may be predicated on an intention of the taker to abandon property taken for a merely temporary use, or on the fact of such abandonment. While some authorities take the view that this, without more, is insufficient to establish the felonious intent, others hold that an intent to abandon is more consistent with an

intent permanently to deprive the owner of his property than it is with an intention to restore it to his possession, and declare that an abandonment to mere chance is such reckless exposure to loss that the guilty party should be held criminally responsible for an intent to lose. In any event, it would seem that a sufficient felonious intent to render the taker guilty may be found in a case where the place or circumstances of the abandonment and the nature of the thing taken are such as to negative the likelihood of its subsequent reclamation by the owner, or where the taker, intending at the time of the taking to do so, lessens the value of the thing taken, before abandoning it, through a felonious appropriation to his own use of severable parts thereof, for the rule is that one who takes property with the felonious intent permanently to deprive the owner of it may be convicted of larceny although for some reason he later abandons it" (32 Am. Jur. pp. 930, 931).

We now turn to the opinions of the Boards of Review involving the question of adequacy of proof in cases of this kind. These cases are summarized in chronological order as follows:

"Accused were found guilty of the larceny of an automobile. The evidence shows that they took an automobile from before the residence of the owner and drove it until arrested by the police, at which time they gave a false account of their possession thereof. They testified that they intended to leave the car where it would likely be found and restored to the owner. Held, That the essential elements of the offense of larceny are sufficiently established and that although accused may have intended to abandon the property after using it as long as they saw fit, such intention is not a defense to the charge" (CM 143354 (1921); sec. 451(40), Dig. Op. JAG, 1912-40).

"Where accused, charged with larceny of an automobile under A.W. 93, after the taking operated the car within a limited area, there is revealed only a purpose to make wrongful use thereof for a pleasure drive of short duration and nothing from which may reasonably be inferred an intent to permanently deprive the owner of his property, a necessary element in the offense of larceny. The evidence supports wrongful taking as a lesser included offense under A.W. 96" (CM 193315, Rosborough (1930); sec. 451(40), Dig. Op. JAG. 1912-40).

"Where the evidence showed that the accused was drunk when apprehended with an automobile which had been reported stolen; that the car had been left with ignition key in place; that the removal of the car at Corozal, Canal Zone, was discovered at 9 p.m., and the car found in the possession of accused several hours thereafter at a place a few miles distant; and there was absence of circumstances indicative of a purpose to desert, Held, That the evidence was insufficient to support a larcenous taking of the car but sufficient to support the lesser included offense of wrongful taking and carrying away without the consent of the owner, in violation of A.W. 96" (CM 194359, Sadler (1931); sec. 451(40), Dig. Op. JAG, 1912-40).

Accused was found guilty of larceny of an automobile under AW 93. The evidence showed: (a) disappearance on the night of Saturday, November 14, 1931, of the car from the place where it was parked, unlocked, in front of the commissary building in Cristobal, Canal Zone; (b) finding of the car at a place in front of the salvage warehouse in Fort Davis, station of accused, on the afternoon of Monday, November 16th, the evidence not showing actual manual possession thereof by accused or anyone at the time; (c) unauthorized possession, and operation of the car by accused on three pleasure drives to places in the vicinity of Cristobal and Fort Davis, such as Colon, France Field, and Coco Solo, during the period from Saturday night, November 14, to Sunday night, November 15, 1931, attended by his pretense to companions and filling station agent of rightful possession of the car. Held, That the circumstances of time, place and restricted area of use of car conjunctively negative any intent permanently to deprive the owner of his property. The record of trial was legally insufficient to support the finding of guilty of larceny of the automobile. (CM 197795, Hathaway (1932); 3 B.R. 153).

Accused was charged with embezzlement of an automobile under AW 93. The evidence shows that accused, after having come lawfully into possession of the automobile, failed to return it at the time he had promised to do so and left it in a damaged condition at a place adjacent to the post where he had borrowed it, where it remained for approximately three weeks before it was recovered by the owner. The owner admitted that he had received, on the "next morning", some kind of a message from the accused about the location of his car. Held, That the evidence is legally insufficient to support the finding of guilty of embezzlement. Under

the circumstances it must be shown that accused intended to deprive the owner of his car permanently. The circumstantial facts related do not justify such inference (CM 205811, Fagan (1936); 8 B.R. 229).

The accused were found guilty of larceny. The evidence showed a wrongful taking and carrying away. With respect to proof of the remaining element of the offense of larceny as charged, i.e., intent permanently to deprive the owner of his property in the automobile, the evidence shows only that accused, or one of them, at about 2:40 a.m., took the car from the street in front of the post office in Portland, Oregon, that both drove rapidly in it in the direction of their nearby station, Vancouver Barracks, Washington, until stopped by the civil police a few minutes later, and that, when stopped, one of accused sprang from the car with an evident purpose of escape (R. 23, 24, 26, 27, 33). Each accused made an unsworn statement that they intended to leave the car by a fire hydrant in Vancouver where it would be found and returned to the owner. Held, That the facts are not such as to form an adequate basis of a reasonable inference of intent permanently to deprive the owner of his property. Legally sufficient to support only so much of the findings of guilty as involve findings of guilty of wrongful taking and carrying away under AW 96. (CM 206350, McAdams, et al (1937); 8 B.R. 269).

It is clear from the foregoing cases that mere asportation and temporary possession of property wrongfully taken or retained are not sufficient to justify an inference of fraudulent intent permanently to deprive the owner of his possession (Also see CM 208699, Crowder; 9 B.R. 27). The first case set out (CM 143-354) indicates that such intent may be inferred where it is shown that accused abandoned or intended to abandon the property. However, the last two cases (CM 205811, CM 206350) indicate that abandonment or apparent intent to abandon, without more, is insufficient to establish felonious intent and that there must be evidence, from the place and circumstances of the abandonment and the nature of the thing taken, to negative the likelihood of its subsequent reclamation by the owner. This appears to be the rule followed by the majority of civil jurisdictions and the one contemplated by the Board of Review opinions above summarized. (Also see CM 227743, Younger; 15 B.R. 377; 1 Bull. JAG 364).

Assuming that the evidence shows that the accused intended to abandon the buffalo after riding it to the hospital, does the

evidence negative the likelihood of the animal's subsequent return to the owner? We think not. It does not appear that the animal was taken by stealth; instead, so far as the record discloses, it was taken in the light of day in the presence of Chinese soldiers and a Chinese officer and within sight of the owners and other villagers. Even if the owners had not seen the buffalo being taken, the circumstances were such that it would obviously have been a simple matter for them to trace the buffalo to the place of proposed abandonment only 1.2 miles away. We cannot believe that the bizarre sight of two partly intoxicated American soldiers, clad in hospital pajamas and dressing gowns and riding a buffalo through the Chinese countryside, would not attract considerable attention and comment and that the place of abandonment of the animal would not become known to the owner. Further, we cannot assume that the buffalo would not return of its own accord to the place from which it was taken. Nor may we assume that the buffalo was not branded or otherwise easily identifiable and that a finder would not return it to the owners. Under all the evidence, we believe that the evidence does not negative the likelihood of recovery of the buffalo if it had been abandoned at the hospital but, on the contrary, strongly suggests that it would be recovered. The fact that the animal was in fact recovered shortly after it was taken tends to support this view.

We consider it immaterial, so far as proof of intent in this case is concerned, that the accused violently resisted the owner's attempt to recover their property. The violence obviously was exercised because the owners attempted to interfere with the accused's temporary use of the buffalo and there is no reason to believe that it denoted a change in their original intent to drive the buffalo to the hospital and there abandon it.

We are impelled to the conclusion that this case falls squarely within the purport of those opinions of the boards of review, supra, in which evidence of a wrongful taking and use and failure to return is considered, in the absence of other circumstances, insufficient evidence of the required animo furandi. The common pattern revealed in those cases, distinguishing them from larceny cases, appears herein: that is, a wrongful taking by intoxicated or irresponsible accused, usually without stealth, followed by temporary use and return to the owner or abandonment under circumstances evincing a likelihood of return.

We believe that the required animo furandi may not logically be inferred from the facts in this case. Accordingly, in the

opinion of the Board, the evidence is not legally sufficient to support the findings of guilty of larceny under the Specification, Charge I, but legally sufficient to support findings of guilty of the lesser included offense of wrongfully taking and carrying away the property described in the specification, without the consent of the owner, in violation of Article of War 96.

8. Specification, Charge II, and Charge II:

As to the charge of murder, there is substantial evidence of record that both accused struck Chang Tseng Shih, the deceased. Chang Kuo Si so testified. Mrs. Chang Chang Shih testified that she did not see Cooper strike the deceased but whether this was because she was not in a position to observe is not disclosed. The court, as the principal finder of fact, apparently found that there was a joint assault. In view of the substantial supporting evidence, we cannot say that the court was not justified in that finding.

It appears beyond any question that Chang Tseng Shih is dead. There is substantial evidence that she died in consequence of an injury received by her and that such injury was the result of the acts of the accused. The fact that she might not have died from the injuries received had it not been for the goiter with which she was afflicted is no defense. The law on this question is well settled, as follows:

> "One who strikes a blow or inflicts a wound from which death ensues has committed a homicide, although if properly treated the injury would not have been fatal. * * *So if the wound is the mediate cause it is no defense to the person inflicting the wound that the immediate cause was disease resulting therefrom. * * * To hasten the death of one who would soon have otherwise died from incurable disease will constitute homicide. The fact that the person killed was in feeble condition, so that his death was caused by a blow which would not have caused the death of a healthy person, will be no defense" (sec. 292, McClain on Criminal Law). (Also see 40 C.J.S. pp. 855, 856; 26 Am. Jur. pp. 191, 192).

We now come to a consideration of whether the homicide was committed with malice aforethought, the grand criterion which distinguishes murder from other homicide. Malice is thus defined in the Manual:

"Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)

"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 ommission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony" (par. 148a (pp. 163, 164), MCM, 1928).

The Staff Judge Advocate, in his review of this case, points out that the deceased was a stranger to the accused prior to the occurrence and that there can be no question of express malice in the sense that the accused intended to take life or cause great bodily harm. The Theater Judge Advocate apparently subscribes to this view, and with it we agree. Our holding as to the Specification, Charge I, precludes a predication of malice on any intent of the accused to commit a felony. (See par. 148a (p. 164) and par. 149d (p. 168), MCM, 1928). Further, malice may not be presumed in this case from the use of a deadly weapon (see par. 112, MCM, 1928) as it is well established that a fist is not, at least per se, such an instrument (sec. 451(7), Dig. Op. JAG, 1912-40). It follows that malice, if it exists in this case within the meaning of the Manual's definition, supra, must be based on the inference that the accused had knowledge that the act which caused death would probably cause the death of, or grievous bodily harm to, the deceased. The evidence will therefore be considered with a view to determining whether there is a reasonable basis for such inference.

The evidence shows that the deceased was a woman of seventy-one years of age, five feet three inches in height, weighing one

hundred pounds. Although the record does not disclose the accuseds' weight or height, it may be gathered that they were men of normal stature and strength. Cooper was a semi-professional flyweight fighter in civilian life.

There is substantial evidence that both accused struck the deceased, that one of them struck her with his clenched fist, and that at least one blow was with sufficient force to knock her down. Further evidence as to the severity of the assault is found in the medical testimony which shows that the deceased's face was blood smeared, that she had hemorrhages or contusions on both sides of the face or skull, that her lips were black and blue, and that she had a hemorrhage of the thyroid gland. The eyewitness accounts of what occurred and the medical testimony, considered together, clearly discloses that the deceased received a beating of considerable severity from the accused.

We are aware of the line of cases that hold that since death is not the natural or probable result of a blow with the fist, no intent to kill will, under ordinary circumstances, be presumed, inferred, or implied, although death resulted from such an act. (26 Am. Jur. pp. 361, 362)(CM ETO 3614, Davis, 1944; 3 Bull. JAG 514) (CM ETO, 8189, Ritts, 1945, and CM ETO, Armijo, 1944; sec. 451 (6), Dig. Op. ETO). However, we believe that this case falls within a patently reasonable and necessary exception to that rule, that is, that malice may be inferred from evidence that an accused beat another in a cruel and inhuman manner (Duebbe v State, 1 Tex. Ap. 159), or that he beat a child (Powell v. State, 67 Miss. 119) or a person in feeble health with knowledge of that condition (Commonwealth v. Fox, 7 Gray 585; State v. O'Brien, 81 Iowa 88).

It must have been apparent to the accused that the deceased was a woman of advanced years, small of stature and light in weight, and it seems so palpable as to preclude argument that they must have known that they could not cruelly beat her without probably causing her death or, at least, grievous bodily injury. That grievous bodily injury, albeit in itself not sufficient to cause death, was in fact inflicted is compelling evidence as to their state of mind. Considering all the evidence, the court was amply justified in finding the accused guilty of murder.

9. The offense of wrongfully taking and carrying away, without the consent of the owner, of property of a value of more than fifty dollars is punishable as for larceny (par. 104c, MCM, 1928)(CM 207466; 8 B.R. 341)(CM 208699; 9 B.R. 30).

10. For the reasons stated, as to both accused, the Board of Review holds the record of trial legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, and Charge I, as involves findings of guilty of wrongfully taking and carrying away the property described in the specification, of the ownership and value alleged, at the time and place alleged and without the consent of the owner, in violation of the 96th Article of War, and legally sufficient to support the findings of guilty of the Specification, Charge II, and Charge II, and legally sufficient to support the sentence as modified by the confirming authority. 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, Criminal Code of the United States (18 U.S.C. 452, 454).

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

Timous T. Valentine, Judge Advocate
Timous T. Valentine

John F. Fontron, Judge Advocate
John F. Fontron

CM IBT 637 (CT 45) 1st Ind.
(Brennan, John V.; Cooper, James F.)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 8 September 1945.

TO: Commanding General, China Theater, APO 879, U. S. Army.

1. In the case of Private John V. Brennan, 31142118, 1712th Signal, 14th USAAF (AAF) Signal Corps, and Private James F. Cooper, 35680244, Burma Road Engineers, Services of Supply, United States Forces, China Theater Corps of Engineers, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support only so much of the findings of guilty of the Specification, Charge I, and Charge I, as involves findings of guilty of wrongfully taking and carrying away the property described in the specification, of the ownership and value alleged, at the time and place alleged and without the consent of the owner, in violation of the 96th Article of War, and legally sufficient to support the findings of guilty of the Specification, Charge II, and Charge II, and legally sufficient to support the sentence as modified by the confirming authority, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. After a careful review of all the facts in this case, I am of the opinion that the ends of justice would be fully met if the sentence were reduced to confinement at hard labor for thirty (30) years as to each accused and I so recommend.

3. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 637; CT 45).

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

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(Findings vacated in part in accordance with recommendation of Assistant Judge Advocate General. Sentence as commuted ordered executed. GCMO 3, CT, 17 Sep 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
11 August 1945

Board of Review
CM IBT 648

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| UNITED STATES<br><br>v<br><br>Private Willie Simmons, 349-40220, Company "C", 1327th Engineer General Service Regiment. | ) ADVANCE SECTION, INDIA BURMA THEATER<br>)<br>) Trial by GCM convened at Myitkyina Sub-Depot, 27 June 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for life. U.S.Penitentiary.<br>) |

HOLDING of the BOARD OF REVIEW
O'BRIEN, VALENTINE and FONTRON, Judge Advocates

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Willie Simmons, Company "C", 1327th Engineer General Service Regiment, did, near Namti, Burma, on or about 16 February 1945, with malice a forethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Chiang Shek, a human being by shooting him with a rifle, caliber 30.

Accused pleaded not guilty to and was found guilty of the Charge and the Specification. There was no evidence of previous conviction. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence and designated the United States Penitentiary nearest the port of debarkation in the United States as the place of confinement. The execution of the sentence was withheld and the record of trial forwarded pursuant to Article of War 50½.

3. Evidence for the Prosecution:

On 16 February 1945 Sana Kaw was picking up potatoes by the roadside where her husband, Chiang Shek, to whom she had been married about sixteen years (R. 13), was washing clothes (R. 6) in a small stream. This was near the village of Namti, Burma (R. 6). At the time, Chiang and his wife were about fifty yards apart (R. 12). There was a bridge about fifteen feet in length across the stream near where the couple were (R. 22). As Sana was engaged in picking up the potatoes she turned, looked around and saw a colored soldier pointing a rifle at her (R. 6-8). The rifle appeared to her to be about a yard long (R. 8). Sana ran to her husband and reported the incident (R. 6, 12). The soldier followed her (R. 11) but did not cross the bridge (R. 12). Chiang came up to the bridge with his wife saying, "we got no customs to make woman like that" (R. 6), and when he was about fifteen feet away (R. 11, 13) accused shot him twice, one bullet hitting him in his chest and the other in his head (R. 6). The wife of Chiang was at the moment standing by his side (R. 12). Chiang fell to the ground (R. 6, 7). Sana attempted to lift up her husband and when she looked at his face she found that he was not breathing (R. 6). She immediately went to the village (R. 6). Accused ran away (R. 6). At no time did Chiang have a knife (R. 8). Soon thereafter two American officers came to the scene and examined the body of Chiang (R. 7). The next day the body of Chiang Shek was burried about two hundred feet from where he had been shot (R. 7). Sana Kaw identified accused at the trial by touching him and naming him as the man who shot her husband (R. 8).

Captain Walter P. McMinn, Corps of Military Police, 7th Military Police Company, Namti, Burma, arrived at the scene of the shooting at about 1600 hours, 16 February 1945. He found, by the side of the road, a dead man lying on his back with the right side of his face down, covered with a blanket. Deceased's chest was covered with blood and there was a pool of blood under his head (R. 21, 22). There was a little blood on the left side of the head and when this was wiped off the bullet wound could be seen (R. 21). A native woman, identified as Sana Kaw, was there at the time (R. 21-23). Deceased was not breathing, had no pulse, and was dead at the time of the examination by Captain McMinn (R. 21). The body of Chiang was taken away by American military police to the 151st American Hospital (R. 22). Captain McMinn was present on the

following day when a body was buried near the scene of the examination. The body was in a box which prevented him from identifying it. Sana Kaw was present at the time of this burial (R. 22). Sana Kaw admitted on cross-examination that, at a line-up of several soldiers in which accused was not included, she identified as her husband's assailant a soldier other than accused (R. 14). At a subsequent line-up she pointed out accused (R. 16, 30).

Accused, on the day of the incident, made voluntary statements to three of his fellow soldiers. Technician Fourth Grade McPherson testified that, at about 1700 hours, accused, while sitting on a wheel cleaning his rifle (R. 17), said, "/I/ had been on the river and saw a native woman in the bushes squatting down with a bottle with something in it that looked like whiskey. /I/ went up to see what she was doing and a native man came out of the bushes and threw a knife at /me/ and /I/ shot at him" (R. 18). On the same afternoon, accused walked up to Private Carter and said, "I killed a mother fucker a while ago". Carter told accused he was joking, to which accused replied, "don't you believe it" (R. 19). On the same afternoon Private Baker was in the mess hall and accused came up to him and said, without being questioned, "* * *a native threw a knife at /me/ and /I/ shot him" (R. 20).

4. Evidence for the Defense:

Sana Kaw, on the 17th of February 1945, was taken to a place where Private Howard J. Spencer, Company C, 1327th Engineer General Service Regiment, along with three other soldiers of his company, were lined up for identification purposes. All four passed before Sana Kaw and Spencer was called back to take off his glasses as a part of the identification. There was an interpreter present. Sana Kaw looked at Spencer about two minutes and then conversation took place between her and the interpreter. Then every one went out of the room except Spencer and a lieutenant who inquired of Spencer why he had committed the murder (R. 25). Accused was not one of the four soldiers called in at this time for identification purposes. Another identification test was had the next day. Accused and Spencer were the only persons in the line-up. Sana Kaw was present. Spencer and the accused were then taken outside the building in the sunlight where Sana Kaw looked at them for about five minutes but said nothing (R. 26). There were only two of these identification line-ups held at Namti Stockade. The first time Spencer was questioned was in the company area. The second and third times were at the Namti

Stockade (R. 26, 27).

5. The defense contended that there was a failure of proof as to the cause of death. In this connection, it clearly appears from the testimony of Sana Kaw that her husband was shot twice by his assailant, one bullet striking him in the chest and the other in his head. He fell, and when she looked in his face and tried to lift him up he was not breathing. She further testified that he was buried on the day following within about two hundred feet from the scene of the fatal shooting. Captain McMinn, upon examination of a body at the scene of the shooting shortly thereafter, found the man whom he examined to be dead with a bullet hole in the left side of his head, a pool of blood under the right side of his head and a quantity of blood over his body. This evidence of the prosecution is uncontradicted.

> "In cases where the cause and manner of death are left in doubt, and become subject of proof, every sort of relevant evidence should be admitted* * *" (26 Am. Jur., par. 320).

> "Evidence showing that accused's act was sufficient to cause death raises a rebuttable presumption that death was due to such act, and death may be presumed to have been caused by apparent wounds, particularly where there is no suggestion in the record that deceased died from any other cause" (40 C.J.S., par. 186, p. 1088).

> "* * * Direct testimony to the effect that deceased is dead may be supplied by language of witnesses, which conclusively indicates such fact. In case the killing of deceased at the hands of defendant is not seriously questioned upon the trial but the defense is justification, it seems that such strict proof of the fact of death as would be required in other cases is unnecessary" (30 C.J., par. 530, p. 286).

> "An ordinary eyewitness may testify that a person was dead or alive when seen by him; this is matter of fact and not mere opinion, or at least it is within the rule permitting a witness to state such instantaneous conclusions from a complex variety of facts" (25 C.J.S., par. 9, footnote 9, p. 1065).

In this case the wife of deceased was present when the fatal shots were fired, saw her husband fall and had full opportunity

to know that his injuries were inflicted by accused and resulted in death. The evidence fails to suggest that deceased died from causes other than the wound and it would require pure conjecture to make such argument. In the circumstances here presented the fact of the death of deceased is fully perceptible and no special knowledge or skill was necessary for the formation of an intelligent opinion as to the cause of the death of deceased. In addition to the testimony of Sana Kaw the death of her husband was corroborated by the testimony of Captain McMinn. This fact is further established by certain voluntary statements of accused to some of his fellow soldiers. He stated to one, "I killed a mother fucker a while ago."; and, to another, "* * *a native threw a knife at [me] and [I] shot him". We are of the opinion that the death of Chiang Shek is sufficiently established to satisfy the proof requirement of the crime.

It was proper for the accused to show, by way of impeachment, that Sana Kaw, in an extra-judicial identification test, identified a soldier other than accused as her husband's assailant, and under appropriate circumstances and in an appropriate manner the prosecution would be entitled to offer rebuttal, but, so far as the record discloses, the evidence as to extra-judicial identification was wholly hearsay in that the witnesses' information was based entirely upon the statements of an interpreter. On this subject the following is pertinent:

> "The investigating officer, upon cross-examination by the defense, was permitted to testify to certain extra-judicial identifications of accused. The proceedings by the investigating officer were conducted through an interpreter and the witness only testified to what the interpreter reported to him. The testimony was therefore hearsay. Insofar as this testimony was produced by the defense for purposes of impeachment, it was not objectionable <u>except for the fact that the identifications came through the interpreter</u>". (Underscoring supplied) (NATO 1490, <u>Johnson et al</u>)

Whether the accused was properly identified presents a question of fact to be determined by the court under all the evidence in the case. It should be here pointed out that at the trial five other colored soldiers were seated in the courtroom along with the accused (R. 5), and from their number she pointed out and marked accused. This was convincing evidence from which the court could properly find that accused was the

person who committed the crime attributed to him by the witness. Accused's identification is further established by his admissions to other soldiers. Whatever irregularities there were in the admission of evidence as to extra-judicial identification inured more to the advantage of the accused than to his detriment and therefore no substantial rights of his were adversely affected thereby.

The crime of murder is thus defined and discussed:

"Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. The death must take place within a year and a day of the act or omission that caused it, and the offense is committed at the place of such act or omission although the victim may have died elsewhere".

"Proof.--(a) That the accused killed a certain person named or described by certain means, as alleged (this involves proof that the person alleged to have been killed is dead; that he died in consequence of an injury received by him; that such injury was the result of the act of the accused; and that the death took place within a year and a day of such act); and (b) that such killing was with malice aforethought".

"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: An intention to cause the death of, or grevious bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation)* * *"(Par. 148a MCM 1928).

"The burden of proving an intent to kill on the part of accused is on the prosecution except where it is not an essential element of the offence charged; however, under the general rule that the law presumes that a person intends the natural, necessary, and probable consequences of his acts, the intent or purpose to kill may be inferred from the circumstances of the killing, such as the character of the assault, the use of a deadly weapon, or the use of a deadly weapon in a deadly manner. Hence, where an as-

sault is made with a dangerous or deadly weapon used in such a way as will naturally, probably, or reasonably produce death, or jeopardize life, an intent to kill is presumed* * *" (40 C.J.S., par. 188, pp. 1088-1089).

"It is murder, malice being presumed or inferred, where death is caused by the intentional and unlawful use of a deadly weapon in a deadly manner provided in all cases that there are no circumstances serving to mitigate, excuse, or justify the act. The use of a deadly weapon is not conclusive as to malice, but the inference of malice therefrom may be overcome, and where the facts and circumstances of the killing are in evidence, its existence of malice must be determined as a fact from all the evidence" (29 C.J., par. 74, pp. 1099-1101).

The statements of accused to some of his fellow soldiers suggest that the man whom he shot had thrown a knife at him. However, no further evidence of this contention was brought forward at the trial nor was an effort made to defend accused on the ground of self-defense. Furthermore, Sana Kaw expressly denied that the deceased was armed or attacked accused. Therefore, under the authorities last quoted, the evidence in this case abundantly justifies the court in reaching the finding which appears in the record.

6. The charge sheet shows accused to be 34 years of age at the time the charges were preferred. He was inducted on 4 January 1944. He had no prior service.

7. The court was legally constituted and had jurisdiction of the person of accused and the subject matter of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and the sentence. A sentence either of death or of imprisonment for life is mandatory upon a 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 (18 US.C., 452, 454).

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

Itimous T. Valentine — Judge Advocate
Itimous T. Valentine

John F. Fontron — Judge Advocate
John F. Fontron

New Delhi, India
15 August 1945

Board of Review
CM IBT 649

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| UNITED STATES | ) | INDIA BURMA AIR SERVICE COMMAND |
| v | ) | Trial by GCM convened at APO 218, % Postmaster, New York, N.Y., 19, 20 June 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 30 years. United States Penitentiary. |
| Private Franklin E. McGhee, 35772481, Company B, 1888th Engineer Aviation Battalion. | ) | |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification 1: In that Private Franklin E. McGhee, Company B 1888th Engineer Aviation Battalion, APO 218 % Postmaster, New York, New York did, at APO 218 % Postmaster, New York, New York, on or about 2 May 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Ma Po Mai, a human being by hitting her on the head with a bamboo pole and/or kukri knife.

Specification 2: In that Private Franklin E. McGhee, Company B 1888th Engineer Aviation Battalion, APO 218 % Postmaster, New York, New York, did, at APO 218 % Postmaster, New York, New York, on or about 2 May 1945, forcibly and feloniously, and against her will, have carnal knowledge of Ma Pwa Zon.

Accused pleaded not guilty to the Charge and Specifications. He was found guilty of Specification 1 and the Charge, and, by exceptions and substitutions, as to the offense charged in Specification 2, he was found guilty of assault with intent to commit rape in violation of the 93rd Article of War. The court sentenced him to dishonorable discharge, total forfeitures and confinement at hard labor for the term of his natural life. The reviewing authority approved the sentence but reduced the period of confinement to thirty years. The United States Penitentiary nearest the port of debarkation was designated as the place of confinement. The order directing the execution of the sentence was withheld and the record of

trial forwarded for action under Article of War 50½.

3. The evidence for the prosectuion was substantially as follows:

Ma Pwa Zon, the prosecutrix, stated that about six o'clock on the morning of 2 May 1945 she was on her way to the bazaar at Momauk in company with three other women, namely, Ma Ti, Ma Om Sun, and Ma Po Mai, the deceased (R. 9). A negro soldier came upon them from the rear carrying a knife and bamboo pole saying, "jig-jig", and "bi-bi" (R. 11, 13, 15). Accused was identified in open court as the negro soldier involved (R. 9, 16). He overtook the party of women and tried to take hold of witness (R. 11). Ma Po Mai shouted (R. 13). Accused then hit Ma Po Mai two or three times on the back of the head just above the nape of the neck with the bamboo pole (R. 13, 16, 18). The women ran and accused gave chase and caught Ma Pua Zon, threw her to the ground and grabbed hold of her neck (R. 12, 13, 19). He held one hand on her neck and in the other he held a Gurkha knife (R. 19). She screamed (R. 19) and he choked her so she could not scream (R. 19). She tried her level best to get up (R. 13, 19) but he pressed her down (R. 12). She said to him very loudly, "Please don't do! Please don't do!" (R. 12). He threatened her with the knife (R. 13). She was afraid (R. 13) and she cried and told him not to do it (R. 12). He mentioned nothing about money and she took no money from him (R. 16). She never agreed to it (R. 17) and never assisted him (R. 17). This witness, testifying through an interpreter, described what accused did to her after he threw her on the ground in the following terms appearing in the record: "He slept with me". "He did me". "touched my private parts * * * with his penis". "He put his penis into my cunt and did no more" (R. 12, 13, 14). Prior to meeting accused she had no marks on her body but after the assault there were marks on her neck (R. 14). She could not say accused discharged but "after committing" her he released her and went to the "east side" (R. 19, 20). As soon as he left she ran to Ma Po Mai who was unconscious on the ground nearby and told her what accused had done, but Ma Po Mai could not speak (R. 20). Later a doctor came to attend them but she could not understand his language and did not speak to him (R. 20). Prosecution's Exhibits A and B were examined by this witness and she was unable to identify either the bamboo pole or the knife as the ones used by accused in perpetration of his assaults (R. 10).

Captain Bernard Goluboff, Medical Corps, testified that he examined a native woman on 2 May 1945 at the 44th Field Hospital, APO 218. She revealed a linear confluent group of contusions on each side of the neck. Examination of the pelvic region externally and internally showed negative. No marks other than the simple bruise on the woman's neck was found. The patient was stoical and at first refused internal examination. He expressed the opinion that the results of his examination indicated a lack of struggle on her part. He further stated as his opinion that normally a woman could not be raped without showing signs of injuries, bruises or contusions, but that to his own knowledge such was possible (R. 21-23). The woman he examined was in no way identified by him except "she had been brought for examination after having been raped" (R. 21).

Major Frederick E. Farrer, Medical Corps, testified that on 2 May 1945 he saw Ma Po Mai brought into the 44th Field Hospital (R. 23, 24) (Exhibit C). The hospital record of deceased was shown to witness to refresh his memory after which he stated that at the time Ma Po Mai entered the hospital her condition did not

appear serious. Later an x-ray was made of her skull which was reported negative. An examination revealed a contusion of the occipital region of the skull. She became lethargic and harder to arouse and her general condition indicated damage to the brain. She gradually grew worse and expired at 2235 hours on 3 May 1945 (R. 25, 26). He expressed the opinion that death was due to a blow on the back of the head from a blunt or dull instrument (R. 27).

Fred W. Nicol and Robert D. Druley, Criminal Investigation Agents, testified that accused, after being warned of his rights under Article of War 24, made a voluntary statement on 3 May 1945 which was reduced to writing and signed by him (R. 29, 33). This statement was introduced in evidence (R. 30, Exhibit D). Accused admitted that he left his company at the 370 mile mark on the Stilwell Road at about 0400 or 0430 hours on 2 May 1945 and started walking toward Momauk. He received a ride in a truck and got off at the 363 mile mark. He walked across the field and met three or four native women walking along a pathway. He asked the woman in the rear for "jig-jig". She replied but he did not understand. He again asked her for "jig-jig" and she said, "5 rupees, Sahib". She then made a motion with her hands and dropped back and stopped. She laid down beside the path, pulled up her skirt, and they began intercourse. About the time the intercourse began a United States white soldier, a guard, came up and almost at this same time he (accused) was struck across the back. He arose and saw a native woman with a stick in her hand. He asked the guard which woman hit him and the guard said he did not know but the best thing for him to do was to go on and stay out of trouble. When he got up from the woman he picked up a kukri knife he then found there on the ground and held it in his hand, but he did not threaten anyone. He left carrying the knife, but after traveling a short distance discovered the loss of his flashlight. While returning to the place of intercourse to search for it, he was met by the guard and another United States white soldier who asked him why he hit that woman. He replied, "What woman was hit?" He accompanied them to a point where he had had intercourse and there saw a native woman beside the highway. Her face was being bathed with cold water and someone was giving her smelling-salts. He had never seen this woman before and she was not in the group he met previously. He denied hitting the woman. The kukri knife was taken from him and he was taken into custody and returned to his company area (Exhibit D).

Agent Druley testified that on the morning of 3 May 1945 he saw deceased, Ma Po Mai, in the 44th Field Hospital. She was unconscious. After she died he saw the body and there appeared to him to be a large lump on the back of her head just above the nape of the neck which was about as large as a hen's egg (R. 31-33).

Private First Class Charles White testified that he and accused left their area about 1900 on 1 May 1945 and went to Momauk about twelve miles away. At Momauk they saw a show which was over about 2130 and then they returned by truck to their company area. They ate a midnight lunch and returned again to Momauk about 0300 hours where some saki was purchased and consumed. About 0200 or 0300 hours accused walked off toward Momauk from the place where they had gone to drink the liquor and witness saw him no more (R. 35, 36). Between the two trips to Momauk accused and witness "lay around drinking beer" and on the second trip they purchased two beer cans of saki which they drank (R. 36).

Ma Ti through an interpreter testified substantially as did Ma Pwa Zon except she was unable to identify accused. In addition, she stated that the negro soldier struck Ma Po Mai with a knife and beat her with a stick (R. 38). He struck her on the back side of the head about four times with the stick and twice with the knife (R. 36). The knife was described as a kukri knife (R. 39). Prosecution's Exhibits A and B were shown to the witness (R. 39, 42). She could not identify the knife and the bamboo pole sufficiently to satisfy the court that they were the articles used by accused in assaulting his victims (R. 43). However, the law member ruled that the pole and knife would be admitted into evidence as similar to the ones used by accused as the witness testified to that effect (R. 43). Exhibit A describes the bamboo pole as three and one-half feet in length and four inches in diameter. The knife is described in Exhibit B as being a kukri knife with a rusty, curved (or crooked) blade approximately twelve inches in length and a hardwood handle approximately five inches in length.

By stipulation between accused, defense counsel and the prosecution it was agreed that if Technician Fifth Grade Arthur Plumley, Technical Sergeant Artice V. Watson, and Sergeant Vincent Kalitius were present they would respectively testify as indicated in Exhibits E, F, and G (R. 49, 50). The court accepted the stipulation and the statements of the individuals were read to the court.

Technician Fifth Grade Plumley's statement relates that on 2 May 1945 he was on guard around 0500, about daylight, when he heard women screaming at a place about two hundred yards southeast of his post. He went to that place and saw some natives "milling around", and on closer observation saw a man and woman having intercourse. He walked up to the couple and observed that the man was a negro soldier and woman, a native. He saw no physical resistance on the part of the woman though she was talking in a shrill voice. Upon his approach the negro said, "Hello", and continued with his activities. About this time a native woman approached and struck the negro across the back with a bamboo pole. He desisted from the intercourse and arose holding a Gurkha knife in his right hand. He picked up a bamboo pole with the other hand and asked who had hit him. Plumley advised him to "go on and mind his own business", and he threw down the pole and departed carrying the knife with him. Accused returned to his post and after conversing with a Sergeant Watson both returned in a jeep to the place where the incident occurred. An unconscious woman was found about twenty-five yards south of where the soldier and native woman had been having intercourse. They looked for the soldier and found him three hundred yards to the east. Upon being asked why he hit the native woman he replied, "What native woman?" He was subsequently interrogated at the scene of the incident and ordered held in custody. The soldier was described as being about five feet eleven inches tall and weighing about one-hundred eighty pounds. The woman was about five feet or under according to the witness.

The statements by the other two witnesses show that a woman was found lying about seventy-five yards south of the Stilwell Road on 2 May 1945 at about 0530. She was unconscious and there was a bump on the back of her head which was bleeding. After first aid treatment she was removed to a native basha about seventy-five yards away.

4. The evidence for the defense was substantially as follows:

First Lieutenant John J. Higgins, First Sergeant Bernet Johnson, and Corporal Fred A. McLaughlin all testified that accused's general reputation for good character and military efficiency in his organization was good (R. 51, 52, 53).

Accused testified as a sworn witness. He stated he got off a truck about six o'clock, 2 May 1945, near the village of Momauk. He walked across a field and noticed three or four native women going along a pathway. One of the women (identified as the witness who testified yesterday) was behind the others and he said to her, "bibi, jig jig, five rupees", and with his hands indicated to her to drop back from the others. She dropped back and reclined on the ground without offering any resistance. He touched no other woman. The act of intercourse was not completed because another woman struck him across the back with a pole. A guard had just arrived on the scene at that time and advised him to go on and stay out of trouble. The knife was not his but one he saw for the first time as he got up from the woman. He left the scene and after a time discovered he had lost his flashlight. While returning to look for it he was stopped by two guards, one being the guard he had seen there during the intercourse, who asked him why he hit the native woman; to which he answered, "What native woman?" On his own accord he returned with them and answered their questions to the best of his knowledge. The court elicited testimony from accused that he paid the native woman five rupees which she accepted. He admitted penetration but denied emission. He denied any knowledge of the assault on the deceased and claimed the intercourse with Ma Pwa Zon was with her consent (R. 53-59).

5. Specification 1 of the Charge alleged that deceased was killed "by hitting her on the head with a bamboo pole and/or kukri knife". The effect of the expression "and/or" in the specification was to charge that accused killed deceased by hitting her with a bamboo pole or by hitting her with a kukri knife, or by hitting her with both such instruments (3 C.J.S., p. 1069). Such inexactitude is not to be countenanced in criminal pleading and might properly have been subject to objection by the defense. However, in the absence of such objection, the irregularity may be considered waived (par. 64, MCM, 1928). There is nothing to indicate that the accused's rights were in any way injured by the pleading.

The charge sheet contains no certificate showing that the charges were served on accused. However, the trial judge advocate stated in open court that they were served on accused on 18 June 1945, the day preceeding trial (R. 2). The defense expressly declined a continuance and agreed to proceed with the trial after the trial judge advocate made his statement. Under such circumstances it appears that accused was in no way prejudiced as to his defense and no error resulted (CM ETO 422, Green, 1943; Dig. Op. ETO, p. 400).

There is some intimation in the allied papers that a short time before accused committed the offenses here involved he had been released from a hospital where he was undergoing observation to determine his mental status. His mental capacity or insanity was neither presented as a defense nor even suggested during the trial itself. Consequently it was not inquired into by the court. There

appears in the allied papers a certificate of a medical officer which states that accused was admitted to the 20th General Hospital on 16 December 1944 and remained until discharged on 21 April 1945. The certificate states that no disease was found requiring treatment, that treatment was useless, that he should not be referred to a hospital again, and that he should be disposed of under the provisions of Army Regulations 615-368 and 615-369. A reference to the mentioned regulations reveals they apply to cases where soldiers are to be separated from the service because they exhibit undesirable habits and traits of character, and not to cases of mental deficiency or insanity. No evidence was presented to the court showing or tending to show insanity of accused, nor was the issue raised as a defense. It is considered that, under these circumstances, the court was not required to inquire into accused's sanity (CM 249921, 32 B.R. 234; CM 193543, 2 B.R. 89); sec. 395(36), Dig. Op. JAG 1912-40).

Exhibits A and B were identified respectively as being articles similar to the bamboo pole and kukri knife used by accused. No claim was made by the prosecution that they were the identical items. The defense objected to their introduction apparently on the ground that it had not been shown they were the weapons used by accused. It was proper for the witnesses to give evidence as to the size, shape, weight etc. of the weapons used by accused and the court was entitled to receive that evidence in order to judge, among other things, whether the weapons were in fact deadly ones. The law member admitted the pole and knife into evidence specifically stating they were admitted as being similar to but not the actual weapons. The defense in no way attempted to show they were dissimilar, nor was any claim to that effect presented. The exhibits only served as demonstrative evidence and as a visual description of the weapons used. As indicated by the following, their admission into evidence was not error:

> "It is proper, and indeed is common practice, in order to assist the jury in understanding the evidence, to permit the introduction in evidence of models, casts, reproductions of impressions in sand, blackboard demonstrations, or other objects, which are fairly representative of an original relevant object. The illustration need not be in all respects exactly the same as the original, it being sufficient if it fairly represents the conditions to illustrate which it is offered. An object identified as similar to a relevant object not available as an exhibit may be introduced for the purpose of illustration" (22 C.J.S., p. 1202).

6. The Manual for Courts-Martial, 1928, sets forth the law of murder in the following language:

> "Murder is the unlawful killing of a human being with malice aforethought. 'Unlawful' means without legal justification or excuse. The death must take place within a year and a day of the act or omission that caused it * * *.

* * *

"Malice aforethought.--Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)

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

Murder as defined in the Manual for Courts-Martial is essentially the offense of murder as denounced and defined at common law.

"Murder is the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace with malice aforethought, either express or implied by law. This malice aforethought * * * is not limited to particular illwill against the person slain, but means that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. * * *killing accompanied with circumstances that show the heart to be previously wicked, is adjudged to be killing of malice aforethought, and consequently murder. * * * And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden (Russell, Law of Crimes, Vol. 1, pp. 655, 656).

"It has been said that whenever an unlawful act (an act malum in-se), is done in prosecution of a felonious intention, and death ensues, it will be murder: * * *" (Russell, Law of Crimes, Vol. 1, p. 757).

"An unintended homicide, committed by one who at the time is engaged in the commission of some other felony, is murder both at common law and under the statutes, even though the statute requires a premeditated design to effect death as

a requisite of murder" (29 C.J., 1097).

The evidence clearly showed that accused assaulted Ma Po Mai at the time and place alleged with the instruments described in the specification and that she died the following day. There is ample evidence to show malice aforethought. From the evidence adduced by the prosecution, which apparently the court accepted as true, there is presented a brutal onslaught, an unprovoked assault, a deliberate attack, a clubbing of deceased into insensibility so that she could in no way interfere with accused as he sought to satisfy his lustful desires in ravishment. Such evidence clearly sustains the conviction of murder. (See CM 246101, 29 B.R. 381; CM 249015, 32 B.R. 28; CM 251541, 33 B.R. 272; CM 252439, 34 B.R. 61)

7. The testimony of the prosecutrix described every element of a brutal assault with intent to commit rape (par. 149L, MCM 1928). Her testimony was corroborated by the testimony of Ma Ti. Accused admitted intercourse at the time and place designated by his victim. A guard saw him in the act. Little reason need be advanced why accused's story that Ma Pwa Zon voluntarily submitted to his advances was rejected by the court. It was amply justified in finding accused guilty of the substituted lesser included offense of assault with intent to commit rape under Article of War 93. (CM 235407, 22 B.R. 39; CM 243938, 28 B.R. 162)

8. There is some evidence tending to show that a few hours before committing the offenses accused had consumed some beer and saki. Drunkenness was not presented as a defense to either of the charges, and there is nothing in the record to indicate that he was too drunk to form the specific intent required to sustain each offense. Upon all the evidence the court was justified in concluding that he was not drunk to such an extent as to be incapable of understanding the nature of his acts. (CM 223335, 13 B.R. 386).

9. The charge sheet shows that accused is 23 years of age and was inducted into the army 17 August 1943 at Huntington, West Virginia. He had no previous service.

10. The court was legally constituted. No errors injuriously affecting the substantial rights of the accused appeared in the record. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and the sentence as approved by the reviewing authority. 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 (18 U.S.C. 452, 454).

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

/s/ Itifious T. Valentine, Judge Advocate

/s/ John F. Fontron, Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
24 August 1945

Board of Review
CM IBT 651

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| UNITED STATES<br><br>v<br><br>First Lieutenant Frank L. Scarborough, Jr., 0-473057, TC, Company B, 748th Railway Operating Battalion. | ADVANCE SECTION, INDIA BURMA THEATER<br><br>Trial by GCM convened at APO 689, % Postmaster, New York, N.Y., 30 May 1945. Dismissal, total forfeitures, confinement at hard labor for 5 years. |

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

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

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

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

Specification: In that 1st Lieutenant FRANK L. SCARBOROUGH, JR., Company B, 748th Railway Operating Battalion, did, at Ledo, Assam, on or about 22 March 1945, forcibly and feloniously, against her will, have carnal knowledge of SOMBARI.

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

Specification: In that 1st Lieutenant FRANK L. SCARBOROUGH, JR., Company B, 748th Railway Operating Battalion, did, at Ledo, Assam, on or about 22 March 1945, with intent to do her bodily harm, commit an assault on SOMBARI by forcibly and against her will removing her from her home.

(192)

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

Specification 1: In that 1st Lieutenant FRANK L. SCARBOROUGH, JR., Company B, 748th Railway Operating Battalion, was, at Ledo, Assam, on or about 25 March 1945, in a public place, to wit, the station and locomotive shed of the Bengal Assam Railway, drunk and disorderly while in uniform.

Specification 2: In that 1st Lieutenant FRANK L. SCARBOROUGH, JR., Company B, 748th Railway Operating Battalion, did, at Ledo, Assam, on or about 25 March 1945, conduct himself in a manner unbecoming an officer and a gentleman, to wit, abusing, threatening, assaulting, and restraining against their will certain employees of the Bengal Assam Railway; namely, BENNY MADHAB SINGH, GOPAL CHANDRA DAY, LOKE MANALI, RAMANI MOHAN DAS, and Lieutenant JAMES D. BRUCE.

The accused pleaded not guilty to all charges and specifications. He was found guilty of the Specification, Charge I, except the words "against her will have carnal knowledge of Sombari" substituting therefor the words "with intent to commit a felony, viz, rape, commit an assault upon Sombari by willfully and feloniously lifting her from her bed and pulling her from her house", and not guilty of Charge I but guilty of a violation of the 93rd Article of War; guilty of the Specification, Charge II and Charge II; and guilty of Specifications 1 and 2, Charge III, and Charge III. The findings and sentence were not announced in open court. The accused was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for a term of 20 years. The reviewing authority disapproved the findings of guilty as to the Specification, Charge II, and Charge II, and approved the findings of guilty of the Specification, Charge I, and Charge I, Specification 1, Charge III, Specification 2, Charge III, except the words "and Lieutenant James D. Bruce", and Charge III. Only so much of the sentence was approved as provides for dismissal from the service, forfeiture of all pay and allowances due or to become due and confinement at hard labor for 5 years. The record of trial was forwarded for action pursuant to the provisions of Article of War 48. The confirming authority confirmed the sentence as modified, designated the United States Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement and forwarded the record pursuant to Article of War 50½.

3. Evidence for the prosecution:

On the night of 22 March 1945 (R. 7) the accused and one Sergeant Butler, a British sergeant in the Indian Army, went to the home of Jayram and his wife, Sombari, in Ledo, Assam. They first knocked on the door, then forced it open and entered the house (R. 20). Both men were drunk (R. 10, 34). Butler told Jayram, "Give me your wife" (R. 21), or "Give your wife to the American sahib", to which Jayram replied, "How shall I give you my wife?" (R. 24). Butler and Jayram then stepped just outside the door (R. 23, 38). The accused went over to Sombari who was sitting on the bed, placed a handkerchief over her mouth and dragged her, pulling off her clothes (R. 21, 31). The accused then temporarily desisted and Sombari replaced her clothing. During this time Harbililash Das, a friend of the Indian couple who was then present, protested to the accused who thereupon struck him (R. 21). The accused again grabbed Sombari by her sari and dragged her from the house assisted by Butler who pushed her (R. 10, 21). Sombari was struggling and tried to stop herself by taking hold of the door (R. 31). She cried out, "I will not go, I will not go" (R. 9). The accused with Butler's assistance took the woman to his quarters where he locked both doors, turned out the lights and disrobed (R. 31, 32). Sombari attempted to leave the room but the accused dragged her from the door and prevented her from opening it (R. 33). Accused had sexual intercourse with Sombari three times during the night. The first two times the woman struggled and resisted but the third time offered no resistance (R. 34, 35). After the intercourse was completed the accused offered to pay Sombari but she refused it (R. 42, 46, 49). About 7:00 o'clock the next morning Sombari was told to leave and she then returned home where she told her husband what had happened (R. 36, 37).

In the late afternoon of 25 March 1945, Benny Madhab Singh, who worked at the Ledo sheds, was taken by the accused to the latter's bungalow. The accused closed the doors and windows and sent for Sergeant Butler who then came in (R. 84, 85). On a table in the room were some bottles of gin and a pistol (R. 86). The accused then questioned Singh as to information given the C.I.D. about the affair with Jayram's wife and who had informed the C.I.D. thereof. The accused also asked Singh why the latter had reported the matter to his foreman rather than to accused himself. During the questioning the accused threatened to degrade Singh for two months, shook his finger at Singh and said "finished". Singh feared that this meant that he would be discharged (R. 86,

87, 96, 97). During this same time the accused questioned Loke Manali, another railroad employee, concerning the same matter, prevented Manali from leaving the room (R. 97, 98), and threatened to send him to jail unless he told the truth (R. 99). During this questioning, after Manali had denied informing the C.I.D., the accused said, "You know, and you informed the C.I.D.", and struck Manali on the shoulder (R. 92, 98). The same afternoon the accused and Butler abused Gopal Chandra Day while they were questioning him about information given to the C.I.D. Gopal was afraid (R. 101, 102). Ramani Mohan Das, station master at Ledo, was also called to the quarters of the accused where the accused caught hold of his shoulder and told him that he must either bring the C.I.D. to the accused or accompany the accused to the C.I.D. office. The station master then went with the accused to the C.I.D. office (R. 89, 105, 106). Throughout the afternoon's proceedings which lasted some two hours (R. 98, 101, 102) the accused and Butler were both drinking (R. 95, 96, 99).

About midnight 25 March 1945 the accused, who was in uniform, (R. 56) was at the shedman's office at the Ledo railroad sheds. Several enlisted men were present as were a Lieutenant Bruce and a Captain Brown, both of whom were British subjects in the Indian Army. The shedman was also present. The accused ordered Lieutenant Bruce, who had a bottle of beer in his hand, to leave the office and the latter went outside. The accused then ordered the shedman to bring Benny Singh and Loke Manali to the shed, upon hearing which Lieutenant Bruce returned and countermanded the order because the men had not had eight hours rest. An argument ensued between the accused and Lieutenant Bruce as to which one had paramount authority in the shed and over employees who worked there. During this argument the accused ordered Lieutenant Bruce to leave the shed again and said, "You are drunk", to which Bruce replied, "I think you are drunk as a son-of-a-bitch yourself". One of the enlisted men got between them but the accused insisted on going after Bruce. Bruce then said, "Now, Frank, listen, I don't want no trouble with you", and accused replied, "That may be so, but I want trouble with you". They pushed each other and Bruce hit accused and knocked him down. The two men were separated and Bruce went outside. The accused followed him out and called Bruce names and the fight was then resumed. Lieutenant Bruce knocked the accused down twice, the last time knocking him out and a short time thereafter the accused walked away (R. 53, 54, 64, 65, 66). Employees of the railroad have occasion to go into the sheds and a great many people pass by them (R. 57). While no witness testified that accused

was drunk and although one witness testified that the accused did not appear to have been drinking previously, there was testimony to the effect that accused was under the influence of liquor, that his breath smelled of liquor, his speech was heavy and loud (R. 55, 56), that his faculties were impaired because of drink (R. 59), and that he was not his normal self (R. 76, 80). On examination by the court Lieutenant Bruce, who was a defense witness, stated that the accused directed the first blow but that witness did not know whether it landed (R. 117).

4. Evidence for the defense:

About 11:00 p.m., 22 March, the accused and Sergeant Butler went to Jayram's house and Jayram came out. Butler told Jayram that the accused would pay money for his wife, whereupon Jayram went back into the house followed by the accused. A short time after, Jayram came out and said that he wanted rations, something to eat (R. 141). The accused and the woman then came from the house and all four went to the bungalow of the accused which was 100 yards away. The woman did not struggle or protest. The accused took the woman to his room while Butler and Jayram went to Butler's room which adjoined that of accused. The accused shortly rejoined the other men and paid Jayram 10 rupees which the latter said was "teak hi" (R. 142-145, 161). Butler and Jayram stayed in Butler's room talking and smoking and Butler went to sleep before Jayram left (R. 157, 158). Butler never heard the woman scream or make any commotion while he was awake (R. 145). A woman of Sombari's stature would be able to reach the bolt of either door in the accused's room (R. 111).

On 25 March the accused was questioning Benny Singh and Loke Manali about rumors concerning the woman and about who had talked to the C.I.D. Butler was acting as interpreter (R. 146, 173, 177). The front door of the room was half open (R. 146) and the back door was not bolted (R. 110). Later on Gopal Day was called in but not restrained (R. 147). Lieutenant Bruce came in some time between 1715 and 1730 and told the accused to let Singh and Manali go. The accused said it was none of Bruce's business (R. 110, 114). The accused and Bruce got into an argument but it all quieted down (R. 147). There was no gun on the table and the accused was not drunk (R. 109). At some stage of the proceedings the accused left the room to have the station master take him to the C.I.D. office (R. 167).

About 10:00 o'clock in the evening of 25 March Lieutenant Flynn, who was the officer of the day, went to the quarters of

the accused in response to a call. Lieutenant Bruce was there and all three officers sat down and talked together. Bruce and the accused then decided to forget the whole thing and go to bed (R. 127, 128, 129). At the request of accused Lieutenant Flynn searched the room and among some clothes in a closet found a .45 caliber pistol well covered with lint and in which the cartridges were corroded. It looked as though it had been in the closet for a long time. The accused insisted that the Lieutenant take the gun which the latter did (R. 129, 130, 132).

There was a fight between the accused and Lieutenant Bruce on the night of 25 March in the yard office of the Ledo railway shed. This was about 50 yards from the road. The accused was not drunk nor was his walk unusual until he got up after being hit and walked back to his quarters (R. 194, 195). There were people standing around at the time. The fight occurred over an argument concerning employees. The accused was drunk according to the definition given by our military law but not according to the British definition (R. 117, 118, 119).

Lieutenant Scarborough is responsible for the maintenance of railway equipment at Ledo and for the efficiency of Indian shedmen (R. 182). All applications for leaves were brought to the accused for signature before going to the D.M.E. (R. 192). The accused was actually Lieutenant Bruce's boss although they shared joint responsibility (R. 116).

A defense witness testified that the reputation of Harbilillash Das, who had been a prosecution witness, was bad and that witness would not believe him under oath (R. 200).

The accused having been advised of his rights elected to remain silent.

5. The accused was found guilty of assault with intent to commit rape which is a lesser offense included in the offense of rape charged in the Specification of Charge I. This finding is supported by the evidence. The overt act of grabbing and dragging the protesting Sombari from her bed and out of her home clearly amounts to an assault upon her. The intent to ravish, which must have existed and concurred with the assault is to be inferred by the outward act and surrounding circumstances. (CM 195035, 2 B.R. 181). The forcible entrance of the accused into an unknown coolie's house, the peremptory demand of his companion for the native's wife, the violence of the assault itself whereby the accused took the struggling woman to his quarters where he

locked the doors and finally consummated three acts of intercourse, are all facts evidencing his lustful desire. (CM 236428, 23 B.R. 1). Such facts are amply sufficient to justify the inference that the accused possessed the requisite intent to overcome all resistance and to gratify his passions regardless of opposition. That the victim finally yielded to the third act of intercourse after offering resistance to the first two does not negative the existence of the requisite intent at the time the assault was committed. (52 C.J., p. 1032). While Sergeant Butler, who had accompanied the accused, testified that Sombari willingly accompanied the latter as a result of a monetary consideration paid to her husband, his testimony was not cogent. This witness was generally evasive while on the stand. In addition he had previously given a statement to the C.I.D. in which he categorically denied any knowledge of the affair. His explanation that he had made such prior inconsistent statement only because he knew it would not count and would have no bearing on the case (R. 149, 150) hardly lends credence to his sworn testimony. The court is judge of the credibility of the witnesses and the weight to be given to the testimony and appears to have been fully justified in rejecting the evidence of a witness so obviously unsatisfactory.

The evidence as to Specification 1, Charge III, shows that the accused, who had been drinking, precipitated a fight with a British officer of the Indian Army in the sheds of the Bengal and Assam Railway at Ledo. This incident occurred in the presence of several enlisted men, another British officer, and the Indian shedman then on duty. While it does not appear that the drunkenness of the accused was gross, there can be little doubt that he had been drinking and that his faculties were impaired as a result thereof. Although mere drunkenness alone may not constitute conduct unbecoming an officer and a gentleman, whether in any particular case it can be said to be of such a character depends not only on the degree of intoxication but also upon the time, place, occasion and other attendant circumstances. (CM 232604, 19 B.R. 139, 145). It is consequently impossible to define with exactitude the drunk and disorderly conduct that is proscribed by Article of War 95 or to fashion a definition sufficiently comprehensive to be applied in every case. Conspicuously disorderly conduct alone may in some instances transcend the limits of conduct set for an officer. (ETO 339, Gage, Dig. Op. ETO p. 573, ETO 4606, Geckler, Dig. Op. ETO p. 486). Winthrop on page 718 cites as an example of behavior which violates the code of

an officer of our army:

> "Engaging in unseemly altercations or broils with military persons or civilians, breaches of the peace, or other disorderly or violent conduct of a disreputable character in public".

The deliberate provocation of a fight with a fellow officer of a friendly allied power under the circumstances and at the place shown in this case was conduct of reprehensible nature. That the accused emerged second best from the fistic encounter precipitated by his intemperate and quarrelsome language and his effort to strike Lieutenant Bruce, is no excuse for his conduct. The offense was further aggravated when the accused caused hostilities to be resumed by calling Lieutenant Bruce names. Without discussing particular cases in which findings of guilty in violation of the 95th Article of War have been held supported by the evidence, we are of the opinion that the unseemly actions of the accused were so indecorous and exhibited such a failure to appreciate his obligations and responsibilities as an officer as to bring them within the prohibition of that article of war.

In Specification 2 of Charge III the accused is charged with additional conduct alleged to be in violation of the 95th Article of War. The evidence in support thereof shows that the accused conducted a two hour inquiry about matters personal to him in his own quarters and behind closed doors. Four Indians were brought in for questioning, all of whom were employed in the railroad sheds where the accused held a position of authority and supervised their work. The subject of the inquiry was a pending investigation by the C.I.D. concerning the Sombari affair of three days before. Those questioned were subjected to threats, abuse and assaults upon their persons. The attitude of the accused throughout the entire proceedings may be said to have been well calculated to cause consternation among, and to instill fear in, not only those who were actually questioned but other Indian employees of the railway as well, the security of whose jobs depended, to some extent at least, upon the accused himself. It might reasonably have been expected that the sequel to such intimidation would be discreet silence on the part of the Indians in the future if not actual retraction of statements already given. No keen perception is required to deduce from the accused's conduct that he desired to hush up the entire matter and to forestall the bringing of charges against him.

Winthrop on page 714 cites as an example of conduct violative of Article of War 95: "Attempting to suborn testimony to be given before a court-martial". See also CM 202479, 6 B.R. 157, 161. The offer of money and promotion to inferior officers in consideration of their not pressing charges against an accused has also been held to violate Article of War 95. (Winthrop, p. 717). In CM 200025, 4 B.R. 211, 228, it was held that the act of advising a soldier to give false testimony before an investigating officer is an attempt to suborn perjury even though the soldier did not follow the suggestion. Any effort to tamper with witnesses, to supress evidence in judicial proceedings or official investigations, or to procure false testimony thereat strikes at the foundations of our judicial system. The C.I.D. is charged with the duty of conducting official investigations into misconduct of military personnel and we believe that any effort to hinder, influence, or impede, even indirectly, any investigation conducted by it is an unwarranted interference with the orderly processes of military justice. In our opinion the evidence shows a clear departure from the high standard of conduct and integrity required of an officer and is sufficient to sustain the findings of guilty of Specification 2 of Charge II.

6. The charge sheet shows that the accused was 28 years of age, entered on active duty 6 April 1943 and had no prior service. There is no record of previous convictions.

7. The court was legally constituted and had jurisdiction of the person and the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority. Dismissal is mandatory upon conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 96.

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

John F. Fontron, Judge Advocate
John F. Fontron

CM IBT 651 (Scarborough, Frank L.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, U. S. Army, 29 August 1945.

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

1. In the case of First Lieutenant Frank L. Scarborough, Jr., O-473057, TC, Company B, 748th Railway Operating Battalion, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence as approved by the reviewing authority, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 651).

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

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(Sentence ordered executed. GCMO 36, IBT, 29 Aug 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
28 August 1945

Board of Review
CM IBT 658 (CT 49)

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| UNITED STATES<br><br>v<br><br>General Prisoner Frank L. Smolley, 36061539, formerly Private, Air Base Depot, United States Forces, China Theater, and,<br><br>General Prisoner Glendon E. Irwin, 39293388, formerly Private, 322nd Troop Carrier Squadron, United States Forces, China Theater. | SERVICES OF SUPPLY, CHINA THEATER<br><br>Trial by GCM convened at APO 627, % Postmaster, New York, N.Y., 28-29 June 1945. Sentence as to Smolley, dishonorable discharge, total forfeitures, confinement at hard labor for 15 years, U.S. Disciplinary Barracks; as to Irwin, dishonorable discharge, total forfeitures, confinement at hard labor for 25 years, U.S. Penitentiary. |

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

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

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

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

Specification 1: In that General Prisoner Frank L. Smolley, formerly Private, Air Base Depot, United States Forces, China Theater, having been duly placed in confinement in China Theater Stockade No. 1, APO 627, on or about 25 November, 1944, did at China Theater Stockade No. 1, APO 627, on or about 16 March, 1945, escape from confinement before he was set at liberty by proper authority.

Specification 2: In that General Prisoner Frank L. Smolley, formerly Private, Air Base Depot, United States Forces, China Theater, having been duly placed in confinement in China Theater Stockade No. 1, APO 627, on or about 31 March, 1945, did at China Theater Stockade No. 1, APO 627, on or about 9 May, 1945, escape from confinement before he was set at liberty by proper authority.

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

Specification 1: In that General Prisoner Frank L. Smolley, formerly Private, Air Base Depot, United States Forces, China Theater, did, at Kunming, China, on or about 16 March, 1945, desert the service of the United States and did remain absent in desertion until on or about 31 March, 1945.

Specification 2: In that General Prisoner Frank L. Smolley, formerly Private, Air Base Depot, United States Forces, China Theater, did at Kunming, China, on or about 9 May, 1945, desert the service of the United States, and did remain absent in desertion until on or about 25 May, 1945.

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

Specification: In that General Prisoner Frank L. Smolley, formerly Private, Air Base Depot, United States Forces, China Theater, in conjunction with General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, did at Kunming, China, on or about 23 March, 1945, feloniously take, steal and carry away a ¼ ton 4x4 truck of the value of over $500, property of the United States, furnished and intended for the military service thereof.

Accused Irwin was tried on the following Charges and Specifications:

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

Specification 1: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, having been duly placed in confinement in China Theater Stockade No. 1, APO 627, on or about 25 November, 1944, did at China Theater Stockade No. 1, APO 627, on or about 16 March, 1945, escape from confinement before he was set at liberty by proper authority.

Specification 2: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, having been duly placed in confinement in China Theater Stockade No. 1, APO 627, on or about 31 March, 1945, did at China Theater Stockade No. 1, APO 627, on or about 9 May, 1945, escape from confinement before he was set at liberty by proper authority.

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

Specification 1: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, did, at Kunming, China, on or about 16 March, 1945, desert the service of the United States and did remain absent in desertion until on or about 31 March, 1945.

Specification 2: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, did at Kunming, China, on or about 9 May, 1945, desert the service of the United States, and did remain absent in desertion until on or about 25 May, 1945.

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

Specification 1: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, in conjunction with General Prisoner Frank L. Smolley, formerly Private, Air Base Depot, did at Kunming, China, on or about 23 March, 1945, feloniously take, steal and carry away a ¼ ton 4x4 truck of the value of over $500, property of the United States, furnished and intended for the military service thereof.

Specification 2: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, did at Kunming, China, on or about 22 March, 1945, feloniously take, steal and carry away one (1) Colt Automatic Pistol, Cal. 45 of the value of about $40 issued to 1st Lt. John D. Lee, Jr., Air Corps., 1339th Army Air Forces Base Unit, India, China Division, Air Transport Command, property of the United States, furnished and intended for the Military Service thereof.

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

Specification 1: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, did at

Kunming, China, on or about 31 March, 1945, by force and violence and by putting him in fear, feloniously take, steal and carry away from the presence of Tung Ching Li one (1) Bulova watch and one (1) Elgin watch, property of Tung Ching Li, of the value of about 195,000 C.N., about 268.00 United States Currency and 168,000 C.N., about $230.00 respectively.

Specification 2: In that General Prisoner Glendon E. Irwin, formerly Private, 322nd Troop Carrier Squadron, did at Kunming, China, on or about 10 April 1945, with intent to do him bodily harm, commit an assault on Sergeant Alfred Stachowiak, 155th Military Police Service Platoon, a guard in the execution of his duty, by striking him on the head with a dangerous weapon, to wit; a blackjack.

The accused, General Prisoner Frank L. Smolley, pleaded guilty to Specifications 1 and 2, Charge I and Charge I, and the Specification of Charge III and Charge III; and not guilty to Specifications 1 and 2, Charge II and Charge II. He was found guilty of all specifications and charges and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 15 years. The reviewing authority approved the sentence, designated the United States Disciplinary Barracks nearest the port of debarkation in the United States as the place of confinement and forwarded the record for action pursuant to Article of War 50½. The accused, General Prisoner Glendon E. Irwin, pleaded guilty to Specifications 1 and 2, Charge I and Charge I, and to Specifications 1 and 2, Charge III and Charge III; and not guilty to Specifications 1 and 2, Charge II and Charge II, and to Specifications 1 and 2, Charge IV and Charge IV. He was found guilty of all specifications and charges and sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 25 years. The reviewing authority approved only so much of the findings of guilty of Specification 2, Charge IV as involves a finding of guilty of assault with intent to do bodily harm upon Sergeant Alfred Stachowiak, 155th Military Police Service Platoon, by attempting to strike him upon the head with a dangerous weapon, to wit, a blackjack. The sentence was approved, the United States Penitentiary nearest the port of debarkation was designated as the place of confinement and the record was forwarded pursuant to Article of War 50½.

3. Evidence for the prosecution:

On about 16 March 1945 both accused escaped from China Theater Stockade No. 1, APO 627 (Exs. 4 and 8). At about 2100 hours, 31 March 1945, while riding in a jeep on Hoo Kuo Road, Kunming, they were picked up by two military policemen and taken to headquarters. Irwin was dressed in ODs and field jacket while Smolley wore an officer's uniform (R. 11, 17). In a shoulder holster Irwin carried a loaded .45 caliber Colt automatic from which the serial number had been filed. He also had two loaded clips of ammunition (R. 12, 13, 19). Smolley was wearing an Elgin wrist watch (Ex. 14; R. 19). Neither accused offered resistance when apprehended. A 1/4 ton 4 x 4 truck which was government property issued and intended for the military service and whose value was over $500.00 disappeared from Hostel 4, Kunming, between 2200 and 2300 hours on 23 March. The warrant officer to whom the vehicle was dispatched had authorized no one to use it (R. 27). During the night of 22 March a .45 Colt automatic pistol, serial No. G-2262070, which was property of the United States issued and intended for the military service thereof and whose value was $40.00 disappeared from a room in Kunming occupied by First Lieutenant John D. Lee, Jr., to whom the pistol had been issued. Lieutenant Lee had authorized no one to take or use it (R. 28). By a technical process in which acids were used, the letter and first five numbers on the pistol taken from Irwin were brought out and found to be G 22620. The next space was indistinct but probably a 7 while the last numeral was 0 (R. 38).

On 31 March 1945 a jeep containing three Americans was driven to a watch shop on Ching Yee Road. Accused Irwin entered the shop, pointed a pistol at three of the staff, one of whom was Tung Chen Li, and took and carried away one "Bulova" watch and one "Elgin" watch (R. 31, 36). The former was worth 195,000.00 CN or one hundred forty dollars gold while the value of the latter was 168,000.00 CN or one hundred twenty dollars gold (R. 31, 32). The rate of exchange on 31 March 1945 was 700 CN to one American dollar (R. 34). The robbery took place at 3:00 o'clock (R. 37).

Both accused escaped from China Theater Stockade No. 1 on 9 May 1945 (Exs. 6 and 10). They were taken into custody at the Luliang airfield 105 miles from Kunming where they were sitting in a jeep at the operations building (R. 23, 25). Both were dressed in fatigues and offered no resistance (R. 26). Irwin said he was Miller and when addressel as "Irwin" said, "no, you got the wrong man" (R. 26). Neither accused admitted his identity

until shown their pictures in the "China Lantern" and then they said, "well this is it" (R. 24).

At about 6:00 o'clock, 10 April 1945, the accused Irwin attempted to hit Sergeant Alfred Stachowiak, prison sergeant at the stockade, with a homemade blackjack made of a cake of soap in a GI sock after the latter removed the handcuffs from accused and was letting him out of the box to go to the latrine. Stachowiak pulled his gun and Irwin jumped back in the cell (R. 39, 41). The "black box", in which three prisoners were then confined, was about 105 inches by 33 inches. It was ventilated. There were no chairs, mattresses or beds. The prisoners slept on the floor (R. 40, 41).

The accused Irwin in a written statement given 26 May 1945 (Ex. 14) said that escape was effected on 9 May through a hole dug through the wall started on 7 May. After leaving, they tried to find a girl friend they knew, but as she had moved, they slept for two days in the rice paddy fields southwest of town. They then crossed the lake to West Mountain, staying at a temple for five days after which they borrowed a gun and stayed in a rented sampan on the lake for seven days. From there they went to Luliang where they intended to turn in because of mosquitos and lack of food. They asked at the airfield for the location of the provost marshal's office but were picked up before they got started there. After escaping they had picked up some money and things they had hidden outside.

In his written statement of 26 May 1945 (Ex. 15), Smolley said that after digging out, they tried to contact a girl friend, but not finding her, stayed one night in a paddy field. They proceeded to West Mountain where they stayed five or six days in a temple. After that they borrowed a gun and stayed in the woods. They picked up a jeep and went to Luliang. Two GIs took them to buy them some liquor but before they got started the military police picked them up. A day after the break from the stockade, he and Irwin stole some clothes from a tent in Hostel C area. The money they used after escaping from the stockade they had hidden away.

4. Evidence for the defense:

Sometime between 2:00 and 3:00 o'clock, the afternoon of 31 March 1945, the accused Irwin got some money changed at Hostel 8. It takes at least half an hour to drive from Hostel 8 to

to Kunming (R. 43, 44).

The accused Irwin, having been duly apprised of his rights as a witness, elected to make an unsworn statement as to Specification 2, Charge IV. He stated that he had been kept in the small black box ten or eleven days before the incident. Sometimes they were let out for exercise and sometimes not. Sometimes they were let out for only a few minutes and sometimes for chow, returning immediately afterwards. After the incident the first thing he remembered was being at the dispensary where a clamp was put in his forehead. He told the doctor that he did not remember how it happened and a sergeant said that accused had got smart and it had backfired. Accused was then put in a large black box and kept by himself continuously for four days. His nerves got so bad he had to be given pheno-barbital tablets. When he could stand it no longer he was removed, but put back after a few days. He stayed in the black box, in all, from 1 May to 9 April. Sergeant Stachowiak would not give him shaving stuff and let him wash the blood from his face only after four days (R. 46, 47).

The accused Smolley, after being advised of his rights as a witness, elected to remain silent (R. 47).

5. While it was not necessary that any evidence be adduced in support of the specifications and charges to which the accused had pleaded guilty (CM 228148, 16 B.R. 83, 86), nevertheless such pleas did not exclude the taking of evidence (par. 70, MCM 1928, p. 54). It was quite proper, therefore, for the prosecution to present its testimony, for it is the better practice to present a prima facie case even though pleas of guilty are entered (CM 236359, 22 B. R. 389, 391). The evidence introduced substantiated the pleas made and showed that they had neither been entered inadvisedly nor made improvidently.

The robbery alleged in Specification 1, Charge IV as to Irwin is established by substantial evidence. Irwin was identified as the robber by two witnesses whose testimony was not materially weakened by the suggestion of an alibi interposed by the defense. The value in CN of the two watches was proved to be that which was alleged. Whether its equivalent in terms of American currency was shown to be the same as alleged is not so clear. It is clear, however, that the value of each watch was substantially in excess of $50.00.

The evidence in support of Specification 2, Charge IV, as to accused Irwin shows that the assault was made with a "homemade

blackjack" made of a piece of soap in a GI sock. A blackjack, as commonly known, is an instrument weighted at one end with an elastic or pliant shaft (Webster's International Dictionary). Because of its construction a blow from it can be delivered with more force than from a rigid unweighted instrument. The instrument used by Irwin, though crudely fashioned, possessed the characteristics of such an instrument. In addition it was termed a blackjack by the soldier assaulted. In our opinion there was no material variance between the pleading and proof. A weapon is dangerous within the purview of Article of War 93 when used in such a manner that it is likely to produce death or great bodily harm (par. 149m, MCM 1928, p. 180). Some weapons are dangerous per se, while others are dangerous because of the manner in which they are employed. Thus while a glass bottle might not ordinarily be considered a "dangerous weapon" the court might be justified by evidence as to the results of its use in finding that it was a dangerous weapon as used (sec. 451 (11), Dig. Op. JAG, 1912-40, p. 314). The same thing may be true of a sugar bowl (Ibid). A stick and a piece of lumber, while not dangerous weapons per se, have been held to be such because of the way in which they were used (CM 172101; CM 236503; 23 B.R. 21, 23). And conversely, a razor with exposed blade though susceptible of use as a dangerous weapon cannot be characterized as such unless used in such a manner as likely to produce death or great bodily harm (CM 209862, 9 B.R. 143, 147). Similarly an unloaded rifle used as a firearm has been held not to be a dangerous weapon (CM 242706, 27 B.R. 147, 149). Applying the test laid down by the above authorities we believe that the instrument used by accused was a dangerous weapon. Due to the leverage that could be obtained because of its construction, a blow of great force could be delivered. As used it was clearly designed to knock out the guard, thus to facilitate an escape from the stockade, and had the blow actually found its mark, no doubt the desired effect would have been obtained. That the attempt to strike the guard did not actually result in a battery upon him, makes it nonetheless an assault. We conclude that Specification 2, Charge IV, as approved by the reviewing authority, as to accused Irwin is supported by the evidence.

Each accused pleaded not guilty to the two desertions alleged. That the two were absent without authority for the times alleged on each occasion is clear. That the absence of each accused on each occasion had its origin in an escape from legal confinement is also established. In determining whether an accused possessed that intent not to return which is a requisite of desertion,

resort must be had to the facts and circumstances surrounding the absence, its inception, continuation and termination. The escapes from confinement were themselves circumstances from which the court might infer the intent to desert (par. 130a, MCM 1928, p. 144). Likewise the facts that the absences were terminated by apprehension in the vicinity of military posts, to the authorities of which the accused might have, but did not, surrender, may be considered in determining intent (Ibid). When apprehended on 31 March 1945, the accused Smolley was dressed as an officer, from which it might be inferred he thereby hoped to escape detection. At the same time the accused Irwin had concealed on his person a loaded pistol which, while not then used, might well have been employed to prevent apprehension and lends support to an inference that he had no intention of voluntarily returning. As to the second absence there are additional circumstances from which the intent to remain permanently absent may be inferred. Both accused were apprehended at Luliang, a place 105 miles distant from their station. They had traveled to Luliang in a stolen jeep. They refused to reveal their identities until confronted with their pictures and Irwin even gave a false name. Previous to the escape they had hidden money to assist them in their flight. Considering all the facts and circumstances in evidence we are of the opinion that the court was amply justified in finding each accused guilty on each count of desertion charged.

6. The unsworn statement of accused Irwin was made in response to questions propounded by counsel. An objection by the prosecution to this form of statement was improperly overruled (R. 46). According to our practice the statement should have been in narrative form, but the irregularity was in favor of the accused and was in no way prejudicial (CM 202928, 6 B.R. 371, 377).

7. At the time the defense counsel called the accused Irwin to make his unsworn statement as to the offense alleged in Charge IV, Specification 2, he stated the circumstances that would be disclosed thereby would show that Irwin was not in his right mind when such offense was committed. The court then advised counsel that if a question of insanity was involved it should be taken up in proper proceedings, to which counsel replied that he did not imply that accused was mentally unsound or insane at the time but under a mental strain. The trial thereupon proceeded without further inquiry into Irwin's mental responsibility (R. 45-46). Taking the statements of counsel in their entirety and considering them in connection with the unsworn statement of accused, it is clear that it was not intended

to raise insanity as an issue. Rather it seems patent that the purpose was to present, as extenuating circumstances, the conditions under which accused was allegedly held in the stockade. Under such circumstances no separate hearing into, or separate finding as to, the mental condition of accused was required, and there was no impropriety in the court's proceeding with the trial.

8. Apparently in an effort to show that accused were legally confined on 9 May 1945 the prosecution offered in evidence Exhibits 5 and 9 being extract copies of guard reports dated 3-23-45, respectively purporting to show Irwin and Smolley as "apprehended & returned to Stockade to conf. 2345 hrs., 3-31-45" (underscoring supplied). The irregularity of admitting, as evidence of an event, an entry contained in an official document prepared eight days before the event transpired cannot be said in this case to have prejudiced either accused in view of their pleas of guilty by which they admitted they were legally confined at the time of their escape. The entry "apprehension", being obviously based on hearsay was not competent to establish apprehension, but that both accused were in fact apprehended was otherwise independently proved. Consequently no prejudicial error resulted.

9. By the first indorsement to the charge sheets, the charges were referred to Second Lieutenant Jacob I. Isaacs, Trial Judge Advocate of the General Court-Martial appointed by paragraph 20, Special Orders No. 146, Headquarters SOS, USF, CT, 8 June 1945. Subsequently a new court of which Lieutenant Isaacs was detailed Trial Judge Advocate was appointed by paragraph 11, Special Orders No. 165, Headquarters SOS, USF, CT, 27 June 1945, and all unarraigned cases in the hands of the Trial Judge Advocate of the General Court-Martial appointed by pp 29, SO 146, 8 June 1945, were directed to be tried before the latter court. It is probable that the reference to pp 29 in the last special order was a typographical error, but whether it was or not is deemed immaterial. The charges were brought to trial by the Trial Judge Advocate to whom they had originally been referred and before a court legally appointed by the convening authority. It has been held that where charges have been referred to the Trial Judge Advocate of one court and by him tried before another court of which he was also Trial Judge Advocate and which was appointed by the same convening authority, the trial by the latter court is valid. (par. 397 (5), Dig. Op. JAG 1912-40, p. 243). Under such circumstances the reviewing authority may ratify the court's action in trying the case and act upon the sentence. (CM ETO 393 (1943), III Bull. JAG, p. 54). In the instant case

the reviewing authority has acted upon and approved the sentence. The irregularity was prejudicial to neither accused.

10. The charge sheets show that accused Smolley is 23-10/12 years of age and was inducted on 25 June 1942 and that accused Irwin is 20-6/12 years of age and was inducted on 9 April 1943. Neither accused had previous service. No evidence of previous convictions was introduced against either accused.

11. The court was legally constituted and had jurisdiction of each accused and of the offenses. No errors injuriously affecting the substantial rights of either accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings and sentences as approved by the reviewing authority. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of robbery, larceny of United States property furnished for military service, assault with intent to do bodily harm with a dangerous weapon and escape from confinement, all of which are recognized as offenses of a civil nature and so punishable by penitentiary confinement by sections 284, 36, 276 of the Criminal Code of the United States (18 U.S.C.A. 463, 87, 455) and section 9, 46 Stat. 327 as amended August 3, 1935, c. 432, 49 Stat. 513 (18 U.S.C.A. 753h) respectively.

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

John F. Fontron, Judge Advocate
John F. Fontron

New Delhi, India
23 August 1945

Board of Review
CM IBT 661

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| UNITED STATES | ADVANCE SECTION, INDIA BURMA THEATER |
| v | Trial by GCM convened at APO 689, % Postmaster, New York, N.Y., 5 July 1945. Dismissal. |
| Second Lieutenant Jacob Bernstein, O-1593453, QMC, 3308th Quartermaster Truck Company. | |

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

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

2. Accused was tried on the following Charge and Specifications.

CHARGE: Violation of the 96th Article of War.

Specification 1: (Finding of not guilty)

Specification 2: In that 2nd Lieutenant Jacob Bernstein, 3308th Quartermaster Truck Company, did, at Chiha Traffic Control Station Number 6, Motor Transport Service, near Teppa China, from on or about 19 April 1945 to on or about 23 April 1945, wrongfully introduce into Camp and unlawfully cohabitate with a Chinese native woman, name unknown, who was not then and there his wife.

The accused pleaded not guilty to Specification 1, guilty to Specification 2, and guilty to the Charge. He was found not guilty of Specification 1, guilty of Specification 2 and guilty of the Charge. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for two years. The reviewing authority approved only so much of the sentence as provides for dismissal and, pursuant to Article of War 48, forwarded the record of trial to the Commanding General, United States Forces, India Burma Theater, who

confirmed the sentence as modified by the review authority. The record of trial was then forwarded to this office pursuant to Article of War 50½.

3. The evidence for the prosecution shows that the accused was in command of the Military Transportation Service station at Toppa, China, at the time herein involved (R. 10, 12). On 19 April 1945, the accused, accompanied by two enlisted men, went to Lungling, China, to get rations. Shortly before they started the return journey one of the enlisted men asked accused if he had gotten anything to eat and accused replied, "No, but I met one of the prettiest Chinese girls you ever saw" (R. 13). The girl accompanied the accused back to camp and accused took her to his tent quarters (R. 13). She was seen in and about his quarters by several enlisted men on the following three days (R. 14, 17, 21). On one occasion the accused asked a non-commissioned officer how he liked his wife. When asked how they managed to sleep in one bed, the accused said it "wasn't so bad" (R. 21).

On 23 April 1945, Major Wilson B. Looney went to accused's quarters and saw a Chinese woman there (R. 11). He was followed shortly by Captain Reed B. Kenagy, Jr. The woman met Captain Kenagy at the door and offered him a seat (R. 7). The accused introduced her to Captain Kenagy as his wife (R. 8, 11) and told him that he had picked up the girl several days previously in the vicinity, that he kept her around there to do laundry and keep the tent clean, and that he kept her in the tent and that she had a place to sleep there (R. 7, 9).

On 23 April 1945, the accused told Lieutenant William S. Maxwell, a convoy officer, that he was trying to get rid of a Chinese native woman and asked him to give her a ride to the next town (R. 18, 23). She was taken to Paoshan in the convoy (R. 24).

It was stipulated that accused was single when the above events took place (R. 9).

4. The accused, on being warned of his rights under Article of War 24, elected to be sworn as a witness. He stated that, on 19 April 1945, he had a conversation with Captain Kenagy in which he "flippantly" introduced a Chinese woman as his wife and told him that he had offered to give her a ride to Paoshan, China, but that bad weather conditions prevented him from doing so immediately. Major Looney was present at the time (R. 27). The woman was not his wife (R. 28).

5. Cohabitation is thus defined and discussed in CM 218647, 12 B.R. 129; 1 Bull. JAG 23.

> "Bishop states that 'to cohabit is to live together' (Marriage and Divorce, 6th ed., vol. 1, sec. 777).

Bouvier defines lascivious cohabitation as -

'The act or state of a man and woman, not married, who dwell together in the same house, behaving themselves as man and wife.

'In statutes forbidding unlawful cohabitation that term involves the idea of habitual sexual intercourse, or living together in such a way as to hold out the appearance of being husband and wife, and it is the scandal resulting therefrom which constitutes the mischief against which the statutes are directed; * * * and proof of occasional acts of intercourse is not sufficient; * * *' (Bouvier Law Dictionary, Rawles 3d revision, vol. 2, p. 1868).

Black defines cohabitation as -

'Living together; living together as husband and wife.

'Cohabitation means having the same habitation, not a sojourn, a habit of visiting or remaining for a time; there must be something more than mere meretricious intercourse. * * *." (Black's Law Dictionary, 2nd ed., p. 213.)

' * * * it has been said that cohabitation is not a sojourn, nor a habit of visiting, nor even a remaining with for a time, but the term implies continuity; * * *." (14 C. J. S. 1312.)

In construing section 3, act of May 22, 1882 (22 Stat. 31) providing that any male person who "cohabits with more than one woman" shall be deemed guilty of a misdemeanor, the Supreme Court held:

'* * * The offence of cohabitation, in the sense of this statute is committed if there is a living or dwelling together as husband and wife. It is, inherently, a continuous offence, having duration; and not an offence consisting of a single act." (in re Snow, 120 U.S. 274, 281.)

Although there is some support for the interpretation that to constitute cohabitation, 'They must live together, if only for a short time, as for a single day, as though the marriage relation existed, and the evidence must be such that a continuance of the adultery may be inferred.' (Underhill's Criminal Evidence, 3rd ed., sec. 584), the weight of authority clearly requires more than a single sojourn for a portion of a single night to constitute cohabitation. The use of the word 'live' likewise gives to the phrase 'live and cohabit' a meaning of permanence in the sense of dwelling and residing and of something more

than a sojourn for a single night".

In CM 218647, supra, where the evidence showed that accused occupied a room with a woman not his wife from 2230 hours until 0500 hours the next morning, the Board of Review held that the proof failed to support the allegation that accused did "live and cohabit" but supported findings of guilty of the lesser included offense or wrongfully and dishonorably occupying a room with a woman not his wife. That case, we believe, is distinguishable from this one in that the relationship between accused and the Chinese woman was of an open, notorious and scandalous character of substantial duration. It clearly was something more than the mere meretricious meeting disclosed in the case cited.

It may be contended that accused did not seriously represent the woman to be his wife. However, we find no authority that such express representation is a requisite of guilt. It is clear that the couple wrongfully lived together openly for at least three days in the manner of husband and wife or with the appearance of being man and wife. We believe that is sufficient to constitute the offense even under the restricted interpretation of the word cohabit set out in CM 218647, supra.

6. Specification 2 of Charge I states an offense under Article of War 96 (CM 254722, 35 B.R. 342, 354; CM 252626, 34 B.R. 106). The findings of guilty of Specification 2, Charge I and Charge I, are amply supported by accused's plea of guilty and the evidence.

7. The court was legally constituted. No errors injuriously affecting the substantial rights of accused were committed during the trial. The Board of Review is of the opinion that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority. Dismissal is authorized upon conviction of violation of the 96th Article of War.

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

/s/ Itimous T. Valentine, Judge Advocate

/s/ John F. Fontron, Judge Advocate

CM IBT 661 (Bernstein, Jacob) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL WITH USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 25 August 1945.

To: Commanding General, United States Forces, India Burma Theater, APO 885, U. S. Army.

1. In the case of Second Lieutenant Jacob Bernstein, O-1593453, QMC, 3308th Quartermaster Truck Company, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings of guilty and the sentence as modified by the reviewing authority, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 661)

/s/ William J. Bacon
/t/ WILLIAM J. BACON,
Colonel, J.A.G.D.,
Assistant Judge Advocate General.

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(Sentence ordered executed. GCMO 35, IBT, 25 Aug 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(219)

New Delhi, India
4 September 1945

Board of Review
CM IBT 667

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| UNITED STATES<br><br>v<br><br>Private First Class Floyd (NMI) Jones, 34047689, 3650th Quartermaster Truck Company, 153rd Quartermaster Battalion (Mobile) | ADVANCE SECTION, IB THEATER<br><br>Trial by GCM convened at APO 218, % Postmaster, New York, N. Y., 7 July 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary. |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Floyd Jones, 3650th Quartermaster Truck Company, did, at the Dumbang River crossing, near Kamaing, Burma, on or about the 5th of March 1945, with malice aforethought, willfully, deliberately, feloniously, and unlawfully kill one Hpaga Hka, a human being, by shooting her with a pistol.

Accused pleaded not guilty to and was found guilty of the Charge and Specification. No evidence of previous convictions was introduced. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the rest of his natural life. The reviewing authority approved the sentence and designated a United States Penitentiary as the place of confinement. The order directing execution of the sentence was withheld and the record of trial was forwarded to this office pursuant to Article of War 50½.

3. For reasons hereinafter indicated it is considered unnecessary to

detail all of the prosecution's evidence in this case. It shows, in substance, that accused was the driver of an International tractor-trailer which was dispatched from Shingbwiyang, Burma, 4 March 1945, as part of a convoy to Myitkyina and return on the Ledo Road (R. 6). At 0700 hours, 5 March, as the convoy was about to leave Myitkyina, accused complained that he had a boil on his buttock and could not keep up with the convoy. He was accordingly given permission to and did leave Myitkyina about one hour before the convoy (R. 8). Accused did not arrive at Shingbwiyang with the convoy that night and on the following day he reported to the convoy commander that he had been held up by some Chinese or Japs who had taken the tractor and trailer from him about dark (R. 10). On 7 March the tractor was found in a river crossing of the Dumbang River near Kamaing, Burma, about three miles from the Ledo Road. The trailer was parked about 100 yards away on a hill (R. 28, 31, 34). The evidence further shows that on the evening of 5 March 1945, four Kachin natives, namely, Hpaka La (otherwise referred to in the record as Hpa Hka La), Hpaga Hka, Hpaunoi Gawng and La Hkn Hka, were returning with a bullock cart from Kamaing to their village. It appears from the testimony of Hpaka La and Hpaunoi Gawng that when they came to the Dumbang River they saw a "trailer" in the river and a negro standing on the river bank. They crossed the river, proceeded about a mile, and noticed the negro following them. He approached, indicated to Hpaka La that he wanted a match, and was given one. The negro then snatched Hpaka La's rifle and shot Hpaka La in the arm with a "short gun" that the negro was holding in his hand. Hpaka La and Hpaunoi Gawng fled but heard several shots fired in rapid succession. One bullet went through Hpaunoi Gawng's thigh and another through his shoulder. Hpaka La, Hpaunoi Gawng and La Hkn Hka returned to their village that evening (R. 21-27). Hpaga Hka did not return, and her body was found the next morning about one mile from the trailer (R. 15). An autopsy disclosed a bullet wound four inches below the right shoulder blade, the bullet having passed through the body and making its exit two inches below the left breast (R. 18). The medical officer who performed the autopsy also examined the wounds of Hpaka La and Hpaunoi Gawng. In his opinion their wounds and those of the deceased were caused by the same type of weapon (R. 19).

Hpaka La identified the accused in court as the negro who did the shooting (R. 24). Hpaunoi Gawng was not asked to identify the accused during the presentation of the prosecution's case in chief (R. 26, 27) and no other witness identified the accused as the negro who did the shooting.

4. The accused, having been properly warned of his rights, was sworn and testified. He stated, in substance, that he received permission to precede the convoy and that he drove slowly to a point near Mogaung, where three Chinese or Japs flagged him. They jumped on the truck while it was moving and one of them covered accused with a pistol. Another carried a rifle. They made him stop and turn the truck around, and they took his wallet. Two of them drove away in the truck, leaving the third to guard accused. The guard took accused into the woods and in a short time fifteen or sixteen more Japs or Chinese came. They questioned him and one hit him with a rifle. Then all but two left and these two were later relieved by two others. Accused had had no food or water, and when darkness came he became angry and ran away. Three

shots were fired at him. He returned to the highway, started walking to Warazup, and was picked up by three men in a weapons carrier. On arriving at Warazup he reported the matter to the military police. Accused was not armed (R. 44-50).

5. After the prosecution and defense rested, the court called two witnesses, namely, Hpaunoi Gawng (also referred to in the record as Hpaunwe Gam) and La Hkn Hka. The examination of the latter two witnesses was conducted by members of the court and was for the most part limited to inquiries as to the identity of the assailant. When asked if he ever saw that man (the assailant) again, Hpaunoi Gawng stated, "I do not see him again". When asked if he would be able to recognize him if he saw him again, he replied, "I cannot recognize him" (R. 67). La Hkn Hka testified that, at the time of the occurrence in question, he heard talking and looked back and saw a "black man" (R. 68). The witness replied in the negative when asked if he could identify the man if he saw him again. He did not remember what the man was wearing, could not say whether he was an American soldier, and did not know to what race he belonged (R. 69).

At the conclusion of the foregoing testimony, the trial judge advocate stated, " * * * in view of the line of questioning which the court has been pursuing, I would like to call Agent Brisco [Criminal Investigation Division] as a witness for the prosecution" (R. 69). Agent Briscoe then testified that on 29 April 1945, during the course of an investigation of this case, he was present at a stockade when an identification lineup was conducted. He caused the accused to be placed in the stockade where there were five other prisoners and he sent for eight more who were then on detail. A Captain Barnard was present and Hpa Hka La was brought in. Briscoe then instructed Barnard to have Hpa Hka La to go along the line and try to identify the man who shot the girl (R. 70, 71). The witness testified at this point as follows:

> "He [Hpaka La] went down the line and had taken four or five steps when he turned to Captain Barnard and said something. Captain Barnard turned to me and said - - " (R. 71).

The defense objected to the indicated proposed testimony as hearsay and, in response to questioning by the law member, the witness stated that what was said by Captain Barnard to him did "assume the appearance of a translation" and was said within accused's hearing. The law member overruled the mentioned objection (R. 72). The witness continued testifying that Captain Barnard told him that Hpa Hka La was afraid to identify the accused. On being assured by the witness through Captain Barnard that he would be protected, Hpa Hka La "proceeded down the line two or three men and pointed out Jones". Hpa Hka La was then sent outside, the order of the lineup was changed with accused selecting his own position, and Hpa Hka La returned and went directly to Jones (R. 72). On cross-examination Briscoe stated that about five minutes after the lineup the prisoners got together and were mumbling. He talked to two of them who protested that it was not a fair lineup, that "at the time Captain Barnard spoke to the Kachin they thought he instructed him to pick out Jones" (R. 73).

At the conclusion of Agent Briscoe's testimony, the defense called several witnesses of the lineup stating that this was done "in view of the new evidence presented by the prosecution" (R. 74).

Private James E. Hunt, a defense witness, testified, in substance, that there were between six and ten negro prisoners in the lineup, including himself; that the native stopped in front of the third man; that the native did not speak until Captain Barnard said something to him; that the native then went down the line, said something to the Captain, and pointed to Jones (R. 75). The native first stopped in front of Private Melton Brown (R. 76). The native pointed out the accused at the second lineup (R. 76).

Private Mexie Jones, a defense witness, testified that he was one of the men in the lineup; that the Kachin first pointed out Brown, said something, and that the Captain touched the Kachin on the arm (R. 78). At the second lineup the Kachin slowed up in front of Brown, then came down the line and pointed out accused (R. 79). (The witness made a statement on 25 May 1945 in which he did not mention the Kachin pointing at Brown (R. 80).)

Agent Briscoe was next recalled as a witness for the court. He testified that the Kachin did not point to anyone other than Jones but did stop in front of Brown and then turned and talked to Captain Barnard (R. 82).

The accused was recalled at his own request (R. 83). He testified that the C.I.D. agent caused him to report to his office on the day of the lineup. The agent said nothing concerning the case until they reached the stockade. He then said someone had been shot and asked whether accused "would mind getting in the lineup". The captain walked behind the Kachin, who stopped in front of Brown and pointed at him. The captain said something to the Kachin, they proceeded down the line, and when they got to accused "the captain said something to him and touched him on the arm and he came on and pointed to me" (R. 83). Captain Barnard then asked the C.I.D. agent if that was the man and he said yes. Accused was the only one in the lineup wearing tennis shoes. The captain pushed the Kachin along (R. 85). The Kachin had no trouble the second time "as he was going by the tennis shoes" (R. 84).

Agent Briscoe, on again being recalled as a witness for the court, stated that he instructed Captain Barnard to tell the Kachin to look at each man as they went down the line and the Kachin did so. Neither the witness or Captain Barnard had his hand on the witness (R. 88). The witness, Agent Faber, Captain Barnard and the Kachin walked down the line together, with the latter two in the rear (R. 87).

6. The question of the admissibility of evidence of extra-judicial identification has been the subject of discussion in several Board of Review opinions. The first opinion dealing with the subject appears to be CM 232790, Levi, 1943 (19 B.R. 193), a rape case. Offered testimony by an army officer that he was present in the guard house when the prosecutrix identified the

accused was excluded as hearsay on ruling by the law member. The Board made no comment as to this ruling. However, in connection with testimony by the prosecutrix that she made an extra-judicial identification of the accused, the Board said:

> "Testimony was received to the effect that on two occasions while accused was in the post guardhouse, Miss Carl, after observing him and hearing him talk, identified him as her assailant. One such identification was qualified and uncertain, but the other was positive. There is a wide diversity of opinion whether evidence of such extra-judicial identification of an accused is competent. The recent trend of judicial decision, as well as the slight preponderance of authority, favors its admission, particularly where the identification test is fairly and impartially conducted. (Wharton's Criminal Evidence, 11th Ed., 691; People v. Hale (Cal.), 222 p. 148; State v. Frost (Conn.), 135 A. 446; Commonwealth v. Powers (Mass.), 200 N.E., 562; People v. Londe (Mich.), 203 N.W., 93; State v. Howie (N.C.), 197 S.E. 611.)
>
> "It is the opinion of the Board of Review that under the circumstances of the present case, evidence of the extra-judicial identification of accused by Miss Carl was properly received."

In CM CBI 159, Williams, 1944 (sec. 395(2), Dig. Op. BOJAG, CBI, Supp I) this Board expressed the view that where the prosecuting witness in a rape case erroneously identified a military policeman as her assailant, it was proper for the prosecution to inquire whether she had made statements out of court inconsistent with such testimony, and to call to her attention the time, place and circumstances of her former statement, and, upon her inability to remember, to offer proof that she had made such previous identification. It further expressed the view that it was improper for the prosecution to elicit testimony from a Criminal Investigation Division agent that certain identifying witnesses other than the prosecutrix identified the accused at a pre-trial lineup. It was stated that while it is for the court to determine the probative value of the witnesses, their credibility, as a general rule, should not be bolstered up by the testimony of others that they had previously identified the accused. As supporting authority, the opinion quoted the following:

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

missible at the trial, as original evidence to prove the crime. Some courts admit it merely in corroboration of the testimony of the prosecutrix" (44 Am. Jur. 945).

The Board held, however, that, in view of the compelling nature of the evidence of guilt, the admission of the improper evidence of extra-judicial identification did not prejudice the substantial rights of the accused.

In CM CBI 171, Doyle, 1944 (sec. 395(2), Dig. Op. BOJAG, CBI, Supp. I) this Board held to have been improperly admitted the testimony of a provost marshal that three identifying witnesses had identified the accused in a pre-trial lineup but that this did not prejudice accused because of the overwhelming evidence of guilt.

In Digest of Opinions of the Branch Office of The Judge Advocate General, North African Theater of Operations, it is stated:

"The investigating officer, upon cross-examination by the defense, was permitted to testify to certain extra-judicial identifications of accused. The proceedings by the investigating officer were conducted through an interpreter and the witness only testified to what the interpreter reported to him. The testimony was therefore hearsay. Insofar as this testimony was produced by the defense for purposes of impeachment, it was not objectionable except for the fact that the identifications came through an interpreter" (NATO 1490, Johnson et al).

"Upon a trial for rape witnesses were permitted to testify that the victim and her husband, prior to trial, identified the accused as the woman's assailant. The testimony was incompetent but, in view of the uncontroverted evidence of identity, was harmless" (NATO 423, Stroud) (NATO 460, Trevino).

The following digest excerpts are also pertinent:

"Accused was found guilty of the rape of one girl in England in violation of AW 92, and of assault with intent to rape another girl in violation of AW 93. HELD: LEGALLY SUFFICIENT. (1) The evidence sufficiently supported the trial court's conclusion that accused was the perpetrator of the offenses against the two victims (discuss at length). This conclusion remains despite his positive denial thereof and his testimony, supported to some degree by other witnesses, that he was at his station or at least returning to it, at the time the offenses were committed. (2) Identity: No

error resulted when a local English police officer was permitted to testify that, a week after the offense, one victim identified accused at an identification parade, or of the other victim's statement (on the stand) that she also had identified the accused at that same earlier identification parade. This question raises a problem of first issue in the ETO. 70 ALR 910 contains an exhaustive study of the admissibility of extra-judicial identification of a defendant in a criminal case, and points out: 'In recent years * * *, the tendency has been towards the admission of such testimony, both as substantive and corroborative evidence, so that now there exists a fairly balanced weight of authority on the question, with a slight preponderance of jurisdictions favoring admission'. State v. Frost, 105 Conn 326; 135 Atl 446, quoted in 70 ALR pp. 911-912 is expressive of the opinion of this Board of Review (quoted). 'Not only do reason and logic support the rule permitting the admission of such evidence, but also practical necessity dictates its use. This is particularly true under the circumstances so frequently revealed in records of trial coming before the Board of Review where the issue of identification of accused is sharply contested. The evidence in support of identification of accused as the malefactor is in the majority of instances dependent upon the testimony of civilian witnesses who are nationals of the country in which the Army of the United States is engaged. These witnesses in a great number of instances are unfamiliar with the English language and must give their testimony through interpreters. They also experience difficulty in distinguishing the physiognomy of the American soldier--both white and colored--after the lapse of time between the incident giving rise to the charge and the date of trial. Under these circumstances evidence of their identification of accused within a few hours or days after the incident is perhaps the most satisfactory evidence available. While the argument of necessity cannot be used to support the admissibility of evidence which by a fixed and undisputed rule of law is not admissible, it is a relevant and highly important factor when a forum upon appellate judicial review is required to elect between two conflicting rules of law, each of which is supported by respectable authority. (But see later case of CM ETO 6554 Hill 1945 (450(4) herein) re identification parade) (CM ETO 3837 Smith, BW 1944) (Also see ETO 7209 Williams (450(4) herein.)." (Dig. Op. ETO, Vol II, pp. 444, 455)

"Accused were found guilty of manslaughter in violation of A.W. 93. The only substantial evidence linking the accused with the assault which caused the victim's death was that the victim, on the day following the assault, identified the accused while they were in the stockade. It was shown, over the objection of the defense counsel, that the accused remained silent and did not deny

the accusatory identification. Several days thereafter the victim became ill and died from a disease caused by the blows he had received in the assault. Held: The record is not legally sufficient to support the findings. The testimony as to what the deceased said and did at the stockade was pure hearsay, and is not excepted from the hearsay rule merely because it dealt with the subject of identification. It does not come within the dying declaration exception, for it was not predicated upon a realization of impending death by the declarant; and it does not come within the res gestae exception, for the declarations were not made at such time and under such circumstances as to be a part of the transaction which they purport to explain. Furthermore, the silence of the accused did not amount to an admission. The majority Federal rule and the rule previously applied in military justice is that incriminating statements made in the presence of accused and not denied by him, although admissible under some circumstances, should not be received when made while the accused is in custody. Under these circumstances the accused has a right to remain silent and his failure to deny such a statement may not be considered as a tacit admission of its truth (McCarthy v. United States, 25 F. 2d 298; CM 248464 (1944), 31 B.R. 293, 3 Bull. JAG 378). CM 270871 (1945)." (IV Bull JAG 4)

"Accused was found guilty of rape in violation of AW 92. HELD: LEGALLY SUFFICIENT. (1) Identity: The identity of accused as the offender was established by the victim and her mother, 'both of whom, as the evidence demonstrates, had previously seen accused at their home two days before. The evidence of identification by these same witnesses at the guardhouse lineup was improperly admitted (CM 270871, IV Bull. JAG 4), but in view of the other competent and compelling evidence of identification, no prejudice' resulted." (CM ETO 6554, Hill, 1945; Dig. Op. ETO Vol II, p. 456).

"Accused was found guilty of the offenses of rape in violation of AW 92; of two specifications of housebreaking in violation of AW 93; and of assault by wrongfully pointing a gun, and menacing and threatening his victim with it, in violation of AW 96. HELD: LEGALLY SUFFICIENT. (1) The evidence supported the respective findings of guilty. (2) Line-up Identification: The rape victim testified that she 'recognized' accused on two occasions soon after the offense. He was then in custody. Following the liberal and majority rule advocated by Wigmore, this Board of Review has held evidence of extrajudicial identification of persons in custody properly admissible, even though the testimony thereof was given by a person other than the identifying party * * *. Since that decision, the Board of Review, sitting in Washington, held in a manslaughter case, that where the only evidence of the accused's identity was that of third persons to the effect that the victim identified accused by word and gesture at the stockade as his assailant,

such evidence was legally insufficient to support a conviction (CM 270871, IV Bull. JAG 4). The stated ground for that decision was that such statements were hearsay, and the cited authority was McCarthy v. United States (C.C.A. 6th 1928), 25 F (2nd) 298. The latter case involved a hearsay accusation but not necessarily identification (Cf. U.S. v. Fox (C.C.A. 2nd 1938) 97 F (2nd) 913). The Washington decision should not be construed as an authority to prohibit testimony by the witness testifying in court that he had previously identified the accused in confinement or arrest, for hearsay is not then involved * * *. The most recent holding on these points was by the Board of Review sitting in the ETO. It was held in a rape case that testimony of third parties as to the accused, by statements and gestures at a police line parade, was not prejudicial error where both such identifying parties positively identified the accused at the trial (CM ETO 6554, Hill). In the instant case, [the victim] * * * did not say that she pointed out the accused or made any statements to him. She testified only that she 'recognized' him, obviously when his features were fresh in her memory. The small minority, which hold to the extremely narrow rule that an identifying witness at a trial may not give testimony as to his statements and acts as an extrajudicial identification, admit testimony of prior recognition * * *. Her evidence of prior recognition was therefore properly admitted in evidence.' (CM ETO 7209 Williams 1945)"

As indicated by the foregoing opinions, precise rules as to the admissibility of evidence of extra-judicial identification can not be defined. (See Mil. Just. Cir. No. 2, BOJAG, IBT, 30 June 1945) Many other aspects of the law of evidence are involved in the question and must be considered. However, the cited opinions set out certain general principles.

CM ETO 7209, supra, which modifies CM ETO 6554, supra, together with CM 232790, supra, are authority for the proposition that an identifying witness, having identified an accused in court, may further testify that he saw and recognized the accused at a pre-trial lineup or similar occasion. Without deciding what our view might otherwise be, but in deference to the authorities cited, we accept that as the rule in this jurisdiction. We believe it better practice, however, for the prosecution not to introduce such evidence where the accused has been positively identified in court and that identification is not disputed. In such cases, evidence of extra-judicial identification ordinarily serves no practical purpose and its introduction may give rise to collateral error. It also appears from the opinions quoted that testimony by other than the identifying witness as to extra-judicial identification by the identifying witness may properly be elicited in cases involving impeachment, surprise or mistaken identification, but in all such cases a proper foundation should be laid by examination of the identifying witness.

It should be borne in mind that mere contradiction does not constitute impeachment and consideration should be given to the principle set out in CM 270871, supra, and discussed in CM ETO 7209, supra, concerning the distinction between evidence as to prior recognition and evidence as to accusatory statements by a witness and admissions by the accused after he is in custody.

We believe the opinions cited, supra, clearly hold that except in cases involving impeachment, surprise or mistaken identification, and then only where proper foundation has been laid by examination of the identifying witness, it is error to permit a witness other than the identifying witness to testify that the identifying witness identified the accused extra-judicially. This error was committed in the case now under consideration. Hpa Hka La's judicial identification of the accused was positive and he had not been impeached. He was not even interrogated as to the extra-judicial identification. It follows that the admission of the prosecution's evidence as to extra-judicial identification in this case was error.

Agent Briscoe's testimony as to Hpa Hka La's identification of the accused was also inadmissible because it was wholly hearsay, being based entirely upon what he was told by the interpreter (NATO 1490, supra, and CM IBT 648, Simmons, 1945. Also see sec. 440, Wharton's Criminal Evidence, 11th ed.) The interpreter was not present in court as a witness and the defense had no opportunity to cross-examine him with respect to what he said to Hpa Hka La and what the latter said to him. In the absence of such testimony Hpa Hka La's conduct in stopping in front of Brown and later pointing at the accused can be given no probative value whatsoever. We can only conjecture as to the significance of what occurred.

In introducing evidence of extra-judicial identification, it should be shown that the identification was made under fair and unsuspicious circumstances. This particularly applies to identification lineups. In many records of trial coming before this Board of Review the identifying witnesses are simple peasants or coolies, uneducated, timid, easily confused by language difficulties, and all too much inclined to say or do what they think will please the investigating officers. In such cases, the court should exercise meticulous care in determining that the witness was not subjected to improper influence or suggestion and that he fully understood the consequences that may follow an erroneous identification. As indicated in CM ETO 3837, supra, a properly conducted [illegible] lineup or similar test may provide the most reliable and satisfactory corroborative evidence available. On the other hand, an improperly conducted test may provide tragically misleading evidence. For that reason, all evidence of extra-judicial identification should be closely scrutinized and received with caution. The "argument of necessity" referred to in CM ETO 3837, supra, in itself suggests convincing argument against the admission of evidence of extra-judicial identification without proper foundation that the identification was made under fair and unsuspicious circumstances.

Where an interpreter is used, the interpreter should be impartial and disinterested in the outcome of the test. In this connection, we find among

the miscellaneous papers accompanying the record of trial in this case a report dated 6 March 1945, subject, "Military Murder Case", signed by Captain J. Barnard, whom we assume is the same Captain Barnard who acted as interpreter at the lineup at the stockade. The report discloses that Captain Barnard was the Civil Affairs Officer, British Military Administration, Kamaing; that he had investigated this case and was interested in securing a conviction; and that he knew accused's name. It manifestly would have been better practice to have selected a different interpreter.

Did the admission of the incompetent evidence with respect to the identification of accused at the stockade injuriously affect the substantial rights of the accused within the meaning of Article of War 37? (See sec. 1284, Dig. Op. JAG, 1912-30.) We believe so. But for Hpa Hka La's identification of the accused, the only evidence connecting accused with the offense was circumstantial and by no means convincing. The other two Kachin witnesses were unable to identify the accused and the accused had denied that he was present at the scene of the crime. Though his story seems somewhat implausible, the only evidence that it was wholly so lies in the testimony of Hpa Hka La, the sole identifying witness. That the court did not consider his testimony compelling is indicated by the fact that it called, on its own motion, Hpaunoi Gawng and La Hkn Hka and saw fit to permit the prosecution to attempt to corroborate Hpa Hka La's judicial identification by introducing, over the strenuous objection of the defense, the wholly incompetent evidence as to the latter's extra-judicial identification. We do not know whether the court was in fact influenced by the incompetent evidence but we manifestly cannot properly assume that it was not influenced or that it considered the competent evidence compelling. In the final analysis, the issue was reduced to one of credibility, that is, whether the accused or Hpa Hka La was to be believed. The admission of the incompetent evidence with respect to the extra-judicial identification tended to corroborate Hpa Hka La's testimony and it would be mere conjecture on our part to say that the court would have found accused guilty notwithstanding the incompetent evidence. We hold, therefore, that the accused's substantial rights were injuriously affected.

7. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings and the sentence.

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

John F. Fontron, Judge Advocate
John F. Fontron

(230)

CM IBT 667 (Jones, Floyd (NMI)) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 8 September 1945.

TO: Commanding General, Advance Section, APO 689.

1. In the case of Private First Class Floyd (NMI) Jones, 34047689, 3650th Quartermaster Truck Company, 153rd Quartermaster Battalion (Mobile), I concur in the foregoing opinion of the Board of Review holding that the record of trial is not legally sufficient to support the findings of guilty and the sentence, and for the reasons stated there I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the Action of The Assistant Judge Advocate General have been taken in accordance with the provisions of Article of War 50½, and that under the further provisions of that Article and in accordance with the fourth note following the Article (M.C.M., 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action or rehearing as you may deem proper.

2. When copies of the published orders in this case are forwarded to this office, together with the record of trial, they should be accompanied by the foregoing opinion and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows: (CM IBT 667).

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

Incls:
Record of Trial

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
21 August 1945

Board of Review
CM IBT 677

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| UNITED STATES | ADVANCE SECTION, IBT |
| v | Trial by GCM convened at APO 689, New York, N.Y., 3 August 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 5 years. United States Disciplinary Barracks. |
| Private James C. Evans, 33904656, Company "D", 1327th Engineer General Service Regiment. | |

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

The record of trial in the case of the soldier above named has been examined by the Board of Review established in the office of The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, India Burma Theater, and the Board finds the same to be legally sufficient to support the sentence.

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

Itimous T. Valentine, Judge Advocate
Itimous T. Valentine

John F. Fontron, Judge Advocate
John F. Fontron

CM IBT 677 (Evans, James C.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, U. S. Army, 23 August 1945.

To: Commanding General, Advance Section, IBT, APO 689, U. S. Army.

1. In the case of Private James C. Evans, 33904656, Company D, 1327th Engineer General Service Regiment, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. Attention is invited to the fact that the miscellaneous papers accompanying the record of trial include a neuropsychiatric report, dated 27 July 1945, diagnosing accused's mental condition as constitutional psychopathic state, drug addiction, and indicating that accused was temporarily irrational at the time of the commission of the alleged offenses because of the use of marihuana or "ganja weed". The neuropsychiatric report was not introduced in evidence, nor was accused's mental condition inquired into in any way or brought to the attention of the court as a matter of defense or mitigation. However, the evidence adduced at the trial, when considered in connection with the mentioned report, strongly suggests that accused was in fact irrational because of the influence of some drug or intoxicant. No other reasonable cause for his violent behavior is apparent.

3. It is not within the province of the Board of Review or the Assistant Judge Advocate General to go outside of the record of trial in determining its legal sufficiency. Therefore, the indicated matter of accused's mental responsibility was not considered in passing upon the record. It is believed, however, that the matter may properly and should be considered by the reviewing authority in taking final action in this case.

4. Although an accused's voluntary intoxication from the use of drugs is not an excuse for crime committed while in that condition, it may be considered as affecting mental capacity to entertain a specific intent where such intent is a necessary element of the offense (par. 126a (p. 136), MCM 1928). Specific intent is an element of the offenses of willful disobedience of a commissioned officer under Article of War 64 (Spec. Charge I) and willful disobedience of a non-commissioned officer under Article of War 65 (Spec. 2, Charge II). Therefore, if the accused in this case was in fact so much under the influence of drugs that he could not entertain a specific intent, he would be guilty only of the lesser included offenses of failure to obey a superior officer and a non-commissioned officer under the 96th Article of War.

5. Because of the strong possibility that accused in this case was in fact unable to entertain a specific intent, it is recommended that consideration be given to approving only so much of the findings of guilty of the Specification, Charge I, and Charge I, and Specification 2, Charge II, as involves findings of guilty of failure to obey under Article of War 96, and that the sentence be reduced accordingly. The two offenses of failure to obey would together support punishment of nine months' confinement and the findings of guilty under Specification 1, Charge II, and Specification 1, Charge III, support an additional punishment of nine months' confinement making a total of eighteen months' confinement, total forfeitures and dishonorable discharge. The punishment imposable under Specification 2, Charge III, should not be included in arriving at a maximum sentence as accused's disorderly conduct constitutes merely a different aspect of the more serious offenses involved (par. 80a, MCM 1928). It is believed that if the foregoing recommendation is adopted the accused will be adequately punished and the possibility of a serious miscarriage of justice will be avoided.

6. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 677).

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

New Delhi, India
25 August 1945

Board of Review
CM IBT 678

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| UNITED STATES | ADVANCE SECTION, INDIA BURMA THEATER |
| v. | Trial by GCM convened at APO 689, % Postmaster, New York, N.Y., 1 August 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary. |
| Private First Class John H. Anderson, 34063672, Company E, 45th Engineer Regiment (GS) | |

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

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

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

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

Specification: In that Private first class John H. Anderson, Company E, Forty Fifth Engineer Regiment (GS), did, at mile 146.0 of the Stilwell Road, on or about 8 June 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with pre-meditation kill one male Kachin, Kanau Tu, a human being by shooting him with a rifle.

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

Specification: In that private first class John H. Anderson, Company E, Forty Fifth Engineer Regiment (GS), did, at mile 146.0 of the Stilwell Road, on or about 8 June 1945, commit an assault upon a Kachin female, Shega Kaw, with intent to commit rape.

The accused pleaded not guilty to all specifications and charges and was found guilty of all specifications and charges. He was sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved

the sentence, designated the United States Penitentiary nearest the port of debarkation in the United States as the place of confinement and forwarded the record of trial pursuant to Article of War 50½.

3. Evidence for the prosecution:

Shega Kaw and her husband, Kanau Tu, both Kachins, lived at Naung Khaum, ten miles from mile 146 of the Stilwell Road (R. 6). On about 8 June 1945 a colored soldier identified as the accused (R. 12, 13) picked them up in a truck about a mile from Lalawn Ga. He drove them to the camp entrance near Sinlum about 4:00 o'clock where he stopped the truck and the two Kachins got out and started home (R. 6, 7, 25). The accused left his truck and asked Private First Class Tutson, the sentry at the gate, to loan him a rifle to shoot chickens. Upon receiving the gun accused called "Hey, Joe" and follwed after the Kachins (R. 25, 26). He approached the couple and shot Kanau Tu as the latter raised his hand in a "salaam". Kanau Tu fell down and died (R. 8). His face was bloody (R. 8) and he neither spoke nor moved thereafter (R. 12). Prior to being shot, Kanau Tu had been in good health (R. 8). Accused dragged the body of deceased into the water and caught and dragged Shega Kaw from the water as she followed her husband's body (R. 8, 9). He prevented her from taking a knife from the body (R. 9, 17). The accused then opened his "dungi" and attempted to have intercourse with the struggling woman but was unable to get an erection. Shega Kaw then fled into the jungle followed by the accused who grabbed her, forced her to lie flat on the ground and again attempted to have intercourse. Again he was unable to secure an erection and Shega Kaw grabbed and squeezed his testicles and penis which were at the time outside his pants. Accused choked Shega Kaw into unconsciousness (R. 9, 10, 11). When she revived she ran into the jungle going to Lashu Ga village (R. 11, 15). About five minutes after accused had borrowed Tutson's rifle the latter heard a shot fired and some twenty minutes thereafter accused returned to the guard post. He there told Tutson, " [I] missed it". One bullet was missing from the rifle and there was sand in the weapon as well as on the accused's clothing. Accused told Tutson to say "no" if the guard were asked if he had seen natives in the truck of accused and also told Tutson to say that accused had stayed around the guard house from 4:00 to 4:30 if any questions were asked concerning that matter (R. 26). In a subsequent statement made to an officer the accused said that he had not fired the gun (R. 23).

The following day, 9 June, two officers went to the Tanai River near mile 146. Shega Kaw was there. Under their direction a native recovered and brought to shore the dead body of a Kachin. Shega Kaw threw herself upon the body and washed the mud off (R. 21). The body was bloated and not moving or breathing (R. 20, 21, 24). There were wounds in the hand and jaw (R. 11, 20), which probably could not have been inflicted by a gun fired from a prone position (R. 22). Lieutenant Favere stated that in his opinion, based on civilian police experience, death was probably caused by the shot (R. 20). No knife was found on the body, but it might have slipped off (R. 37).

4. Evidence for the defense:

The accused having been advised of his rights elected to be sworn and testify. He stated that on 8 June he had picked up the two Kachins. The man said he would supply accused a "bibi" in return for some rice. Arrangements

were made to meet at the Kachin camp at 4:00 the following day. Accordingly, on the next day, accused picked up the Kachin and a "bibi" and drove to the old motor pool in E area where the couple started into the woods (R. 31). Accused asked Tutson for a rifle to kill chickens, called "Hey, Joe" and followed the natives. Thirty rupees, instead of rice, was paid to the Kachin man who then told accused to go ahead (R. 32). The accused took the woman to the river bank where they lay down and began having intercourse (R. 32, 36). The old man kept hollering and accused looked up and saw him advancing some four or five feet away with a knife in his hand (R. 35). On seeing the native walking toward him at a fast pace accused got to his knees, grabbed his rifle and shot him (R. 32, 34, 35). He did not throw the body into the river (R. 36). The woman grabbed the testicles of accused whereupon he choked her. He returned to the truck (R. 32), where he told Tutson to say "yes" if asked whether accused had been at the guard house from 4:00 to 4:30 but did not tell Tutson to deny having seen natives in the truck. He also said, "I missed it", to Tutson (R. 35). The rifle was taken along for protection since "they" carry long open knives and are known to "cut your head off" (R. 32). Consequently, accused did not know what would happen. Although he thought he had a good "deal", he thought his head might be cut off (R. 34).

Several witnesses testified that accused bore a good reputation, got along well with his associates, and satisfactorily performed his military duties (R. 28, 30).

5. The evidence is not complex and presents little difficulty. That presented by the prosecution shows the accused following a married Kachin couple to a river bank, where, with a borrowed rifle, he shot the unresisting husband, threw the body into the water, dragged the wife from the river and twice assaulted her in attempts to have sexual intercourse, finally desisting only after he had choked the woman into insensibility. Murder is defined in the Manual as "the unlawful killing of a human being with malice aforethought" (par. 148a, MCM 1928, p. 167). Malice does not necessarily mean hatred or ill will toward the person killed nor an actual intent to take life. Neither must it have existed for any particular time before the homicide if it exist when the act is committed. Malice aforethought may mean either an intention to cause the death of or grievous bodily harm to any person, whether killed or not, or knowledge that the act which causes death will probably cause death or grievous bodily harm to any person (Ibid. p. 168-169). Such state of mind may be implied or presumed from the use of a deadly weapon (26 Am. Jur. p. 362). In our opinion the evidence of the prosecution clearly establishes the offense of murder within the above definitions. Although there was no expert medical testimony as to the cause of death it does not appear that in this case such evidence was required. There was direct evidence as to the character and location of the wounds inflicted on the deceased, and his subsequent death. By an eyewitness it was shown that after being shot the deceased fell down, his face was bloody and that he neither spoke nor moved. The witness said that Kanau Tu died. Prior to the shooting he had been in good health. A lay witness gave his opinion that death was due to the shot. All this evidence was admissible (40 C.J.S. pp. 1202, 1204). No contention was made nor were there facts or circumstances from which it might reasonably be inferred that death resulted from causes other than the injuries

inflicted by accused. The cause of death was adequately established.

An assault with intent to commit rape is an attempt to commit rape in which the overt act amounts to an assault upon the woman intended to be ravished (par. 149l, MCM 1928, p. 179). Two physical assaults are shown to have been made against the person of Shega Kaw. The intent with which they were committed may be inferred from the actual attempt to have intercourse with her, the consummation of which was prevented only by his present physical inability.

The defense interposed by the accused that his attempted intercourse was with the consent of Shega Kaw as a result of a monetary consideration paid, and that he shot the deceased in self-defense as the latter came at him with a knife is not too impressive when subjected to close scrutiny. Why a vicious attack with a knife should be made upon the accused while he was engaging in intercourse only in pursuance of previous arrangements, is difficult to comprehend. The denial of accused that he had fired the rifle which he had borrowed "to shoot chickens", and his effort to cover up his whereabouts and activities as evidenced by his conversation with the guard Tutson do not add to the likelihood of his story. In any event the court was the judge of the credibility of the witnesses and the weight to be attached to their evidence (par. 124a, MCM 1928, p. 132) and we are not warranted in saying that in this case its findings were not justified.

6. The charge sheet discloses the present age of the accused to be 26-3/12 years. He was inducted on 8 August 1941 and had no prior service. There was evidence of one previous conviction by summary court-martial for absence without leave from 11 June to 16 June 1944.

7. The court was legally constituted and had jurisdiction of the person of accused and of the offenses. No errors injuriously affecting the substantial rights of the accused were committed during the trial. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offenses of murder and assault with intent to commit rape. Murder is an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 U.S.C.A. 452, 454). Assault with intent to commit rape is likewise an offense of a civil nature and punishable by penitentiary confinement by section 276, Criminal Code of the United States (18 U.S.C.A. 455).

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

/s/ Itimous T. Valentine, Judge Advocate

/s/ John F. Fontron, Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
29 August 1945

Board of Review
CM IBT 679

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| UNITED STATES<br><br>v<br><br>Second Lieutenant Chester Stachiw, 02065845, Air Corps, 493rd Bombardment Squadron, 7th Bombardment Group (H) AAF. | ARMY AIR FORCES, INDIA BURMA THEATER<br><br>Trial by GCM convened at APO 690, % Postmaster, New York, N.Y., 24 July 1945. Dismissal. |

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

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

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

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

Specification: In that Second Lieutenant Chester Stachiw, AC, 493rd Bombardment Squadron, 7th Bombardment Group (H) AAF, did, at or near Asansol, India, on or about 16 May 1945, knowingly and wilfully apply to his own use and benefit a 4 x 4, ¼ ton truck automobile, of the value of more than $50.00, property of the United States, furnished and intended for the military service thereof.

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

Specification 1: In that Second Lieutenant Chester Stachiw, AC, 493rd Bombardment Squadron, 7th Bombardment Group (H)

(240)

AAF, did, at or near Asanson, India, on or about 16 May 1945, with intent to deceive Corporal Salvatore Tarace, 1365th Military Police Company Aviation, who was then in the execution of his duties as a member of the military police, officially state to the said Corporal Salvatore Tarace that his (Second Lieutenant Stachiw's) name, serial number, and organization were Second Lieutenant C. Jackson, 0-726876, 493rd Bombardment Squadron, APO 217, which statement was known by the said Second Lieutenant Chester Stachiw to be untrue, in that his correct name, serial number, and organization were Second Lieutenant Chester Stachiw, 0-2065845, 493rd Bombardment Squadron.

Specification 2: In that Second Lieutenant Chester Stachiw, AC, 493rd Bombardment Squadron, 7th Bombardment Group (H) AAF, having knowingly and wilfully applied to his own use and benefit a 4 x 4, ¼ ton truck automobile, of the value of more than $50.00, property of the United States, furnished and intended for the military service thereof, did, at or near Asansol, India, on or about 16 May 1945, wilfully, unlawfully, and wrongfully make an offer to Corporal Salvatore Tarace, 1365th Military Police Company Aviation, who was then on duty as a member of the military police, of Rs. 50/--, in an effort to induce the said Corporal Salvatore Tarace not to make an official report of the facts and circumstances of his (Second Lieutenant Stachiw's) misapplication of the said automobile, which it was the duty of the said Corporal Salvatore Tarace to do.

The accused pleaded not guilty to and was found guilty of all specifications and charges. He was sentenced to be dismissed the service. The reviewing authority approved only so much of the findings of guilty of the Specification, Charge I as involves a finding that the accused did, at the time and place alleged, knowingly and willfully apply to his own use and benefit a 4 x 4 ¼ ton truck automobile, of some value, property of the United States, furnished and intended for the military service thereof, and only so much of the findings of guilty of Specification 1, Charge II as involves a finding that the accused did, at the time and place alleged, with intent to deceive Corporal Salvatore Tarace, 1365th Military Police Company, Aviation, who was then in the execution of his duties as a member of the Military Police, officially state to the said Corporal Salvatore Tarace that his (Second Lieutenant Stachiw's) name, serial number and organization

were Second Lieutenant C. Jackson, 0726876, 493rd Bombardment Squadron, which statement was known by the said Second Lieutenant Stachiw to be untrue, in that his correct name and organization were Second Lieutenant Chester Stachiw, 493rd Bombardment Squadron. The findings of guilty of Specification 2, Charge II, and of Charges I and II were approved, the sentence was approved and the record of trial was forwarded for action under the 48th Article of War. The confirming authority confirmed the sentence, withheld the execution of the sentence and forwarded the record of trial pursuant to Article of War 50½.

3. On the evening of 15 May 1945, Lieutenant Alfin, 9th Bombardment Squadron, 7th Bombardment Group (R. 5), borrowed a jeep from the Engineering Officer of his organization, obtained a trip ticket therefor (R. 6) and he and Lieutenant Kleman went to a dance at the Engineering Institute at Asansol (R. 5, 6). About 2230 hours Lieutenant Kleman borrowed the jeep from Lieutenant Alfin, returning it an hour later to the spot where it had been originally parked (R. 6, 8). The jeep was missing at 0030 hours when the two officers went out to leave (R. 6, 8). At that time Lieutenant Alfin had given no one permission to use it (R. 5). The loss was reported to Corporal Salvatore Tarace, the Military Policeman on duty at the Institute (R. 6) who secured the license number by calling the military police gate at Ninge where the jeep was listed under Lieutenant Alfin's name. Tarace then sent Sergeant Shake and Private First Class Taylor to check the vicinity (R. 10). Tarace wore an MP brassard (R. 17). At 0200 hours, 16 May 1945, the jeep, whose description and serial number had been furnished by Tarace, was apprehended on the Grand Trunk Road in Asansol. Lieutenant Stachiw and an Indian were in the jeep and the former drove it back to the Institute where Shake reported to Tarace (R. 14, 15). Tarace went out where the jeep and the lieutenant were (R. 15). The accused, whom Tarace knew and referred to at the trial as C. Jackson, told Tarace that his name was C. Jackson and his serial number 0726876. He stated that he had no identification papers. A truck driver, Van Vliet, vouched for accused as being an officer of the 493rd (R. 11). At that time Van Vliet did not know his name but learned later the same night that it was Stachiw (R. 18). During the conversation the accused told Tarace, "Lt. Alfin is willing to forget the incident. Why can't you forget it. You are trying to get me in trouble", and offered Tarace fifty rupees to forget it (R. 12) and not send in a report (R. 13). Two weeks later Tarace saw "Lt. Jackson" at an

investigation in the 493rd orderly room and learned that the latter had given a false name (R. 12). The same jeep that Lieutenant Alfin had driven to the dance was returned to him by the military policeman at 0300 hours, 16 May, and the two officers drove it back (R. 6, 9). The records of the 493rd Bombardment Squadron disclose no Second Lieutenant C. Jackson, serial number 0726876. The 66-2 form of accused, signed by accused, shows his serial number to be 02065845 (R. 20).

4. The defense presented no evidence. The accused having been advised of his rights by defense counsel elected to remain silent (R. 21).

5. There is sufficient evidence to justify the finding that the jeep in which accused was apprehended was that driven to the dance by Lieutenant Alfin and taken therefrom without his permission. However, evidence that the serial number on the jeep found in possession of accused by Sergeant Shake corresponded to that given the latter by Tarace who in turn secured it by 'phone from the military police gate, was not competent to establish identity of the vehicle.

There was no direct evidence that the vehicle taken by accused was a 4 x 4, ¼ ton truck, the property of the United States furnished and intended for the military service thereof. Proof of such elements may however be supplied by circumstantial evidence. In paragraph 150i, Manual for Courts-Martial 1928, page 185, it is said:

> "Although there may be no direct evidence that the property was at the time of the alleged offense property of the United States furnished or intended for the military service thereof, still circumstantial evidence such as evidence that the property was of a type and kind furnished or intended for, or issued for use in, the military service might together with other proved circumstances warrant the court in inferring that it was the property of the United States, so furnished or intended".

The vehicle was referred to as a jeep throughout the trial. A jeep is a recognized standard Army vehicle (CM 237858, 24 B.R. 127, 131). In the common parlance of the Army generally, with the exception of the Armored Command, and certainly within the India Burma Theater, the term refers to and means the common standard Army ¼ ton, 4 x 4 truck. The vehicle was borrowed from an officer of the 9th Bombardment Squadron, 7th Bombardment Group,

from which it may reasonably be inferred that it belonged to, and was for the use of, that organization. It is contrary to common experience in the Army that a vehicle so distinctively an item of Army equipment would be the personal property of the officer rather than organizational equipment. This conclusion is further strengthened by the fact that the jeep was dispatched by trip ticket, the method prescribed in paragraph 6a, Army Regulation 850-15, 28 August 1943, for dispatch of government vehicles to individuals for non-tactical purposes. In CM 248919, 31 B. R. 377, the accused was charged with misappropriation of two ¼ ton, 4 x 4, trucks in violation of Article of War 94. The vehicles were referred to throughout the record as "peeps" and were shown to have been taken from the possession of a military policeman while on duty and from a base motor officer. It was held that such facts were sufficient for the court to infer that the vehicles were property of the United States furnished and intended for the military service thereof and that failure to refer to them by their proper description was not material since it was well known that in the parlance of the Armored Command, a "peep" is a ¼ ton, 4 x 4, government truck. In the instant case it is our opinion that the evidence justified the inference that the vehicle was property of the United States, issued and intended for its military service and that the vehicle taken by accused was that alleged in the specification.

The value of the jeep was not shown, but as said in the Review of the Theater Judge Advocate, it may be inferred that it possessed some value (par. 149g, MCM 1928, p. 173). As no confinement was adjudged the variance between allegation and proof was not material (CM 244666, 28 B.R. 379, 385). The findings of guilty of Charge I and its specification appear to be supported by the record. It was not necessary for accused to have come into lawful possession of the property applied to his own use. The misapplication of government property is in violation of Article of War 94 whether control of the property is obtained rightfully or wrongfully (CM 243287, 27 B.R. 321), III Bull. JAG p. 236; CBI 195, Supp. I, Dig. Op. CBI 19).

Under Specifications 1 and 2, Charge II the accused was found guilty, in substance, of giving a false name to a military policeman who was in the execution of his duties, and of attempting to bribe the latter not to make a report. The evidence sufficiently establishes the commission of both offenses. Winthrop's Military Law and Precedents, Second Edition, Vols. 1 and 2,

Reprint 1920, on page 717, cites several examples of conduct unbecoming an officer and a gentleman, among which are: giving a false name to an officer of a provost guard on being arrested; attempting to pass the guards with a false pass and by an assumed name. A false official statement to a guard on duty at the main gate of his station has been held to be conduct of a similar nature and to violate Article of War 95 (CM ETO 1953, Dig. Op. ETO p. 586). The offense of bribery is tainted with corruption and moral turpitude (CM 248104, 31 B.R. 137, 143). Consequently, it seems that any attempt on the part of an officer to induce a soldier to violate his duty by offering him money is clearly conduct which does not conform to the standard expected of a gentleman and required of an officer. Particularly is that true when the bribery is attempted to escape detection and prevent apprehension as a wrongdoer. It is the opinion of the Board of Review that both offenses alleged and proved under Charge II come within, and violate the provisions of, the 95th Article of War.

6. The charge sheet shows the accused to be 21 years of age and that he was commissioned a second lieutenant, AUS, on 31 July 1944. There is no record of previous convictions.

7. The court was legally constituted and had jurisdiction of the accused and of the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as approved and the sentence. Dismissal is mandatory upon a conviction of a violation of Article of War 95 and is authorized upon conviction of a violation of Article of War 94.

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

Timous T. Valentine, Judge Advocate
Timous T. Valentine

John F. Fontron, Judge Advocate
John F. Fontron

CM IBT 679 (Stachiw, Chester) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 1 September 1945.
To: Commanding General, United States Forces, India Burma Theater, APO 885.

1. In the case of Second Lieutenant Chester Stachiw, 0-2065845, Air Corps, 493rd Bombardment Squadron, 7th Bombardment Group (H), AAF, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings as approved and the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 679)

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

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(Sentence ordered executed. GCMO 37, IBT, 1 Sep 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(247)

New Delhi, India
10 September 1945

Board of Review
CM IBT 680

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| UNITED STATES<br><br>v<br><br>Second Lieutenant Thomas D. Coles, O-1556702, 3480th Ordnance Medium Automotive Maintenance Company, and<br><br>Technician Fourth Grade Frederick W. Hauser, 35019823, Hqs. 75th Ordnance Battalion. | ) | ADVANCE SECTION, INDIA BURMA THEATER<br><br>Trial by GCM convened at Myitkyina, Burma, 29, 30 June 1945. Hauser: Acquitted. Coles: Dismissal, total forfeitures, confinement at hard labor for six years. United States Penitentiary. |

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

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

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

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

Specification: In that Second Lieutenant Thomas D. Coles, 3480th Ordnance Medium Automotive Maintenance Company (at that time a member of the 115th Ordnance Medium Maintenance Company), and Technician Fourth Grade Frederick W. Hauser, Headquarters, 75th Ordnance Battalion (at that time a member of the 115th Ordnance Medium Maintenance Company), acting jointly, and in pursuance of a common intent, did, at or near the village of Sein, near Bhamo, Burma, on or about 6 May 1945, with intent to do bodily harm, commit an assault upon Ma Swe Mi by forcibly and against her will, removing her from the residence occupied by Mg Hla Shwe.

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

Specification: In that Second Lieutenant Thomas D. Coles, 3480th Ordnance Medium Automotive Maintenance Company (at that time a member of the 115th Ordnance Medium Maintenance Company), and Technician Fourth Grade Frederick W. Hauser, Headquarters, 75th Ordnance Battalion (at that time a member of the 115th Ordnance Medium Maintenance Company), acting jointly, and in pursuance of a common intent, did, at or near the village of Sein, near Bhamo, Burma, on or about 6 May 1945, forcibly and feloniously, against her will, have carnal knowledge of Ma Swe Mi.

Each accused pleaded not guilty to all Specifications and Charges. Accused Hauser was found not guilty. Accused Coles was found guilty of all Specifications and Charges and sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for the rest of his natural life. The reviewing authority approved the sentence and forwarded the record of trial for action under Article of War 48. The confirming authority confirmed only so much of the findings of guilty of the Specification, Charge I, and Charge I as involves findings that accused did, at the time and place alleged, commit an assault upon Ma Swe Mi in violation of the 96th Article of War. The confirming authority confirmed the findings of guilty of the Specification, Charge II, and Charge II, but reduced the period of confinement to six years. The execution of the sentence was withheld and the record of trial was forwarded to this office for action pursuant to Article of War 50½.

3. Evidence for the prosecution.

As Technician Fourth Grade Frederick W. Hauser, who was jointly tried with Second Lieutenant Thomas D. Coles, was acquitted by the court, this opinion will be concerned only with Lieutenant Coles, who will hereafter be referred to as accused.

On the evening of 6 May 1945 at about midnight, accused (R. 33), in company with two Indians, entered the house of Mg Hla Shwe, which is in the village of Sein, about five miles from Bhamo, Burma, and in which Ma Swe Mi, a 17-year old Burmese woman, was sleeping (R. 7, 15, 23, 29, 30, 53). The husband of Ma Swe Mi was away at the village of Nanzin and for this reason she was spending the night in the house of her uncle, Mg Hla Shwe, nearby (R. 12, 30). Members of accused's party had shortly before entered the nearby houses of Ma Tu and Ma Swe Mi (R. 23-25). Accused had a carbine in his hands (R. 8, 30) when he entered Mg Hla Shwe's house. The older of the two Indians laid hands upon Ma Swe Mi and dislodged her from her bed, disarranged her clothing, and caused her to drop to the floor near the entrance to the house (R. 7, 16, 19, 30, 38). Accused then handed the carbine to the younger Indian (R. 8, 16, 30). Ma Swe Mi importuned the older Indian not to pull her or to drag her and resisted him (R. 8). Accused grabbed her right hand or shoulder while the older Indian held her left hand or

shoulder and together they pulled and dragged her from the house to the jeep which was waiting outside and into which the older Indian lifted her (R. 9, 11, 16, 18, 30, 31, 38, 39). Before Ma Swe Mi was carried from the house in which she was sleeping, the younger Indian pointed and aimed the carbine at her and her uncle and aunt (R. 9, 11, 30, 54). During the time Ma Swe Mi was being forcibly carried or dragged to the jeep, she cried, shouted and resisted, and to stop her cries accused closed her mouth with his hand (R. 8, 17, 31). During the trip from the house to the jeep, Ma Swe Mi was dragged and pulled with her feet off the ground, while she tried to push the older Indian and accused away from her. Accused first laid his hands upon the victim in the house, at the gate of the house, or about 10 feet from the house in which she was sleeping (R. 14, 18, 30, 38). Sergeant Hauser, who was in the waiting jeep, started the motor, and drove off immediately after Ma Swe Mi was placed in the jeep, which was then driven to the Bhamo road and stopped (R. 31, 33). The older Indian, accompanied by accused, then dragged Ma Swe Mi from the jeep and took her into the jungle and there pushed her down (R. 31, 41, 42). Here accused, in spite of her resistance, got on top of her and "he did by force to [her]", "he jabbed his penis into [hers]", "put his penis in [hers]" and "raped" her. She did not spread her thighs for him to commit the act (R. 32). Sergeant Hauser and each of the two Indians then came into the jungle and "raped" her one after the other. She was then taken back to the jeep which was driven toward Nanzin road where it was again stopped on the left side (R. 34). The driver and the two Indians got off the jeep and accused drove her to a house, took her upstairs, woke up another "white American" and then went downstairs leaving her with the other man (R. 34), who promptly had sexual intercourse with her against her will (R. 54). When he had finished, accused again came upstairs and took her down to a tent where he "raped" her twice more (R. 35). He then took her back to the jeep. Sergeant Hauser drove her toward the village from which they had carried her (R. 36). On the way back to the village, Sergeant Hauser stopped the car and again "raped" (R. 54) her (R. 36). Sergeant Hauser then lifted her back into the jeep and drove her in the vicinity of her home (R. 36). This was about 0300 hours on 7 May 1945. At the time she reached her home she was crying, there were marks on her right shoulder and her clothing was torn. This was observed by three villagers (R. 10, 17, 26, 37). Ma Swe Mi never consented to any of the acts of intercourse with Lieutenant Coles or Sergeant Hauser, but resisted with all her strength (R. 54).

On 10 May accused made a written sworn statement (Prox. Ex. 2) in which he denied that he had ever seen Ma Swe Mi before the investigation and that he had ever visited Sein village. He also denied that he had ever had sexual intercourse with a native woman in the CBI Theater (pp. 6, 7, Pros. Ex. 2). On 14 May 1945 he made another signed sworn statement (Pros. Ex. 3) in which he admitted that on 6 May 1945, about 2300 hours, he and Sergeant Hauser decided to go in search of women. Pursuant to this decision they took the mail orderly's jeep and drove to the Indian guardhouse where they picked up an old and young Indian guard. Lieutenant Coles admitted that he had been out once before with these two Indians and through them had obtained a woman from a native village

(p. 2, Pros. Ex. 3). He had spoken to the two Indians beforehand about going out on the night of 6 May. The two Indians got in the jeep with accused and Sergeant Hauser, with Sergeant Hauser driving the jeep. Sergeant Hauser gave the carbine to the older Indian. At a point about nine miles out of Bhamo on the Stilwell Road the old Indian directed that they drive off to the right of the Stilwell Road, stating that he knew where they could get a nice looking girl for the price of about ten rupees (pp. 3, 4, Pros. Ex. 3). Following this direction they arrived at and stopped in a native village about one mile down the road to the right. Accused and the two Indians got out of the jeep with the old Indian carrying the carbine. They entered one house and then another. In the latter house the old Indian handed the carbine to the young Indian and thereupon hit another Indian who was in the house. At this point Lieutenant Coles got frightened and attempted to leave but the young Indian pulled the bolt back on the carbine, pointed it at him and said, "Lieutenant, you stay here". The old Indian then stepped up on a platform and grabbed a young Burmese girl with his hand around her and appeared to be forcing her from the bed. The girl slid to the floor and the young Indian helped the old Indian to get the girl out of the house. Lieutenant Coles went outside the house and was followed by the old Indian and the girl. The young Indian came last with the carbine. The old Indian took the girl by the arm and placed her in the back of the jeep while accused was standing by talking to Sergeant Hauser who was still at the steering wheel of the jeep (pp. 6, 7, Pros. Ex. 3). They got in the jeep and proceeded toward the Stilwell Road with accused seated on the right of the girl in the rear seat (p. 7, Pros. Ex. 3). After going in the direction of Bhamo for about a mile, and off about 100 yards up a side road, the jeep was stopped. At this time the old Indian had the carbine with him in the front seat of the jeep. Here the old Indian got out and the young Indian pushed the girl and the old Indian dragged her from the jeep. Sergeant Hauser got out of the jeep and said he wanted to take the first crack at her. Accused and the old Indian stood about twenty or thirty yards away from Sergeant Hauser and the girl, and left them alone for about ten minutes. Hauser then called to accused who walked out and found Sergeant Hauser and the girl together. Sergeant Hauser said he had given her five rupees. The two Indians and Sergeant Hauser walked away, leaving accused and the girl alone. He had sexual intercourse with her to which, according to his statement, she made no objection. The two Indians then in turn took over the girl (p. 10, Pros. Ex. 3). After this was finished, they all got back in the jeep and Sergeant Hauser, upon accused's suggestion, drove to the enlisted men's entrance of the camp where Sergeant Hauser and the two Indians got out, leaving Lieutenant Coles and the girl. From there he drove the girl to the officer's quarters where Captain Heany inspected the girl, patting her posterior elevation and "grabbed her breasts". At this time, again according to his statement, she removed her petticoat, becoming nude. Accused waited in the jeep for about ten minutes for the signal of Captain Heany at which time he returned upstairs where he saw Captain Heany give the girl some rupees. At that time, accused made the statement that he was going to "shack up" with the girl awhile in the tent. He and the girl went to the tent outside where, according to him,

they both undressed in bed and twice had sexual intercourse. Upon both occasions he used a rubber. Accused offered the girl five rupees but she refused to accept the money (pp. 13, 14, 15 Ibid).

4. For the defense.

Accused at his own request testified as a witness (R. 80). He stated that on the night in question he told Sergeant Hauser to obtain a carbine and that one accordingly was borrowed. Accused took the carbine and removed the clip, after which he handed it to one of the Indians (R. 81). The testimony of accused is substantially the same as that contained in his pre-trial sworn statement on 14 May 1945 as it relates to the visit to the village and what transpired there (R. 82) as well as the details of the trip from the Indian village where they got Ma Swe Mi and what transpired throughout the remainder of the evening (R. 90). He, however, denied anyone was holding the girl at the time she arrived at the jeep near her uncle's house, but stated that she was lifted into the jeep by the old Indian (R. 83). He further stated that as they drove away from the village the young Indian was playing with her breasts which were exposed and that the girl was giggling (R. 84). Lieutenant Coles in his testimony did not admit the girl was dragged, as he did in his pre-trial statement, but contended that she was "goosed" by the young Indian as she was getting out of the jeep and that the old Indian merely "caught her to keep her from falling". On cross-examination, however, he did admit, with respect to what transpired between her and the old Indian at the situs of the alleged rape, that "he grabbed her, and by doing that kept her from falling. He could only drag her from the jeep" (R. 84, 88, 89). Lieutenant Coles admitted having sexual intercourse with Ma Swe Mi but said that he asked the girl, "You and me jig-jig?", and that she nodded her head in assent (R. 84). He denied that he used any force but stated that after playing with her breasts he had intercourse with her during which she put her arms around him (R. 85). Lieutenant Coles then related the subsequent events of the evening which were substantially the same as the narrative set forth in his pre-trial statement of 14 May 1945 (R. 85-91). Sergeant Hauser testified in his own behalf in substantial corroboration of each important part of the evidence later given by accused (R. 61-63). He also testified that the victim consented to the acts of intercourse had by him with the girl (R. 68) and that she accepted five rupees as compensation (R. 65-66). Hauser further stated that Ma Swe Mi accepted from him candy and powder (R. 67, 72-73). The girl was not crying, according to him, when he took her back to the village (R. 69).

On 9 May Ma Swe Mi at an identification lineup identified a Technical Sergeant Kirby as one of the accused, but in this lineup neither Sergeant Hauser or Lieutenant Coles were present (R. 79).

5. It is well established that two or more persons cannot jointly commit a single rape, because by the very nature of the act individual action is necessary. However, all persons aiding and abetting another in the commission of rape are guilty as principals and chargeable as such. Under this principle,

though the evidence indicates that both Lieutenant Coles and Sergeant Hauser violated the person of the victim and might properly have been separately charged, there was no objection, under the circumstances of this case, in charging them jointly and in finding only the one guilty. (NATO 646, 779; Dig. Op. BOJAG, NATO (1 June 44), p. 28)

There is direct and uncontradicted evidence that accused as well as his confederates completed acts of sexual intercourse with the prosecuting witness at the time and place alleged. Therefore, the real question here involved is whether such acts of intercourse as were committed by accused upon the person of Ma Swe Mi were done by force and against her will so as to constitute the crime of rape, or whether she consented thereto. Accused contends that her consent and cooperation were freely given, while the prosecution takes the position that the victim resisted to the extent of her ability at all times. The crime here charged is defined in the Manual for Courts-Martial as follows:

> "Rape is the unlawful carnal knowledge of a woman by force and without her consent.
>
> "Any penetration, however slight, of a woman's genitals is sufficient carnal knowledge, whether emission occurs or not.
>
> * * * * *
>
> "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.
>
> "Mere verbal protestations and a pretense of resistance are not sufficient to show want of consent, and where a woman fails to take such measures to frustrate the execution of a man's design as she is able to, and are called for by the circumstances, the inference may be drawn that she did in fact consent" (par. 148b, MCM 1928).
>
> "Although the general rule is that a conviction of rape may be upheld on the uncorroborated testimony of the prosecutrix, the rule will not be applied where, as in this case, the prosecutrix's testimony was contradictory, uncertain, and improbable" (Bull, JAG, Vol. IV, par. 395(10), p. 51).

From all the evidence in the case it is clear that accused, Sergeant Hauser and two unnamed Indian men on the night of 6 May 1945, at about 2400 hours, according to plans theretofore made, left the camp and went to the native village of Sein in search of a woman upon whom they could gratify their sex desires. The four men were fortified with a carbine which had been specially procured at the direction of accused. The older of the two Indians directed the course to

be followed and, when they reached the village designated by him, the two Indians and accused left the jeep waiting nearby with Hauser at the steering wheel. They went from hut to hut until they found the victim who was sleeping in the home of her aunt. The young Indian pointed the carbine at Ma Swe Mi and her uncle and aunt to frighten and intimidate them and prevent interference while the older Indian pulled Ma Swe Mi from her bed and with the aid of accused took her by force from the house and dragged or carried her and placed her in the waiting jeep. During all this time she was resisting, struggling and crying, and in order to stop her alarm accused put his hand over her mouth. After she was put in the jeep, the young Indian came running with the carbine in hand and joined his fellows in the jeep which was quickly driven away to a spot along the Bhamo or Stilwell Road where it was stopped. Ma Swe Mi forcibly and against her will was taken therefrom to a point in the jungle where accused and all of his companions had sexual intercourse with her, each in his turn. She at all times resisted and never gave her consent to any of the acts of sexual intercourse. From this point she was again placed in the jeep and driven some distance where Sergeant Hauser and the two Indians got out, leaving accused who took over the steering wheel and drove her to the officer's quarters for other acts of intercourse. About three hours later accused took her again to Sergeant Hauser in the jeep and directed that she be taken back to the village. Accordingly, Sergeant Hauser carried her back to a point near the house from which she was taken and put her out. He had sexual intercourse with her against her will on the way.

The amount of resistance a woman may put up when attacked depends on the circumstances as they then appear. She is not required to continue a fruitless and futile struggle. In this case with four men, one of whom had a carbine, with her alone with them in the jungle, she may have well been apprehensive and feared for her life. She was not required to strike or scratch one of the men and thereby invite upon herself even more serious injuries and perhaps death.

> "The term 'against her will' was used in the old statutes convertibly with 'without her consent;' and it may now be received as settled law that rape is proved when carnal intercourse is effected with a woman without her consent, although no positive resistance of the will can be shown" (Wharton's Criminal Law, Vol. 1, par. 700, p. 940).

The fact of the resistance by Ma Swe Mi is not only shown by her testimony but is supported by of the presence of the three men in the house in which she was sleeping and the ruthless way employed by them in taking her from her bed to the car and into the jungle away from her friends and under circumstances under which her outcries and screams could not be heard by friendly ears. Her statement of what transpired finds further support in the fact that Sergeant Hauser, acting under direction of accused, carried her back to the village but not into the house in which they found her, as well as the fact that she was crying, her

clothes were torn, and her body injured when she returned to her friends and relatives about three o'clock in the morning. The behavior attributed to her by accused is most improbable and unnatural.

On 10 May 1945, accused made a voluntary statement in which he denied any association with or knowledge of this woman or that he had ever had sexual intercourse with any native since he had been in the India Burma Theater. This statement was made when he knew that he was being suspected and that an investigation was in progress. Concealment of the truth may be regarded as evidence of guilt and so considered by the court.

On the 14th of May he made another statement in which he admitted that he and his three confederates, pursuant to a bargain, left the camp in search of sexual intercourse which was to have been provided by the older Indian. They went to the town in which they found Ma Swe Mi sleeping in the home of her uncle and aunt. Accused admitted his presence in the house with the two Indians and that the old Indian appeared to be dragging the girl out of the bed. He detailed in this statement the course followed by him and his associates at the spot in the jungle where they had intercourse with her as well as at the officer's quarters and the tent. He also admitted that he carried the girl in the jeep back to Sergeant Hauser and directed her return to the village. The only substantial difference between the testimony of accused and his victim concerning what transpired was his contention that the acts of sexual intercourse were consented to by her and her contention that she resisted to the utmost.

Accused became a witness in his own behalf and his testimony in pertinent particulars was substantially the same as that contained in his statement of 14 May 1945. The court, therefore, had before it the testimony of the prosecutrix with the corroborative circumstances and inferences and the contradictory statements and testimony of accused. It is understandable why the court gave little credence to the statements and the testimony of accused in the light of this irreconcilable and unexplained contradiction. Perhaps the court regarded the old adage, "falsus in uno, falsus in omnibus", applicable to the statements and the testimony of accused and upon that theory discarded it in favor of the straight-forward and corroborated narrative of the victim.

Honest resistance by Ma Swe Mi abundantly appears from her own and the other testimony in this case and the court was therefore justified in finding that she resisted honestly and to the best of her ability having in consideration the number of her adversaries, their strength and the presence of a dangerous firearm which had already been threateningly used.

Sergeant Hauser's testimony was corroborative of that of accused but added nothing to its probative value.

A number of times during the examination Ma Swe Mi used the word "rape"

when asked to describe what accused did to her at the spot where the jeep was first stopped after leaving the village. Ordinarily this would be regarded as a conclusion of the witness based upon the facts and for that reason incompetent, but in the context in which she used it here it was manifest that she was employing it as a "shorthand rendition of her interpretation of the consummated acts of sexual intercourse". It was nowhere used by her in the technical legal sense but as a method of describing actual penetration by the male organ into her female organ. This appears clear from her answer when asked to give her definition of the term "rape" (R. 52). Her explanation of her meaning of the term rape together with the caution of the law member to the court renders harmless whatever error, if any, there was in her use of the term.

Under the Specification of Charge I as approved by the confirming authority, accused stands convicted of a simple assault upon Ma Swe Mi. An assault is lesser than and included in the charge of assault with intent to do bodily harm. There is abundant evidence in the record tending to prove that accused assaulted the victim in the home of her uncle and aunt as well as a number of other times on the evening of 6 May 1945. The assault involved in this Specification and Charge is apparently one aspect of the assault included in the rape charged in the Specification of Charge II and, for that reason, should not have been separately pleaded. However, as the sentence is sustained by the charge of rape, the erroneous duplication is not prejudicial (sec. 1555(1)(3), Dig. Op. JAG, 1912-30).

6. The charge sheet shows the accused to be 28-2/12 years of age and that he was inducted 16 June 1941 for the duration and six months. He was commissioned a second lieutenant on 26 June 1943. The record shows no record of previous convictions.

7. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as confirmed by the confirming authority, and the sentence. Death or imprisonment for life, as a court-martial may direct, is mandatory upon conviction of the 92nd Article of War. Confinement in a penitentiary is authorized by Article of War 42 for the

(256)

offense of rape, recognized as an offense of a civil nature and so punishable by penitentiary confinement (section 278, Criminal Code of the United States, 18 U.S.C. 457).

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

(Sick in hospital), Judge Advocate
Itimous T. Valentine

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

John F. Fontron, Judge Advocate
John F. Fontron

CM IBT 680 (Coles, Thomas D.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 15 September 1945.

TO: Commanding General, United States Forces, India Burma Theater, APO 885.

1. In the case of Second Lieutenant Thomas D. Coles, 0-1556702, 3480th Ordnance Medium Automotive Maintenance Company, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings as confirmed by the confirming authority and the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 680).

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

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(As to accused Coles, sentence as modified ordered executed. GCMO 38, IBT, 15 Sep 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
14 September 1945

Board of Review
CM IBT 684

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| UNITED STATES<br><br>v<br><br>Private Isaac N. Young, 13088152, 73rd Evacuation Hospital, Technician Fifth Grade Clinton (NMI) Riley, 34225109, Company B, 45th Engineer Regiment, Private First Class Claudie (NMI) Roberts, 34324277, Company B, 45th Engineer Regiment, Private First Class Tommy (NMI) Wideman, 34758917, Company B, 45th Engineer Regiment, Private Volney G. Lynch, 32741588, 73rd Evacuation Hospital, and Private John C. McClurg, 35579795, 3842nd Quartermaster Truck Company. | ADVANCE SECTION, INDIA BURMA THEATER<br><br>Trial by GCM convened at Myitkyina, Burma, 21, 22 July 1945. Sentence as to each accused: dishonorable discharge, forfeiture of all pay and allowances due or to become due, and confinement at hard labor for 15 years. United States Penitentiary. |

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

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

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

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

Specification: In that Pvt. Volney G. Lynch, 73rd Evacuation Hospital, Pvt. Isaac N. Young, 73rd Evacuation Hospital, Pvt. John C. McClurg, 3842nd QM Truck Co., T/5 Clinton Riley, Company B, 45th Engineer Regiment, Private First Class Tommy Wideman, Company B, 45th Engineer Regiment and Private First Class Claudie Roberts, Company B, 45th Engineer Regiment, acting jointly, and in pursuance of a common intent, did, at or near Nyaungdawgle Village, Burma, on or about 25 May 1945, forcibly and feloniously,

against her will, have carnal knowledge of Ma Thein Tin, a native woman.

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

Specification 1: In that Pvt. Volney G. Lynch, 73rd Evacuation Hospital, Pvt. Isaac N. Young, 73rd Evacuation Hospital, Pvt. John C. McClurg, 3842nd QM Truck Co., T/5 Clinton Riley, Company B, 45th Engineer Regiment, Private First Class Tommy Wideman, Company B, 45th Engineer Regiment, and Private First Class Claudie Roberts, Company B, 45th Engineer Regiment, acting jointly and in pursuance of a common intent, did, at Nyaungdawgle Village, Burma, on or about 25 May 1945, unlawfully enter the dwelling of Maungohn Pe with intent to commit a criminal offense, to wit, rape, therein.

Specification 2: In that Pvt. Volney G. Lynch, 73rd Evacuation Hospital, Pvt. Isaac N. Young, 73rd Evacuation Hospital, Pvt. John C. McClurg, 3842nd QM Truck Co., T/5 Clinton Riley, Company B, 45th Engineer Regiment, Private First Class Tommy Wideman, Company B, 45th Engineer Regiment, and Private First Class Claudie Roberts, Company B, 45th Engineer Regiment, acting jointly and in pursuance of a common intent, did, at Nyaungdawgle Village, Burma, on or about 25 May 1945, with intent to commit a felony, viz, rape, enter the dwelling house of Ma Thein Tin, and unlawfully and feloniously, and without her consent, take said woman, Ma Thein Tin from her dwelling house and place her in a vehicle.

Each accused pleaded not guilty to all Charges and Specifications. The accused Private John C. McClurg and Private First Class Claudie Roberts were found guilty of all Charges and Specifications. The accused Private First Class Tommy Wideman was found guilty of the Specification, Charge I, and Charge I, and Specification 2, Charge II, and Charge II; and not guilty of Specification 1, Charge II. The accused Private Isaac N. Young, Private Volney G. Lynch and Technician Fifth Grade Clinton Riley were each found guilty of Specifications 1 and 2, Charge II, and Charge II, and not guilty of the Specification, Charge I and Charge I.

Each accused was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority might direct for terms as follows Private McClurg, Private First Class Roberts and Private First Class Tommy Wideman, for life; Private Isaac N. Young for 20 years; Private Volney G. Lynch for 30 years; Technician Fifth Grade Clinton Riley for 25 years. The reviewing authority disapproved the findings of guilty of Specifications 1 and 2, Charge II

and Charge II as to Private McClurg and Private First Class Roberts, disapproved the findings of guilty of Specification 2, Charge II and Charge II as to Private First Class Wideman and disapproved the findings of guilty of Specification 1, Charge II as to Private Young, Private Lynch and Technician Fifth Grade Riley. Only so much of each sentence as provided for dishonorable discharge, total forfeitures and confinement at hard labor for 15 years was approved. The United States Penitentiary nearest the Port of Debarkation in the United States was designated as the place of confinement in the case of each accused, the order directing the execution of each sentence was withheld, and the record of trial forwarded pursuant to Article of War 50½.

3. Evidence for the prosecution:

Ma Thein Tin and her husband, Mauong Ohn Pe, were in bed and asleep in their home in Naungdawgle Village when, about 2:00 o'clock a.m., 26 May, some shots were fired outside the house and a white American soldier entered and asked for "bebe" and "jig jig" (R. 10, 25, 26). Two black soldiers armed with rifles entered about the same time. Mauong Ohn Pe was dragged from the house where he was pushed and fell down as a shot was fired from behind (R. 26). Ma Thein Tin was dragged from the bed, carried out of the house and put in the bed of a truck in which were about five soldiers (R. 11) about three of whom were colored and about two, white (R. 13). At the time she was put in the truck she heard many shots close at hand (R. 11, 12). She could not cry out because hands were placed over her mouth (R. 11). The truck drove away, after which Mauong Ohn Pe, finding his wife gone, reported the matter to the American authorities (R. 46). After the truck drove off, three or four of the men therein grabbed the woman by her shoulders and legs, pulled her legs apart and one of them had sexual intercourse with her (R. 12). She tried to struggle but they grabbed her and had sexual intercourse with her "time by time" many times (R. 13). After about an hour the truck stopped in the road and the men drank liquor. It then moved on and stopped a second time (R. 13, 14). At this time, about 0400 hours, the military police came upon the parked truck, the woman and all six accused, four of whom were out of the truck, one (a white soldier) asleep in the back of the truck, and one (a colored soldier) in the front. All accused were placed under arrest and told to get back in the truck. One of them refused and the military policeman fired two shots at his feet. One of the colored soldiers picked up a rifle but put it down when told to do so. All participants were taken to the military police company area, and the woman later taken to a hospital for examination (R. 28-30).

Ma Thein Tin was 26 years old, had been married 6 or 7 years (R. 16), had one child 5 years of age and was six months pregnant (R. 9). A woman of her age who had borne a child might not show physical evidence of rape (Pros. Stip. 1, R. 79).

The accused were taken to the stockade at Myitkyina about 1215 hours on 26 May where they were put to work on the rock pile without being fed. During the afternoon they were taken in pairs to the office of the Criminal Investigation Division:

for questioning and then returned to the rock pile (R. 36, 40, 41). They were fed at 1600 hours (R. 41).

After being advised of their rights under Article of War 24, each accused made a voluntary statement to the Criminal Investigation Division (Exhibits 1 to 6 incl). In them, the accused told substantially the same story as to the events leading up to the incident. All six had started out on a fishing trip in a truck driven by McClurg. They later abandoned the idea of fishing and decided to get some women, whereupon they started in search of "bebe" and "jig jig". All had been drinking a considerable quantity of "sake". There are some differences in the various statements concerning the details of what occurred at the home of Maung Ohn Pe and the events thereafter. The pertinent facts relating to the incident itself, as stated by each accused, may be thus summarized:

Riley: Two of the accused went into a hut which proved to be vacant and then all except Wideman followed a man and woman into a hut next door. Roberts carried a rifle. They were refused "jig jig" and went outside where Roberts gave the rifle to Riley. All except Wideman and Riley re-entered the house and Roberts carried the woman outside. Her husband followed and threw himself on Riley who flung him aside and fired his rifle to scare the people. Wideman fired two shots also. Riley helped Roberts put the woman into the truck and they all drove off. "Mac" (McClurg), Wideman and Roberts each had intercourse with the woman. The accused were later picked up by the military police while the truck was stopped on the Ledo Road. The girl was taken from the house against her will (Ex. 1).

Wideman: "Mac" (McClurg) and the other colored boys (Riley and Roberts) went into the house and Wideman went around back. He heard Riley say "Come on man lets go", heard a rifle shot and returned to the truck in which the woman was sitting. They drove toward the Stilwell Road. Roberts pulled the woman's clothing over her stomach and had sexual intercourse with her. Wideman then had intercourse with her, after which he went to sleep and remembered no more until he woke up next morning. No money was paid the woman and she accompanied them against her will (Ex. 2).

Young: All of the accused except Young entered the hut and brought the girl out. Two of the colored accused each had a gun and three shots were fired. Young drove the truck away. About 2230 hours the truck was stopped and all accused were in the back end. Roberts and another colored boy had intercourse with the woman. She had been taken against her will and was paid nothing. While the truck was parked they were all arrested by the military police (Ex. 3).

McClurg: Upon being called by Lynch, McClurg went to the door of the house and saw a man and woman on the bed. Lynch asked for "jig jig" and Roberts insisted on taking the woman but McClurg prevented him. Roberts later returned into the house where Riley pulled the man to the door. Riley fell down and the native man fell on top of him. McClurg then took hold of the man's arm and shoved him out the door into the yard. Riley then got up and fired his rifle. Roberts carried the woman from the house against her will and, with Riley's help, put her in the truck. They drove off and Roberts had intercourse with the woman. Wideman stated that he also had had intercourse with the woman.

McClurg tried to have intercourse with her but the road was too rough. He did effect penetration however. The military police picked them all up while the truck was stopped on the Stilwell Road (Ex. 5).

Lynch: He entered the house first, followed by three or four others, two of the colored boys taking their loaded rifles with them. Lynch asked for "jig jig" and when the woman said "no" returned outside. Later he went back in the rear part of the house and on returning outside saw the colored boys arguing with the native man and woman. Someone pushed the man, three shots were fired, and the woman was put in the truck. Lynch jumped on the truck, helped move the woman to the middle of the truck and covered her with a blanket. Two of the colored boys and McClurg had sexual intercourse with the woman. She seemed to be complaining while pointing with both hands and repeating, "baby, baby". Lynch went to sleep and woke up at 0800 hours (Ex. 5).

Roberts: He "passed out" and did not remember taking the woman from the house or having intercourse with her. He woke up while the truck was parked just before they were arrested by the military police (Ex. 6).

4. Evidence for the defense:

The accused Private Isaac N. Young, having been advised of his rights, elected to be sworn and testify. He stated that on the night in question he drove the truck into Naungdawgle Village. Some soldiers told them where they could get "jig jig" and they proceeded to the house to which they were directed parking the truck in the yard (R. 60, 61, 63). Young got out of the truck but did not go into the house. Riley and Wideman had rifles and while Young was in the yard he heard shots fired nearby. Young did not see any girl put into the truck, but after 45 minutes had elapsed someone said "lets go", and he drove the truck away (R. 64). He got off on the wrong road and just before stopping to turn around, looked through the back window and for the first time saw Ma Thein Tin. She was sitting on the floor and Roberts, Wideman and Lynch were on the seats along the side (R. 65-66). Wideman got into the front seat and Riley and McClurg took places in the rear of the truck (R. 68). Between that time and the time they got to the Ledo Road, accused Roberts had intercourse with the woman (R. 70, 72, 73). He did not see actual penetration (R. 75). They went on to the Ledo Road where they stopped to eat watermelon and smoke a cigarette. They were there picked up by the military police (R. 61).

The accused Private John C. McClurg, having been advised of his rights, elected to be sworn as a witness. He testified that he first saw the woman walking out of the house with Roberts. Roberts had his arms around her and she was not coming voluntarily, but did not resist (R. 77, 78). Before coming to the Stilwell Road this witness, who had been in the front seat of the truck, got into the back end and covered the woman with his blanket. Young gave her a cigarette which she smoked (R. 76). Witness asked her for "jig jig". She lay down, pulled up her clothes and he attempted intercourse but the truck being in motion it was too rough. He might have effected penetration (R. 78). He saw no

one else have intercourse with her (R. 79).

The accused Riley was warned of his rights and, upon then being sworn, testified that the woman had said "no jig jig, no bebe". She left the house walking, though Roberts had his hands on her. Witness realized that she was being taken against her will. He helped put her into the truck, and also flung an Indian boy from him and fired a rifle to scare people (R. 90, 91). He rode in the front of the truck and had no intercourse with the woman (R. 88). He saw Roberts and Wideman have intercourse with her when he flashed his light on them. He saw McClurg do the same after the truck was turned around (R. 92, 93). The woman made no protestations or outcry. She was given a cigarette and smoked it. She made no attempt to leave the truck when the military police came (R. 89).

The remaining three accused elected to remain silent (R. 87).

In April Ma Thein Tin had been seen by a witness to accept 15 rupees from a GI and then go inside the house with him (R. 81, 82). A physical examination of Ma Thein Tin within 10 hours of the incident disclosed no evidence of rape (Def. Stip. 1, R. 79).

Evidence of the good conduct and efficiency of the accused McClurg was introduced (R. 59).

5. On the evening of 25 May 1945 the six accused, after consuming liberal portions of a potent oriental beverage, set out in search of "jig jig", a term which, in the GI jargon used in this section of the world, denotes the non-platonic favors of a female. Their quest was joint, and each essayed a particular part in the venture that was patently calculated to provide sexual gratification for all participants. McClurg at first drove the truck which he had furnished, while later on Young took over the driver's duties and piloted it to the native house. Two of the colored accused were armed with rifles which they carried into the house. Lynch led the searching party inside. Both Riley and McClurg physically assaulted the man and Riley, as he flung the man away, helpfully fired his rifle "to scare people". Wideman had the other firearm and at that same time two other shots rang out. Roberts carried the woman from the house and Riley, in an accommodating mood, helped lift her into the truck. Lynch, at this point, helped move the woman to the middle of the truck and covered her with a blanket. Young drove the truck away, taking as passengers the other five men as well as the woman who had been so uncermoniously deposited therein. The scene shifts in time and place and we find "three or four" of the accused gallantly holding the woman on the floor of the truck by her shoulders, prying her legs apart and in turn having intercourse with her. While it is not clear how many times the woman was subjected to sexual indignities it is patent that two of the accused consummated intercourse while a third effected penetration. Such are the facts revealed by a dispassionate perusal of the record.

6. The Specification of Charge I alleges rape, and of this offense Roberts, Wideman and McClurg were found guilty. Of these three accused, the first two did have intercourse with Ma Thein Tin while the latter at least penetrated her private parts even though he may not have had an emission. Consequently each of the three accused did in fact have carnal knowledge of the woman and, if such was effected by force and without the woman's consent, each committed a separate and individual rape no matter how little time intervened between the separate acts. Rape is an offense the nature of which necessitates individual action and two or more persons cannot jointly and directly commit a single rape. But even though a joint rape be a physical impossibility, it is well established that all persons present and who aid and abet the commission of rape by another are chargeable as principals and equally guilty with the actual perpetrator (CM CBI 159, Williams, Supp. I, Dig. Op. CBI, p. 16-17; CM NATO 1242, III Bull, JAG, p. 62). So in the instant case if the accused assisted, aided and abetted each other in the commission of the individual offense of each, all are equally culpable and collectively responsible for the act of each. It is obvious that not only the three accused named above, but the other three as well, embarked on a joint enterprise and acted in concert in procuring Ma Thein Tin for immoral purposes. Their conduct throughout was well designed to culminate in the gratification of their several desires. Each by his presence and by his individual acts, which are detailed in the preceding paragraph, lent assistance to each and all of the others from the time the home of Kauong Ohn Pe was unlawfully entered to the time his wife, who had been forcibly removed therefrom, was ravished. There is no evidence from which any reasonable inference can be drawn that Ma Thein Tin consented to the intercourse or that it was consummated in any manner other than by force. It is true that three of the accused testified that the woman offered no resistance, but this is in direct contradiction to her testimony. Nor does such testimony accord to the established facts. The entry late at night into a home of total strangers by five or six soldiers, two of whom were armed, and the forcible removal of an unwilling woman therefrom does not indicate any consideration for the personal wishes or inclinations of the woman involved. Nor does the assault upon the woman's husband and the firing of weapons during the procedure evince any peaceable disposition on their part. The continued presence in the truck of all six men, two still armed, and at least three of whom were in the back end of the truck at all times, constituted a continuing threat of personal danger. Even though the woman may not have resisted the advances with as much force as she might have offered under different circumstances, certainly no consent may be implied under the circumstances present in this case. It is patent that physical resistance could have been to no avail on a dark country road late at night against six men two of whom were armed and had previously shown a disposition to use their arms.

> " * * * The extent and character of the resistance required of a woman to establish her lack of consent depend upon the circumstances and relative strength of the parties, and not upon the

presence or absence of bruises or other physical injuries. In the present case, additional resistance against the six assailants would have been as futile as it was impossible" CM 236801, II Bull. JAG 310.

It must have been a thoroughly subdued and frightened woman who cowered on the bed of the truck. Submission through fear is not consent (CM 236250, 22 B.R. 359), and in the instant case had the victim actually offered no physical resistance to the intercourse itself it could hardly be said that the offense would thereby have been minimized. In our opinion the record amply sustains the findings of guilty of rape returned against the three accused named above.

7. The remaining accused were found not guilty of Charge I and its Specification but guilty of Charge II, and Specification 2 thereunder. The latter hybrid pleading, which conforms to no known form set forth in the Manual, charges that accused did "with intent to commit a felony, viz, rape, enter the dwelling house of Ma Thein Tin, and unlawfully and feloniously, and without her consent, take said woman, Ma Thein Tin, from her dwelling house and place her in a vehicle". In order to determine whether the evidence supports a finding of guilty thereunder it first becomes necessary to ascertain what offense is alleged. We believe that the qualifying phrase "with intent to commit a felony, viz rape" refers to and modifies the subsequent allegations not only as to the entry, but as to all that was done after entry was effected, i.e. the unlawful and felonious taking and placing of the woman in a vehicle without her consent. The Specification consequently alleges assault with intent to commit rape even though neither the word "assault" nor the phrase "commit an assault" are used. Where the particular act or acts constituting the overt act essential to an assault with intent to commit rape are alleged, it is not necessary to use the word "assault" or to charge that the acts constituted an assault (52 C.J. 1047). The allegations that the accused unlawfully and feloniously and without her consent "took" the woman and "placed" her in a vehicle sufficiently charge the overt act of an assault upon her person. At first glance the Specification might appear duplicitous as containing a valid charge of housebreaking as well as assault to commit rape, but careful analysis shows otherwise. An essential element of the crime of housebreaking is an "unlawful" entry (par. 149e, MCM 1928, p. 169; CM 200627, 4 B.R. 355, 362; CM 237644, 24 B.R. 83, 85). Here no unlawful entry is alleged. Rather the allegation of "unlawfulness" follows the allegations of entering the house, and immediately precedes those of the assault. Nor would it appear that housebreaking was intended to be pleaded in this Specification, for a valid charge of unlawfully entering the house with intent to commit rape is contained in the preceding Specification. However, regardless of what the intendment of the pleader may have been, the Specification is defective so far as a charge of housebreaking is concerned. This being so, the phrase "enter the dwelling house of Ma Thein Tin" may be regarded as descriptive only, and therefore surplusage. "Mere surplusage does not amount to duplicity, and where a count charges one offense and defectively charges another, the latter charge may be regarded as surplusage" (27 Am. Jur. 686-7). Accordingly, the findings of guilty under this Specification are of an assault with intent to commit rape.

"Where several acts are charged in a single count, a portion of them only being sufficiently charged, a general verdict is generally regarded as sufficient if any of the acts is well charged, being applied to that portion of the count which properly charges the unlawful act" (42 C.J.S. 1355).

7. What has previously been said concerning the collective responsibility of the three accused convicted of rape applies with equal force to the collective responsibility of Young, Riley and Lynch for assault with intent to rape. They were each present at, and by their acts, words, and conduct, encouraging and aiding the commission of the assault upon Ma Thein Tin. The intent with which the assault itself was made may be inferred from the facts and circumstances surrounding it. That it was the intent of the accused for at least some of them to have sexual union with their victim at any cost seems evident from the violent manner in which she was separated from her husband and deposited in the truck, from the display of force exhibited by the discharge of firearms and from the subsequent several sexual relations themselves under circumstances clearly negativing consent. We conclude that the court was amply justified in finding the accused Young, Riley and Lynch, all of whom participated in the unjustifiable attack upon Ma Thein Tin, guilty as principals of assault with intent to commit rape as charged in Specification 2 of Charge II.

8. As a part of its case in chief the prosecution introduced statements given the Criminal Investigation Division by each accused. Five were made on 26 May 1945 while the sixth, that of Roberts, was made on the following day. The first statement offered was that made by the accused Riley. To its admission the defense interposed an objection on the ground that the circumstances under which it was made raised a doubt as to its voluntary nature. Evidence was then adduced by the defense showing in substance that the six accused were taken to the stockade at Myitkyina about 1215 hours on 26 March where they were given 12-pound hammers and put to work bursting rocks. They were not fed on their arrival and about 1400 hours asked for food. The request was reported to the corporal who said that no food could be served until regular meal time (R. 40). The accused were fed at 1600 hours (R. 41). In the interim the accused were taken in pairs to the office of the Criminal Investigation Division (R. 36, 39). The accused Young, testifying as to the events of the afternoon, stated that he did not work on the rock pile very long before he was first taken to the Criminal Investigation Division; that he was then returned to the rock pile and taken a second time to the Criminal Investigation Division office on the same afternoon; and that he did not have to do much work on the rock pile (R. 37, 38). He stated also that when he arrived at the Criminal Investigation Division he was told he had better tell the truth (R. 38). It also appears that none of the accused had eaten since the previous night and that none had had any sleep (R. 35, 36). Young was the only one of the accused who testified as to the circumstances under which the statements were made. The defense counsel, in stating his objection to the admission of Riley's statement, said that there was no intention of establishing that the accused were not advised of their rights under Article of War 24,

but that under the facts disclosed, the accused were under considerable stress. The testimony of those before whom the statements were given was to the effect that each accused was in fact warned of his rights and were neither threatened nor given any promises. A separate objection was entered to the admission of the statement of each of the accused on the basis of the evidence adduced at the time Riley's statement was offered.

It is, of course, fundamental that to be admissible a confession must have been made voluntarily. It may further be conceded that situations may arise under which a confession may not be considered as having been given voluntarily even though an accused was, at the time of making it, advised of his rights under Article of War 24 and even though no threats or promises were then made. But we do not believe that such a situation is disclosed by the evidence in this case. While not placing any stamp of approval upon the manner in which the accused were placed at work on a rock pile without being fed, we cannot say that the accused were thereby subjected to such intolerable conditions or to such inhumane treatment as would overcome their free will or would induce them to declare themselves falsely to escape further similar treatment. The failure to feed the accused does not appear to have been part of an intentional plot or campaign to mistreat them or to withhold any privilege unless they confessed, but seems more to have been mere neglect, doubtless due in part to the inconvenient time they arrived at the stockade. There is no indication that the accused were subjected to long continued questioning in the face of any expressed unwillingness to talk. Five statements were taken during the same afternoon from which it would appear rather obvious that there was little reluctance on the part of accused to relate what had happened, even though two of the accused were returned to the Criminal Investigation Division office a second time. Nor were the accused even taken separately to be interrogated. It must further be noted that not one of the accused intimated that he was under any duress at the time he made his statement, that his mental or physical properties had been impaired in any way by the treatment he had received, or that he had not wished to make a statement. Significant also is the fact that one of their number, Roberts, made no statement whatever on 26 March and was not refused food thereafter. Nor did Roberts ever make any incriminating statement, which would seem a potent indication that no compulsion was employed. That the accused were both tired and hungry when they were interviewed may fairly be assumed but that their condition was such as to put them at an unfair disadvantage can hardly be gleaned from the evidence. In a case in which was involved the admissibility of a confession obtained after five days of intermittent questioning, in the intervals between which the accused was segregated from other prisoners, the Board of Review stated:

> "Whether or not these conditions imposed upon accused a hardship so intolerable that, at the end of five days, he made a false confession to escape them, was properly a question for the court to decide" (CM 252086, 33 B.R. 331, 343).

In the one case of accused Young it appears that some members of the Criminal Investigation Division stated that "you had better tell the truth", but a mere adjuration to speak the truth does not vitiate a confession when neither threats

nor promises are applied (CM 252086, supra; Vol. 2, Wharton's Criminal Evidence, par. 625). In civil jurisdictions the great weight of authority likewise is that an admonition to tell the truth, which imports neither a threat or a benefit, does not render a confession incompetent (Vol. III, Wigmore on Evidence, Third Edition, Section 832; Fitter v United States, 258 Fed. Rep. 567). In discussing the rules to be applied upon appellate review in determining whether a confession is admissible in any given case, the Board of Review in CM 192609, 2 B.R. 9, 16, said:

> "It was necessary for the court-martial in this case, acting through the law member, to ascertain and determine as a question of law and as a preliminary question of fact, whether the confession was voluntary, and its decision with respect to the facts is entitled to such weight that it should not be disturbed on appellate review unless there be no reasonable basis and evidence for its action".

In spite of the impropriety of putting the accused to work on the rock pile without their having been fed either breakfast or dinner, we cannot say that the facts disclose a situation which, as a matter of law, rendered the confessions involuntary, or that there was no reasonable basis for the court's action in admitting them. The law member correctly ruled that the statement of each accused could be considered as evidence only as to the one who made it and not against the others (par. 114c, MCM 1928, p. 117).

9. On cross-examination the accused Young was asked whom, if anyone, he had seen have sexual intercourse with Ma Thein Tin while she was in the truck. The defense objected to the questions on the ground that such cross-examination went beyond the limits of the direct examination (R. 67, 71). The objection was properly overruled. While Young had not testified to any individual acts of his co-conspirators, his testimony related to the events of the night, and especially his own participation therein, from a time before the native's house was entered until the apprehension of accused by the military police. That general subject having been opened, the cross-examination might go into any phase thereof (70 C.J. 656). The cross-examination of a witness as to facts in issue, or relevant to the issue is a matter of right, not of discretion (CM 234591; 21 B.R. 61, 66). An even greater latitude is allowed in the cross-examination of an accused than in that of other witnesses (par. 121b, MCM 1928, p. 127) and in general he may be cross-examined as to any matter pertinent to the issue in the case or any matter concerning which he has testified or to which he has referred on his direct examination (70 C.J. 674). Young was charged with the commission of a joint offense and what his five co-conspirators did in furtherance thereof was germane to the issues as to Young. The matters sought to be elicited by the trial judge advocate pertained directly to the actions of all the accused during the time and under the circumstances about which Young had testified on direct examination. In CM 214273, 10 B.R. 349, 351, it was said:

> "As the offense was joint robbery, it was perfectly proper to cross-examine all the accused, as both were bound by the acts of each accused".

That the questions might implicate one or more of his co-conspirators does not make them improper, or the answers in response thereto inadmissible. An accomplice or co-conspirator is competent to testify against another involved in the same offense (CM 252439, III Bull, JAG, p. 284).

10. Evidence of prior convictions was introduced as to the accused McClurg and Lynch. Exhibit 7, setting out a previous conviction as to Lynch, is a letter written "for the commanding officer" of the 88th Quartermaster Battalion Mobile, by the Personnel Adjutant, and is not certified as a true copy of any official document. It therefore does not conform to the requirements of paragraph 116a of the Manual. Exhibit 8 purports to be a certified true copy of extracts from the service record of Lynch. It is signed "Jerome G. Byrnes, Captain, MAC, Personnel Officer" but does not anywhere contain the designation of the latter's organization. Although a personnel officer is, under regulations, the custodian of the service records of enlisted personnel of his organization, the authentication should reveal, either by a statement to such effect or by other evidence contained therein, that the officer making it is in fact the custodian of the original. However, any objections to the two documents because of faulty authentication may be considered waived since not asserted when they were proffered. Par. 116a, MCM 1928, p. 120. In any event the substantial rights of neither accused were prejudiced as each acknowledged in open court the correctness of their contents. Appended to the record as Exhibit 9 is a certified true copy of previous convictions as to Young. The authentication is the same as that on the certificate pertaining to Lynch, and is faulty for the same reason. It cannot be said that Young waived any objection thereto or acknowledged its contents as correct, for the record discloses that the trial judge advocate announced in court that he had no evidence of previous convictions against Young. Whether the court considered the contents of Exhibit 9 we cannot say, but if it did there is no indication that it was influenced thereby, for the lightest sentence of the six was imposed against Young. Consequently no prejudicial error is discerned.

11. The record discloses the following personal data as to each accused: Private McClurg, age 22-7/12 years and inducted 9 January 1943; Private Young, 27 years of age, enlisted 14 July 1942; Private Lynch, 25 years old, inducted 9 January 1943, Private First Class Roberts, 24 years of age and inducted on 20 August 1942; Private First Class Wideman, age 36, inducted 21 September 1943; Technician Fifth Grade Riley, 35 years old, inducted on 20 July 1942. The record discloses prior convictions against the following accused: Private McClurg, absence without leave from 20 July 1944 to 7 September 1944; Private Lynch, absence without leave from 27 December 1944 to 2 January 1945 and drunk and disorderly in public on 15 January 1945; Private Young, absence without leave from 3 September 1943 to 12 September 1944.

12. The court was legally constituted and had jurisdiction of each accused

and of the offenses. No errors injuriously affecting the substantial rights of any of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings and sentences as approved by the reviewing authority. Both rape and assault to commit rape are recognized as offenses of a civil nature and so punishable by penitentiary confinement by Sections 278 and 276, Criminal Code of the United States (18 U.S.C.A. 457 and 455) respectively.

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

(Sick in hospital), Judge Advocate
Itimous T. Valentine

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

John F. Fontron, Judge Advocate
John F. Fontron

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
12 September 1945

Board of Review
CM IBT 690

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| UNITED STATES<br><br>v<br><br>Technician Fifth Grade Isaac Walker, 34791260, 4155th Quartermaster Truck Company | BASE SECTION, INDIA BURMA THEATER<br><br>Trial by GCM convened at Calcutta, India, 17 August 1945. Confinement at hard labor for 6 months. Forfeit $18.65 per month for 6 months. IB Stockade No. 1, Kanchrapara, India. |

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

1. The record of trial in the case of the soldier above named has been examined in the office of The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, India Burma Theater, and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Assistant Judge Advocate General.

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

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

Specification: In that Technician Fifth Grade Isaac Walker, 4155th Quartermaster Truck Company, did, at Calcutta, India, on or about 12 July 1945, wrongfully take and use without consent of the owner a certain automobile, to wit: a Truck, tractor trailer #9912, property of the United States, of a value of more than Fifty Dollars ($50.00).

CHARGE II: (Finding of not guilty)

Specification: (Finding of not guilty)

The court found accused guilty of the Specification of Charge I, except the

words "#9912", of the excepted words not guilty, and guilty of Charge I. Accused was sentenced to be confined at hard labor at such place as the reviewing authority may direct for six months and to forfeit $18.65 per month for a like period. The reviewing authority approved the sentence and ordered it executed. The result of trial was promulgated in General Court-Martial Orders No. 11, Headquarters Base Section, India Burma Theater, 25 August 1945.

3. The prosecution's evidence pertinent to the offense of which accused was found guilty may be summarized as follows:

On the night of 11, 12 July 1945 accused was on duty as a truck driver at "B" motor pool, King George Docks (Calcutta, India). It was usual for a driver to have one trip ticket upon which he recorded all the trips which he made during the night. Accused was assigned truck #9351 in which he made several trips (R. 7, 8, 9, Ex. 1). His trip ticket did not show any trips to Cossipore. Corporal Nash and Sergeant Johnson were on duty as dispatchers during the night and they denied that accused was directed at any time to go to Cossipore with a tire for another truck (R. 7, 9). Truck #9912 was assigned to the motor pool and is property of the United States of a value of greater than $50.00. Corporal Nash testified that he did not dispatch anyone in truck #9912 and had no reason to believe that it went out that night (R. 9). At about 2400 hours Private First Class Antoine saw accused in truck #9951 at Kidderpore (a district of Calcutta). He testified that that truck had been assigned to accused at 1800 hours by Corporal Nash (R. 10). He also saw accused at Kidderpore at 0215 hours (R. 15, 16). After being warned of his rights under the 24th Article of War, accused made an extra-judicial statement which was introduced in evidence as Exhibit 3. In this he said that he relieved the regular dispatcher for a time during the night and around 2200 hours a soldier called in stating his truck was broken down with a flat tire at Cossipore. Accused told him they would come to fix it. This conversation was reported to the sergeant in charge and he stated someone would be sent up to fix it later. About 0115 hours accused told the sergeant he would take the tire to Cossipore and the sergeant replied that it was "OK". Accused left the motor pool in the truck dispatched to him for the night, #9351, with the tire but was unable to find the disabled truck. On the way back to the motor pool he was stopped on Circular Road by two Indians who told him a truck was broken down around the corner and they directed him to a place where ten or twelve Indian policemen were gathered. Private First Class Antoine came up behind him in another truck while the Indians were talking to him. The policemen tried to get accused and Antoine to go to police headquarters but both declined as they "had done nothing". One policeman jumped on the truck of accused as he started to drive off but when accused suddenly applied his brakes, the policeman fell off. Accused then returned to the motor pool (Ex. 3).

4. The accused, on being warned of his rights under the 24th Article of War, elected to remain silent (R. 18). Corporal Nash, called as a defense

witness, testified that on the night of the alleged offense there was no truck in the motor pool bearing number 9951 and that he did not know whether the trucks bearing number 9351 and 9912 had been painted following the offense (R. 18).

5. Accused has been charged with wrongfully taking and using without the consent of the owner a truck tractor trailer No. 9912, property of the United States, of a value of more than $50.00. The evidence reveals that accused took and used either truck No. 9951 (R. 10) or No. 9351 (R. 8; Exhibits 1, 3). There is no evidence whatsoever that he took and used truck No. 9912.

In CM IBT 380, Yacavone (IV Bull. JAG, p. 180), we stated:

"It is a fundamental principal of law that the prosecution must prove the taking by accused of the identical thing charged in the specification to have been stolen (36 C.J. p. 850). Thus, a conviction for larceny is wholly unsupported by evidence which shows that accused took and carried away, from a different place from that charged in the indictment, similar, but entirely distinct property from that referred to in the indictment (36 C.J. p. 851, note 30 (b)), or, where an animal found in defendant's possession is to be identified by its marks, the identification necessarily fails if there is a material variance (ib., note 33 (a)). * * * Applying this principle to this case, it seems clear that the allegation that accused stole a Thompson sub-machine gun, S 327905, on or about 22 December 1943 is not supported by proof that he stole a Thompson sub-machine gun, SN 372904, in December 1943.

"A court-martial may make findings with exceptions and substitutions as to figures, dates, amounts and other details 'provided that such action does not change the nature and identity of the offense charged' (Par. 78c, MCM 1928; CM 211866, 10 B.R. 147). However, as indicated by the quoted proviso, the authority of a court to make exceptions and substitutions in its findings is subject to the fundamental principle that a court may convict an accused only of the offense of which he is charged or of a lesser included offense or, as otherwise stated, an accused cannot be hailed to court for the commission of one crime and there convicted of another (State v. Ferguson, 191 N.C. 668) and a conviction cannot be sustained upon a different theory than that on which the case has been tried (State v. Mason, 98 Vt. 363). The accused in this case was brought to trial and the prosecution proceeded on the theory that the accused stole a particular machine gun on or about a particular date. The accused presumably prepared his defense accordingly. The state failed in its proof of the specification but did present evidence tending to prove that the accused stole a different machine gun sometime during the month in question. The proof manifestly was inexplicably at variance with the allegations of the specification and the court, in an apparent attempt to

obviate the variance, acquitted accused by exceptions and substitutions of the theft of the Thompson sub-machine gun described in the specification but found him guilty of the theft of an unidentified Thompson sub-machine gun. The substituted finding necessarily referred to the theft of a gun other than that described in the specification and was not based on the theory of guilt under which the case was tried. It was, in effect, a finding of guilty of an offense not charged. It follows the finding was illegal (Sec. CM 128088, Lee)."

In the case presently before us accused has been charged with wrongfully taking and using property without consent of the owner, while in the Yacavone case accused was charged with larceny. However, we are of the opinion that the principle involved is identical.

It is to be noted that in the Yacavone case the descriptive matter concerning the property alleged to have been stolen was averred directly while in this case the descriptive matter has been averred under a videlicet. We deem this of no consequence. It has been held in civil jurisdictions that the object of a videlicet is to point out that the pleader does not undertake to prove the precise circumstances as alleged and does not bind the pleader to an exact recital where it is not otherwise required but relieves him from the necessity of proving a nonessential descriptive averment. However, as stated in Wharton's Criminal Evidence, Volume II, page 1916, if what precedes be matter of direct averment and material, then what is stated under the videlicet will be deemed material and traversable, and if traversable it must be proved. In Corpus Juris Secundum, Vol. 42, page 1267, it is stated:

"However, where an allegation is descriptive of the identity of that which is essential to the charge in the indictment, whether it be necessary or unnecessary or more or less particular, such allegation cannot be rejected as surplusage and must be proved, even though it is pleaded under a videlicet * * * ".

Inasmuch as accused has been charged with taking and using an automobile of a certain number and the prosecution has proved the taking of an automobile of a different number, we believe, applying the principles of the Yacavone case, that the variance between the allegata and probata is fatal. Because of the foregoing we deem it unnecessary to discuss the question as to whether the taking and using of the automobile by accused was wrongful and without consent of the owner.

6. For the foregoing reasons, the Board of Review holds the record of trial legally insufficient to support the findings and the sentence.

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(277)

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

(Sick in hospital), Judge Advocate
Itimous T. Valentine

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

John F. Fontron, Judge Advocate
John F. Fontron

1st Ind.

CM IBT 690 (Walker, Isaac)

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885
c/o Postmaster, New York, N. Y., 14 September 1945.

TO: Commanding General, United States Forces, India Burma Theater, APO 885, U. S. Army.

1. Herewith transmitted for your action under Article of War 50½, as amended by the act of 20 August 1937 (Pub. No. 325, 75th Cong.) and by the act of 1 August 1942 (Pub. No. 693, 77th Cong.) is the record of trial by general court-martial in the case of Technician Fifth Grade Isaac Walker, 34791260, 4155th Quartermaster Truck Company, together with the foregoing opinion of the Board of Review constituted in the Branch Office of The Judge Advocate General with the United States Forces in India Burma.

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

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

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

2 Incls:
Record of Trial
Action Sheet.

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(Findings and sentence vacated. GCMO 39, IBT, 19 Sep 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(279)

New Delhi, India
21 September 1945

Board of Review
CM IBT 706 (CT 62)

| | |
|---|---|
| UNITED STATES<br><br>v<br><br>Private Willard J. Stickney, 39087814, 1st & 2nd Storage & Issue Platoons, 69th Medical Depot Company, Base General Depot #2. | SERVICES OF SUPPLY, CHINA THEATER<br><br>Trial by GCM convened at APO 627, % Postmaster, New York, N.Y., 17 August 1945. Dishonorable discharge (suspended), total forfeitures, Confinement at hard labor for 1 year. |

OPINION of the BOARD OF REVIEW
O'BRIEN, VALENTINE, VAN NESS and FONTRON, Judge Advocates

1. The record of trial in the case of the soldier named above has been examined in the office of The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, India Burma Theater, and there found legally insufficient to support the findings and sentence. The record has now been examined by the Board of Review and the Board submits this, its opinion, to The Assistant Judge Advocate General.

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

CHARGE: Violation of the 61st Article of War.

Specification 1: (finding of not guilty)

Specification 2: In that Private Willard J. Stickney, 1st & 2nd Storage & Issue platoons, 69th Medical Depot Company did without proper leave, absent himself from his place of duty at the Medical Supply compounds of Base General Depot #2, Kunming, China, from about 16 May 1945 to about 26 May 1945.

Accused pleaded not guilty to both Specifications and the Charge and was found not guilty of Specification 1 but guilty of Specification 2 of the Charge and the Charge. Evidence of one previous conviction was improperly admitted. Accused was

sentenced to be dishonorably discharged, to forfeit all pay and allowances due or to become due and to be confined at hard labor for 1 year. The reviewing authority approved the sentence but suspended the execution of the dishonorable discharge until the soldier's release from confinement and designated the India Burma Stockade No. 1, Kanchrapara, India, as the place of confinement. The result of the trial was promulgated in General Court-Martial Orders Number 40, Headquarters Services of Supply, United States Forces, China Theater, 1 September 1945.

3. The prosecution's evidence pertinent to Specification 2 of the Charge is as follows:

Master Sergeant Leon D. Poplaski testified that he was Acting First Sergeant of the 1st and 2nd Storage and Issue Platoons, 69th Medical Depot Company, and Chief Clerk in the Medical Supply Section (R. 8); that accused is a member of the 69th Medical Depot Company; that the mentioned platoons operated as a separate organization until 15 June 1945 and that Captain Charles L. Gornall was the Section Commander; that the entry dated 21 May 1945 in the duplicate copy of morning report showing accused "dy to AWOL as of 16 May 1945" (Pros. Ex. 3) and the entry dated 28 May 1945, showing accused "AWOL to Conf." (Pros. Ex. 4) were prepared by the witness; that the purported signature of Captain Charles R. Gornall which appears on the morning report of 21 May 1945 was in fact signed by Lieutenant Chandler S. Briggs, whose initials it bears; that the morning report of 28 May 1945 was signed by Captain Gornall; that Lieutenant Briggs is the Warehouse Officer in the Medical Section, Base General Depot No. 1, and assumes Captain Gornall's duties as Company Commander in the latter's absence; that the morning report of 16 May was signed by Captain Gornall; that those of 17 May to 21 May, inclusive, were signed by Lieutenant Briggs (apparently in the manner above indicated) and that those of 22 May to 28 May, inclusive, were signed by Captain Gornall (R. 7-10).

The extract copies of the mentioned morning report entries of 21 May 1945 and 28 May 1945 were received in evidence, over objection by the defense, as Prosecution's Exhibits 3 and 4.

Sergeant William R. Wain, 1211 Military Police Company, testified that on 26 May 1945, in response to a telephone call, he "picked up" accused at Hostel No. 6; that accused was lying on a cot and did not answer when asked his name; that accused was taken to the stockade (R. 13, 14).

Captain Charles L. Gornall, 69th Medical Depot Company, testified that between 0800 and 0830 hours, 16 May 1945, as he

was on his way to work in a jeep, he saw accused riding in a weapons carrier away from the Depot. The witness inquired of his chief warehouseman, a sergeant, where accused was working that day and whether he had been given time off and was told that he was working with the carpenters and had not received time off. The witness "checked" with his head carpenter, who said accused had been to work that morning but disappeared. Accused did not report to and was not present with his organization from 16 May 1945 to 26 May 1945. The witness did not give him permission to be absent (R. 15, 16). Prosecution's Exhibit 3 bears Lieutenant Briggs's initials on the witness's "signature". Prosecution's Exhibit 4 bears the witness's signature (R. 17).

4. The defense introduced in evidence as Defense Exhibit A, without objection by the prosecution, a certificate dated 21 July 1945, signed by Captain Anthony E. Coletti, MC, Neuropsychiatrist, stating, in substance, that although accused does not have any mental deficiency or derangement and knows right from wrong and is able to adhere to the right, he is a constitutional psychopath, "inadequate personality, with chronic alcoholism"; that he was unable to adjust himself in civilian life and will be unable to do so in the military service; that he will not benefit from punishment and that "frank mental illness" may be precipitated thereby; that discharge under the provisions of Army Regulations 615-368 is recommended (R. 18).

Accused, on being advised of his rights, made an unsworn statement which was not pertinent to the specification of which he was found guilty (R. 19, 19a).

5. It affirmatively appears that the morning report of 21 May 1945 was not signed by the commanding officer of the reporting unit or by an officer designated by him, as required by paragraph 43, Army Regulations 345-400, 3 January 1945. The admissibility of a morning report as an exception to the hearsay rule is based on the principle that the officer making it had the duty to know the matter stated and to record it (par. 117a, MCM 1928). This clearly requires the signature of the proper recording officer and not the mere signing of his name by another officer. As the original morning report of 21 May was not properly executed, neither it nor the certified extract copy of the entry pertaining to accused (Pros. Ex. 3) was admissible.

Notwithstanding the inadmissibility of the morning report, we believe accused's absence as alleged was proved by competent

evidence of a compelling nature. The testimony of accused's Commanding Officer, Captain Gornall, shows that he saw accused at about 0800 hours, 16 May 1945, under circumstances indicating that accused was absent from his duties. Captain Gornall accordingly investigated in order to learn where accused was supposed to be working and whether he had been given time off. He was unable to find accused and stated categorically that accused did not report to and was not present with the organization from 16 May 1945 to 26 May 1945 and that he did not give him permission to be absent. The evidence further shows that accused was apprehended on the latter date. The testimony as to what Captain Gornall was told by the chief warehouseman and head carpenter in the course of his investigation was hearsay and of no probative value. However, his testimony as a whole shows that he had direct knowledge of facts indicating that accused was absent without leave and that he personally investigated the matter and searched for accused. His statement that accused absented himself without leave on the date alleged was, therefore, based on his knowledge of the facts. Although it appears that Captain Gornall was not present with the organization during all the period of alleged absence, the condition of absence without leave having once been shown may be presumed to have continued until, as in this case, it was terminated by apprehension (par 130a (p. 143), MCM 1928). Accused having been absent without leave from his organization during the period alleged, he was, necessarily, absent from his duties as alleged.

6. The specification of which accused was found guilty alleges that accused "did without proper leave, absent himself from his place of duty at * * * from about 16 May 1945 to about 26 May 1945". This hybrid form of pleading does not conform to any of the model specifications set out under Article of War 61 in Appendix 4 of the Manual, nor is the offense one of those expressly designated under Article of War 61 in the Table of Maximum Punishments (par. 104c, MCM 1928). The question therefore arises whether it alleges an offense so closely related to absence without leave from command, quarters, station or camp that it is punishable as such or whether it alleges one of those less closely related offenses described in the first part of Article of War 61 (failure to repair, quitting duty) to which the limitations prescribed by the Table of Maximum Punishments still applies (see Bull. No. 57, Sec. I, WD 1942; Cir. No. 9, Sec. III, WD 1943). If it alleges one of the latter types of offenses, the sentence herein is excessive. The only precedent we can find for the use of a similar specification is not helpful as the accused therein was an officer and the Table of Maximum

Punishments did not apply (CM 234591, 21 B.R. 61).

As indicated by the discussion of Article of War 61 in paragraph 132 and by the model specifications in Appendix 4 of the Manual, the offenses to which the Table of Maximum Punishments still applies (failure to repair, quitting duty) are characterized by a quitting or failure to repair for a particular scheduled or routine duty. On the other hand, the offense of absence without leave from command, quarters, station or camp is characterized by an abandonment of all duties, usually for a substantial period of time. We believe that the specification of which accused was found guilty is not reasonably susceptible of being construed as charging that he was absent from a particular scheduled or routine duty only. The inclusion in the pleading of the allegation as to the period of time involved in the absence and the exclusion of any reference to a particular duty is significant in this respect. Instead, in our opinion, the specification fairly charges an abandonment of all duties for a substantial period and is so closely related to absence without leave from command, quarters, station or camp that it must be considered tantamount thereto and punishable as such.

7. There was improperly introduced, without objection by the defense, evidence of one previous conviction for offenses committed more than one year prior to the commission of the offense of which accused was found guilty. Although this is not considered fatal error, the inadmissible evidence may have influenced the court in determining the sentence imposed. The record of trial can be purged of any possible effect of the error by a remission of part of the sentence by the reviewing authority (SPJGJ 1944/4686,III Bull JAG 186).

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

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

(on detached service), Judge Advocate
Itimous T. Valentine

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

John F. Fontron, Judge Advocate
John F. Fontron

New Delhi, India.
17 October 1945

Board of Review
CM IBT 725

| | |
|---|---|
| UNITED STATES<br><br>v<br><br>First Lieutenant Francis L. Colburn, 0918602, Army of the United States, Assigned to Headquarters, United States Forces, India Burma Theater. | BASE SECTION, INDIA BURMA THEATER<br><br>Trial by GCM convened APO 465, % Postmaster, New York, N. Y., 5, 6 September 1945. Dismissal, total forfeitures, confinement at hard labor for 5 years. |

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

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

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

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

Specification: In that First Lieutenant Francis L Colburn, AUS, assigned to Headquarters United States Forces, India Burma Theater, did, at or near Katpadi, India, on or about 2 September 1944 feloniously embezzle by fraudulently converting to his own use Rs. 7,375/- (Seven thousand three hundred and seventy-five rupees), lawful monies of the Government of India, of the value of Rs. 7,375/-, the property of Army Exchange Service, entrusted to him by the said Army Exchange Service, for the purchase of curios and novelty merchandise.

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

Specification 1: In that First Lieutenant Francis L. Colburn, AUS, assigned to Headquarters United States Forces, India Burma Theater, having been entrusted with funds in the sum of about Rs. 8,000/-(Eight

thousand rupees), by Army Exchange Service for the purchase of curios and novelty merchandise, did, at Calcutta, India, on or about 10 September 1944, wrongfully, wilfully and with intent to deceive the said Army Exchange Service, and with intent to fraudulently conceal from the said Army Exchange Service, a shortage of funds then existing, falsely make a certain Purchase Order for and on behalf of the said Army Exchange Service to wit:

"PURCHASE ORDER
UNITED STATES ARMY EXCHANGE SERVICE No. 394
GENERAL DEPOT NO. 2-SUPPLY OFFICE
HINDUSTHAN BLDG. CALCUTTA.

Phone Cal. 7080
Extension 103

Triplicate Date 1st September, 1944

To. Arcot Mission Industrial Institute,
Katpadi, N. Arcot, India.
Attn: Rev. B. Rottschaefer.

Make invoices in TRIPLICATE to: Army Exchange Service, Supply Office, Hindusthan Bldg. Calcutta.

Delivery to be made by rail to U. S. Army Exchange Service, Howrah Station, Calcutta. Terms n/15 R.O.G. (This order paid for on 1/9/44)

Please Supply the following:

| QUANTITY | UNIT | ITEM | UNIT COST | TOTAL |
|---|---|---|---|---|
| 100 | pr | Full Elephant Book Ends | 15 | 1500 |
| 100 | ea | Elephant Lamp Stand | 18 | 1800 |
| 100 | ea | Carved Collection Plate | 13 | 1300 |
| 100 | ea | Carved Fruit Bowl | 16 | 1600 |
| 50 | ea | Bell Elephant | 20 | 1000 |
| 25 | ea | Elephant Blotters | 4 | 100 |
| | | Boxing and Packing | | 75 |

Hand made from rosewood - Show order number on packing cases. Confirmation.

TOTAL 7375
As per your Quotation of by
Ordered by -
/s/ Francis L. Colburn,
THIS SPACE FOR EXCHANGE OFFICE USE ONLY: /t/ Francis L. Colburn,

RR 1368 dt 10.11.44 Inv. dt 1/9/44 - Rs. 7,375/-.

1st Lt. AUS.,
Procurement Officer.

Approved -
ARMY EXCHANGE SERVICE-SUPPLY OFFICE."

The said Purchase Order was then known by the said First Lieutenant Francis L. Colburn to be false and untrue.

Specification 2: In that First Lieutenant Francis L. Colburn, AUS, assigned to Headquarters United States Forces, India Burma Theater, having been entrusted with funds in the sum of about Rs. 8,000/-(Eight thousand rupees), by Army Exchange Service for the purchase of curios and novelty merchandise, did, at Calcutta, India, on or about 10 September 1944 wrongfully, wilfully and with intent to deceive the said Army Exchange Service, and with intent to fraudulently conceal from the said Army Exchange Service, a shortage of funds then existing, falsely make a certain paid Invoice from American Arcot Mission Industrial Institute to wit:

"AMERICAN ARCOT MISSION 157
Industrial Institute

Rev. B. Rottschaefer
Benj. Devries Esq.

Katpadi. S. India.
1 September 1944.

| | | | Unit Cost. | Total Cost. |
|---|---|---|---|---|
| 100 | pr | Full Elephant Book Ends | 15 | 1500 |
| 100 | ea | Elephant Lamp Stand | 18 | 1800 |
| 100 | ea | Carved Collection Plate | 13 | 1300 |
| 100 | ea | Carved Fruit Bowl | 16 | 1600 |
| 50 | ea | Bell Elephant | 20 | 1000 |
| 25 | ea | Elephant Blotters | 4 | 100 |
| | | Boxing and Packing | | 75 |
| | | | TOTAL RS: | 7375 |

ARCOT MISSION
Paid CMJ PAID.
Industrial Institute
18 R.R. No. 1368 d/-10.11.44."

The said Invoice was, as he, the said First Lieutenant Francis L. Colburn then well knew, falsely made and untrue.

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

Specification 1: In that First Lieutenant Francis L. Colburn, AUS, assigned to Headquarters United States Forces, India Burma Theater, did, at Calcutta, India, on or about 1 September 1944 wrongfully and wilfully submit to the Army Exchange Service a false paid Invoice for the amount of Rs. 321/6/-, (Three hundred and twenty-one rupees and six annas), which Invoice was known by the said First Lieutenant Francis L. Colburn to be untrue, with the intent to deceive the said Army Exchange Service, and which Invoice was in words and figures as follows:

"AMERICAN ARCOT MISSION
Industrial Institute

Rev. B. Rottschaefer
Benj. Devries Esq.

Katpadi. S. India.
1 September 1944.

| | | Rs. | as. |
|---|---|---|---|
| | 1 pr. full elephant book ends | 15. | |
| | 1 elephant lamp stand | 18. | |
| | 1 collection plate | 13. | |
| | 1 inlaid table | 52. | |
| ARCOT | 1 fruit bowl | 16. | |
| MISSION | 1 adjustable book end | 41. | |
| Paid CMJ | 1 peg table | 6. | 8. |
| Industri- | 1 adyat table | 7. | 8. |
| al Insti- | 1 standing elephant | 8. | 8. |
| tute | 1 elephant blotter | 4. | |
| | 1 pipe | 7. | 8. |
| | 1 kneeling elephant | 7. | 8. |
| | 1 bell elephant | 20. | |
| | 1 pr elephants 7 gong | 87. | |
| | 1 nut bowl & mallet | 8. | 8. |
| | Boxing | 9. | 6. |
| | Total Rs: | 321. | 6. |

EXHIBIT RR, FOLIO 117, Page 18
/s/ PJW."

The said Invoice was, as he, the said First Lieutenant Francis L. Colburn, then well knew, falsely made.

Specification 2: In that First Lieutenant Francis L. Colburn, AUS, assigned to Headquarters United States Forces, India Burma Theater, having been entrusted with funds in the sum about Rs. 8,000/-(Eight thousand rupees), by Army Exchange Service, for the purchase of curios and novelty merchandise, did, at Calcutta, India, on or about 10 November 1944, wrongfully, wilfully and with intent to deceive the said Army Exchange Service and with intent to fraudulently conceal a shortage of funds then existing, cause to make a false Receiving Report to wit:

"BENT WAREHOUSE
RECEIVING REPORT

Vendor Arcot Mission
Delivered to A.E.S.Hindusthan Building.
Order No. 394 From By Date 10.11.44.

| Cases. | Units per Case. | Total Units | Unit | Description | Unit Cost. | Total Cost. | Unit Sell. | Total Sell. |
|---|---|---|---|---|---|---|---|---|
| 2 Cases | | 100 | ea | Carved Collection Plates | 13 | 1300 | 15 | 1500 |
| | | 100 | " | " Fruit Bowls | 16 | 1600 | 18.8. | 1850 |
| | | 50 | " | Bell Elephants | 20 | 1000 | 23. | 1150 |
| | | 100 | pr | Full Elephant Book Ends | 15 | 1500 | 17.4. | 1725 |
| | | | | | | 5400 | | 6225 |

1/11 FRC

Pfc L.C.Bobsien L.1967C. Serial No.1368"
Checker

The said Receiving Report, was as he, the said First Lieutanant Francis L. Colburn, then well knew, falsely made.

Accused pleaded not guilty to all charges and specifications and was found guilty of all charges and specifications. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for five years. The reviewing authority approved the sentence and, pursuant to Article of War 48, forwarded the record of trial to the Commanding General, United States Forces, India Burma Theater, who confirmed the sentence. The order directing execution of the sentence was withheld and the record of trial was forwarded to this office pursuant to Article of War 50½. The forwarding letter indicates that a United States Disciplinary Barracks will be designated as the place of confinement.

3. This case has been the subject of a very comprehensive review by the Theater Judge Advocate. Part of that review is adopted, with appropriate modifications, in this review.

4. The evidence for the prosecution shows that accused is assigned to Headquarters, United States Forces, India Burma Theater, APO 885, and attached to Headquarters, Base Section, APO 465 (R. 12, Pros. Ex. 7), and at the time of the events herein involved was an assistant procurement officer of the Army

Exchange Service. On 18 August 1944, accused acknowledged receipt from the Accounting Department, Army Exchange Service, China Burma India Theater, of five bank drafts totaling Rs 25,000/- "to be used for the purchase of Army Exchange merchandise" (Pros. Ex. 1; R. 11).

The American Arcot Mission Industrial Institute, hereinafter referred to as Arcot, is a trade school located at Katpadi, India, which, in connection with its other activities, manufactures furniture and curios. Reverend Bernard Rottschaefer is in charge of Arcot (R. 32). On 1 September 1944, the accused, who was on his first visit to Arcot, and had not previously met Reverend Rottschaefer, purchased and paid in cash for sample curios in the amount of Rs 141/6 (Pros. Ex. 18; R. 33). He also placed an open order and advanced Rs 5,000/- for undesignated numbers of certain curios, which order was confirmed by Purchase Order No. 395 (Pros. Ex. 4; R. 33) inclosed in letter dated 15 September 1944 (Pros. Ex. 17; R. 32). The accused placed no other order for samples and paid no other sum on 1 September 1944 and at no time placed orders for or made advancements on or paid for goods totaling Rs. 7,375/- or Rs 321/6 (R. 34, 35).

On 7 June 1945, Major Ward, Chief of the Army Exchange Service Accounting Section, India Burma Theater, made a recapitulation and audit of the Arcot account (Pros. Ex. 2; R. 12). The Arcot account showed that on Purchase Order No. 394 (see Specification 1, Charge II), dated 1 September 1944, and signed by the accused (Pros. Ex. 3; R. 13), an advance was made to Arcot in the amount of Rs 7,375/-, which includes a Rs 75/- item for boxing and packing, and that on Purchase Order No. 395, signed by the accused and also dated 1 September 1944 (Pros. Ex. 4; R. 13), an advance was made to Arcot in the amount of Rs 5,000/-. This made a total advance of Rs 12,375/- (Pros. Ex. 2; R. 12). The audit of the Arcot account further disclosed an invoice from Arcot dated 1 September 1944 in the amount of Rs 7,375/- (see Specification 2, Charge II). There is an Arcot "Paid" stamp on the invoice and the initials C.M.J. (Pros. Ex. 5; R. 14). This document was used in the preparation of the recapitulation (Pros. Ex 2) giving Arcot credit for Rs 7,375/- (R. 14). The audit disclosed that on 10 November 1944, on Receiving Report No. 1368, dated 10 November 1944, (Pros. Ex. 6; R. 14) (see Specification 2, Charge III) merchandise in the amount of Rs 5,400/- was received against that invoice and against Purchase Order No. 394 and that Arcot was credited with Rs 75/- for packing charges, making a total credit of Rs. 5,475/- (R. 12). The receiving report (Pros. Ex. 6) signed by Private First Class Bobsien has the initials F.L.C. in the accused's handwriting (Pros. Ex. 8; R. 15). The aforementioned Purchase Orders No. 394 and No. 395 were used in the official audits (R. 13). The Army Exchange Service audit further showed a refund on the abovementioned advances, for on 28 March 1945 two checks were received from Arcot, both dated 6 March 1945, one in the amount of Rs 1,900/- and the other in the amount of Rs

1,043/-/3. As of 7 June 1945 the audit disclosed balance due to Army Exchange Service of Rs 605/11/9 (Pros. Ex. 2; R. 12). Subsequent to 7 June 1945 (the date of the audit) additional merchandise in the amount of Rs 605/11/9 was received from Arcot, thus, after adjustment for breakage and shortage, balancing the Arcot account (R. 13).

On 26 September 1944, Master Sergeant Slattery, of the Army Exchange Service Accounting Department, prepared a journal entry voucher from supporting vouchers and invoices (Pros. Ex. 14; R. 23). Arcot is credited with Rs 321/6. Sergeant Slattery prepared this entry from sheet No. 3 of Prosecution's Exhibit 14 (see Specification 1, Charge III). This sheet, a receipted invoice for merchandise totaling Rs 321/6, was given to him by the accused. It is on Arcot stationery, dated 1 September 1944, and is stamped "Paid" with an Arcot rubber stamp. In the latter part of September 1944 the accused prepared and delivered to Sergeant Slattery a recapitulation of expenditures made by accused on his buying trip to South India (2 August 1944 to 7 September 1944) in which the items of Rs 321/6, Rs 5,000/- and Rs 7,375/- are listed as credits (Pros. Ex. 15; R. 26).

On 2 November 1944, Captain Grasty, Acting Chief of Army Exchange Service, China Burma India Theater, issued a letter addressed to Lieutenant Walker, Procurement Officer, directing that buying should cease until overstocks could be determined. A copy of this directive was handed to Lieutenant Walker and a copy was mailed to accused, his assistant (Pros. Ex. 16; R. 28, 29).

On 25 November 1944, Reverend Rottschaefer received a letter from the accused (Pros. Ex. 19; R. 35) wherein reference was made to Purchase Order No. 394 and items thereon. That same day the accused wrote a personal letter to the Reverend wherein he ordered additional merchandise totaling Rs 1,000/- and enclosed a 1,000 rupee note to cover the cost of same. Arcot never received Purchase Order No. 394 dated 1 September 1944 (Pros. Ex. 3), but assumed that was correct (R. 35). No order in the amount of Rs 7,375/- was ever placed (R. 34), neither was the "Paid" Invoice (Pros. Ex. 5) prepared by Arcot nor was Rs 7,375/- ever received in payment. Arcot does not possess a "Paid" stamp and its bills are not prepared on letterheads (as in Pros. Ex. 5), but are prepared on regular bill forms (R. 34). Arcot indicates payment on its invoices by issuing a separate receipt which is stamped with a revenue stamp. Arcot receipts bear a number indicating partial or full payment (R. 42). The items listed on Prosecution's Exhibit 6, the Receiving Report, were never shipped by Arcot (R. 35). Arcot did not prepare the receipted invoice in the amount of Rs. 321/6 dated 1 September 1944 (Pros. Ex. 14).

On 8 or 9 January 1945 Reverend Rottschaefer received a personal letter from the accused sent from New Delhi (Pros. Ex. 21; R. 36, 37) wherein the accused stated that purchasing was temporarily to be suspended and asked that an Arcot check be mailed to him in care of Jagat Narain for the remainder of the account.

On 27 February 1945, the accused sent Reverend Rottschaefer an official letter requesting a recapitulation of shipments and remission of the balance of the account by check made out to Army Exchange Service (Pros. Ex. 22; R. 37). On 28 February 1945, the accused sent Reverend Rottschaefer a personal letter (Pros. Ex. 23; R. 37) wherein the accused stated he had sent two money orders, one for Rs 600/- and one for Rs 300/-, and requested that this amount, Rs 900/-, be included in the refund. The accused also requested that the refund be made by two checks payable to Army Exchange Service, one of Rs 1,900/- and the other for the balance. On 6 March 1945, Reverend Rottschaefer, by letter (Pros. Ex. 24; R. 38), acknowledged receipt of the money and stated he was sending the checks as requested. Reverend Rottschaefer enclosed the two checks in the amount of Rs 1043/0/3 and Rs 1,900/-, respectively (Pros. Exs. 11, 12), and also enclosed a recapitulation of all cash received from Army Exchange Service by Arcot (Pros. Ex. 25; R. 38), a total of Rs.6,900/-. Against the total cash received by Arcot is credited Rs 3,956/15/9 for merchandise delivered plus the two refund checks. Arcot was paid by Army Exchange Service only Rs 3,956/15/9 for merchandise delivered. The check for Rs 1,043/0/3 balances the Rs 5,000/- advance made by Army Exchange Service on Purchase Order No. 395. Arcot never received a cash advance of Rs 7,375/- nor Purchase Order No. 394 (R. 40). On 29 March 1945 the accused sent a personal letter to Reverend Rottschaefer (Pros. Ex. 26; R. 39) wherein he acknowledged receipt of the checks and the recapitulation.

On 15 April 1945, the accused sent a personal letter to Reverend Rottschaefer (Pros. Ex. 27; R. 39) wherein he suggested that an Indian civilian in Army Exchange Service had been manipulating Army Exchange Service accounts. The accused asked the Reverend not to make any statement concerning the accounts because there was an investigation in progress.

Gerald H. Grueba, a civilian employee in charge of the curio section of the Army Exchange Service warehouse, identified a tally in sheet (QMC form No. 489) as bearing his signature and having been made out by him on telephonic instructions from an unknown person at the Hindusthan Building, Army Exchange Service office (Pros. Ex. 13; R. 51). This sheet refers to Purchase Order No. 394 and shows Arcot Mission as the consignor of the merchandise received and the Hindusthan Building as the place of receipt. It was common practice to make out tally in sheets on the basis of calls received from the Hindusthan Building office (R. 51). On

10 November 1944, Private First Class Bobsien, who was in charge of the local procurement section of the Army Exchange Bent Warehouse, made out and signed, on the basis of the mentioned tally in sheet (Pros. Ex. 13), Receiving Report No. 1368 (Pros. Ex. 6) showing receipt at the Hindusthan Building of certain items from Arcot Mission on Purchase Order No. 394, the total cost of such items being Rs 5,400/-/. Bobsien did not see or check the merchandise as "it was taken for granted that it was delivered to the Hindusthan Building" (R. 30). The items shown on the tally in sheet (Pros. Ex. 13) and the receiving report (Pros. Ex. 6) are the same.

On 20 March 1945, the accused wrote a personal letter to Lieutenant Sackman of Army Exchange Service at APO 885 (Pros. Ex. 9; R. 17). Enclosed in the letter was a recapitulation of shipments made against Purchase Order No. 395 (Pros. Ex. 10; R. 17). This recapitulation showed a total shipment of Rs 3,956/15/9 and a check in the amount of Rs 1,043/0/3 (Pros. Ex. 11; R. 18) which was also enclosed. This check added to the merchandise delivered makes a total credit to Arcot to Rs 5,000/-. Also enclosed in the letter was another check signed by B. Rottschaefer in the amount of Rs 1,900/-(Pros. Ex. 12; R. 18). The letter requests that Lieutenant Sackman apply the Rs 1,900/- to balance the other Arcot order (No. 394). The letter also referred to other items not having any bearing in the present case.

Some time in May or June 1945, Captain Backman, Army Exchange Service Warehouse Officer, at Cossipore, Calcutta, at the request of the Criminal Investigation Division, made a search of the Army Exchange Service records for documents. The tally in sheet from which Receiving Report No. 1368 (Pros. Ex. 6) was prepared was found. The merchandise referred to in the report was not found in the warehouse (R. 20, 21). The master register number and serial number 1368 shows a blank (R. 22). Under their warehouse system the merchandise would be there, or, if it had been shipped out, the record of the shipment would have been made. There is no record of the merchandise mentioned in the receiving report ever having been shipped out (R. 23).

On 21 January 1945, after being duly warned of his rights under Article of War 24, the accused was questioned by the Inspector General's Department concerning other dealings in the Army Exchange Service (R. 43). No reference was made by the Inspector General's Department at this time as to accused's own Army Exchange Service and Arcot transactions.

On 25 May 1945, the Inspector General's investigation (which had started 21 January 1945) was continued and this time Lieutenant Colonel Barry, of the Criminal Investigation Division, was also present (R. 45). He was on special assignment for the Inspector

General's office (R. 48). At the second interrogation the accused, without coercion or promise of any kind, voluntarily stated that he did not wilfully retain any money advanced him by army Exchange Service; that the transactions between himself and Arcot were based on the fact that he had been robbed Army Exchange Service money on the train; that when he had boarded the train at Katpadi he was in a compartment filled with many people and including an English lieutenant colonel; that next morning the English lieutenant colonel discovered that his traveling bag had been stolen during the night; that the English officers got off at Bangalore Cantonment; that between the station and Bangalore the accused discovered that his shirt, trousers and a small bag had been stolen; that Rs 8,000/- of Army Exchange money in currency, which was in the trousers, was also gone; that he felt that he would rather make up the money personally rather than go through an investigation and therefore never reported this loss to Army Exchange Service; that he made a report of the loss to the British authorities at Bangalore as soon as he arrived and got little satisfaction; that he had another sum of about ten or twelve thousand rupees of Army Exchange Service money under his pillow in the train and this money was not stolen; that, to cover the loss, he paid a part of it out of his own personal funds (less than the amount of Rs 1,000/-) and wrote out the Purchase Order No. 394, Arcot, in the amount of Rs 7,375/- (Pros. Ex. 3) to cover the amount of the balance until he could repay it; that the Purchase Order was in the Army Exchange Service open order file but was not placed with the vendor because it was fraudulent; that the Arcot invoice (Pros Ex. 5) marked "Paid" with a rubber stamp was prepared by civilian clerk Ramchand who bought the rubber stamp at the accused's request; that the receiving report (Pros. Ex. 6) was made at the warehouse and he initialed it and that the merchandise listed thereon never came into the Army Exchange Service warehouse; that Private First Class Bobsien signed as checker because the accused had requested the warehouse to make out a receiving report; that the money he sent to Reverend Rottschaefer, asking Reverend Rottschaefer to send two checks, was for the purpose of preventing Army Exchange Service from detecting the falsified record; that he had prepared through Ramchand the Arcot invoice (Pros. Ex. 14) in the amount of Rs 321/6/0 and affixed the "Paid" stamp thereon at Calcutta initialing C.M.I. but that this is a true accounting of samples bought and paid for but on a forged receipt which did not come from Arcot; that he had Rs 8,000/- in his handbag on the train; that he personally repaid Rs 1,900/- out of his pocket and that he now owed a balance of Rs 5,475/- (R. 53-65).

Search of records by the officer in charge, military police; by the Rail Transport Officer, Bangalore; by the Railway Sub-Inspector, Bangalore railway station; by the Indian police, Special Branch, Civil Military Station, Bangalore, has not disclosed any

complaint by any American officer on 1 or 2 September 1944, concerning stolen baggage or money on the train en route to Bangalore (Pros. Exs. 30, 31, 32, 34, 35; R. 77). Subba Rao, Sub-Inspector, Bangalore, in charge of Railway Police Station on 1 and 2 September 1944, stated that no such complaint was made to him concerning robbery or Rs 8,000/- or any other sum (Pros. Ex. 33; R. 77).

5. Evidence for the Defense:

In 1944 Lieutenant Walker was in charge of the Procurement Department, Army Exchange Service, and the accused was Procurement Officer under him in the same department. On 2 November 1944, Lieutenant Walker went to New Delhi to report irregularities in Army Exchange Service. He did so on the morning of 2 November 1944. That afternoon he received a letter from Captain Grasty (Pros. Ex. 16) which stated that no new orders should be placed. He then wrote the accused to prepare an analysis, as requested in the letter, but not to stop buying. In December 1944 Lieutenant Walker heard of the investigation of the Supply Department (R. 68-70).

On the night of 1 - 2 September 1944, Lieutenant Colonel E. A. Rieu, I.A.O.C., (British officer) was traveling on the 20.20 train from Madras Central Station to Bangalore Cantonment. He noticed a United States first lieutenant in the lower berth on the opposite side. The colonel was awakened during the night by the light being switched and a British enlisted man who was smoking a cigarette. The colonel did not see this man leave. Upon getting up in the morning he noticed that his Rev-robe suitcase was missing. He searched for but could not find it. He mentioned this to his fellow travelers. His fellow travelers had a look at their own effects but passed no comments. As far as the colonel can remember, accused was dressed when the train arrived at Bangalore. The colonel reported his loss to the rail transportation officer at Bangalore Cantonement and has not, as yet, recovered his baggage (Def. Ex. A; R. 72). Lieutenant Ajnalia, Rail Transportation Officer, Bangalore Cantonment Station, was the man to who Lieutenant Colonel Rieu made the complaint concerning the robbery (Def. Ex. B; R. 73).

Accused's reputation for truth and veracity is excellent. The accused worked for Montgomery Ward in a responsible position, handling large sums of money for eight and a half years (R. 71, 72).

The accused, upon being advised of his rights, elected to take the stand in his own defense and make a sworn statement (R. 73) The accused denied having embezzled Army Exchange Service money but stated that Rs 8,000/-, approximately, had been stolen from his small bag on the train the night of 2 September 1944. This bag was hooked in the compartment; that he mentioned this fact to some British authorities, one of the Indians at the station,

but not to any one else; that he was alone when he discovered the loss; that the documents mentioned in Charges II and III were fraudulent in that they were made to give him time to repay the additional money, the difference between the amount already paid and what was stolen; that he wrote to the Reverend Rottschaefer (Pros. Ex. 27) asking him to be non-committal during any investigation; that after the investigation had started he was making arrangements to have money sent to him from the United States in order to repay the loss (R. 73-76).

6. As to Charge I, the embezzlement, the Manual for Courts-Martial defines embezzlement as the fraudulent appropriation of property by a person to whom it has been lawfully entrusted (Par. 149h, MCM). In discussing the embezzlement it is necessary that we also consider the other charges and specifications, i.e., the false vouchers etc., for these derelictions flow from the embezzlement in causal connection.

The facts in evidence are voluminous and the figures complicated but when stripped of all non-essentials it appears the prosecution proved that the Army Exchange Service lawfully entrusted to the accused Rs 25,000/- for purchasing curios. From this amount the accused used part for purchases from Arcot. This was in compliance with the authority granted to him. As was proved by the testimony of Reverend Rottschaefer, Arcot received an actual advance in the sum of Rs 5,000/- and actual cash paid in the sum of Rs 3,956/15/9 for merchandise delivered to Army Exchange Service under Purchase Order No. 395. The prosecution then showed that, at the same time and unbeknown to Arcot, the accused submitted to Army Exchange Service a second, and fraudulent, Purchase Order No. 394 in the amount of Rs 7,375/- supposedly an advance made to Arcot for purported merchandise. Shortly thereafter, on 2 November 1944, the accused was notified by his Army Exchange Service superiors that all purchasing should stop. The accused then found himself in a predicament since the Rs 7,375/- "purchase - advance" was already on the Army Exchange Service books. On 10 November 1944 he prepared a fraudulent tally in sheet and a receiving report in the amount of Rs 5,400/- (to be applied to Purchase Order No. 394). An additional Rs 75/- was credited as packing adjustments. Thus, there was a book balance of Rs 1,900/- on the fraudulent "purchase - advance" of Rs. 7,375/-. On 25 November 1944 in a personal letter to Reverend Rottschaefer the accused referred to Purchase Order No. 394 (the order about which Arcot knew nothing) and advanced Rs 1000 in cash on an additional order for merchandise totaling that amount in cost. On 28 February 1945, the accused sent Reverend Rottschaefer two money orders totaling Rs 900/-, this sum to be added to the Rs 1,000/- already sent, making a total of Rs.1,900/-. He then requested the Reverend Rottschaefer to send two checks, one in the amount of Rs 1,043/-/3 to cover the legitimate order No. 395 (this

sum being the difference between Rs 3,956/15/9, the value of the goods actually shipped by Arcot, and Rs 5,000/- advance actually made to Arcot) and the other check, in the amount of Rs 1,900/- (to cover the balance of the fraudulent advance under Purchase Order No. 394). In this way the Arcot account would balance on the Army Exchange Service books. The accused then sent these checks (together with a recapitulation) to Lieutenant Sackman with instructions to apply the amounts to the Arcot account. Thereafter, the accused sent Reverend Rottschaefer a letter requesting him not to make any statements in the event of an investigation.

At an Inspector General investigation in January 1945 the accused did not mention these fraudulent documents nor his loss of Rs 8,000/- even though the Inspector General was investigating Army Exchange Service affairs. At a continuation of the Inspector General investigation in May 1945, however, the accused then did admit that he had prepared and submitted the fraudulent documents (now enumerated under present Charges II and III) but stated that about Rs 8,000/- were stolen from him on the train, the night of 1 - 2 September 1944 at which time a British lieutenant Colonel also lost some of his baggage.

When, during the trial, the accused took the stand under oath in his own defense, he reiterated that the submitted documents were fraudulent, that the Rs 8,000/- had been stolen on the train and that he had reported the loss to some Indian officials at Bangalore. The defense submitted a stipulation indicating that Lieutenant Colonel Rieu, I.A.O.C., did lose his baggage that night and reported the loss. The prosecution then submitted several stipulations which indicated that there was no record of a report of any loss by the accused.

As in other criminal cases, the burden of proving all the elements of the crime of embezzlement rests on the prosecution (29 C.J.S; 730). It is believed that the prosecution has proved a prima facie case, for if a person had received money and renders a false account concealed appropriation is implied. The fraudulent appropriation is inferred from the facts. Falsification of accounts is peculiarly significant as evidence from which fraud can be inferred (Wharton's Criminal Law, 12th Ed. Vol. 2, Sec. 1279) i.e., the inference that a person has embezzled property by fraudulently converting it to his own use can be drawn from the fact that he has not paid the money or delivered the property in due course to the owner and from the fact that he has not accounted for the money which he has received (Ibid). The evidence establishes receipt by the accused, in his fiduciary capacity, of money for which he did not account. It has been held: "The circumstances under which the monies were received, the failure of accused to account therefor, his concealment of the shortage, and his statements that he intended to make good the loss and knew that the erroneous

entries * * * tending to conceal the shortage were false, left no reasonable alternative to the court other than to conclude that, as charged, the monies were fraudulently converted by accused to his own use. Embezzlement in violation of the 93rd Article of War is established beyond reasonable doubt" (CM 206323, Schneider, 8 B.R. p. 267; CM 236974, Barksdale, 23 B.R. p. 199).

Since the prosecution has made a prima facie case of embezzlement, as by proving facts which give rise to a presumption in its favor, it becomes incumbent on the accused to adduce evidence in denial or explanation of the incriminating circumstances (29 C.J.S. 730; Wharton's Criminal Evidence, 11th Ed., Vol. 2, Sec. 889). The only explanation that the accused makes is that the money was stolen from him on the train. Close scrutiny of this story reveals some very pertinent inconsistancies. The accused, in his explanation to the Inspector General, gives two versions as to where the Rs 8,000/- was kept. First, that it was kept in his pants, and second, that it was kept in his hand bag. (The other and larger sum he had prudently hidden under his pillow.) In court the accused reiterated that the money was in his hand bag. He then states that his pants and shirt were stolen and that he did not notice the theft until after the British officer had left the train. However, during the trial, the accused submitted a stipulation which states that the British officer, before leaving the train, noticed the accused was dressed and that the accused had made no remarks concerning any theft of the accused's effects. This fact is very significant. It seems strange that when a theft is reported by a fellow traveler in a small railroad compartment that the accused, who had a great deal of money in his possession, should not immediately have checked to see if his money was gone. It seems even more strange that the accused should be seen dressed (when he states his pants and shirt had been stolen) and yet that he should not discover any theft of his belongings until after his fellow traveler had departed. Again, the British officer's complaint to police authorities of a theft is on the records whereas the accused's complaint is not. The court has chosen to disbelieve the accused's explanation. It should be remembered that "The defendant in a criminal prosecution is presumed to be innocent until proven guilty, but when he goes on the witness stand his testimony must be viewed as that of any other witness. If he is in a position to be biased, or if his interests would naturally lead him to depart from the truth, his testimony must be viewed with the same caution as that of any other prejudiced person * * *" (Wharton's Criminal Evidence, 11th Ed., Vol. 2, Sec. 878).

The defense further contends that the accused was showing his good faith inasmuch as he had already contributed Rs 1,900/- of his own money as restitution and intended to make arrangements to repay the balance. However, the return of the amount of the

fund or his intent to return it does not tend either to negative or to excuse the offenses charged (28 Fed. Dig. 313; 20 C.J. 437).

In addition to presenting the actual documents in court, the prosecution also presented evidence in the nature of an audit of the Army Exchange Service books. Such secondary evidence by an accountant or auditor is admissible in these cases (20 Am. Jur. 399).

The evidence establishing the guilt of the accused as to embezzlement likewise establishes his guilt as to the other offenses charged. The accused, in open court, admitted the fraudulency of the documents. As an excuse for his deeds he stated that he acted thus only with the intention of affording himself time within which to make restitution. The accused in civilian life had been employed by Montgomery Ward and Company, as a regional merchandiser, for 125 stores. In that position he was in charge of purchasing and merchandising departments with a yearly volume of business in excess of $10,000,000. It is incomprehensible that a man with such experience in the business world should falsify accounts merely to enable him to make restitution of monies for whose loss he claims no blame. Even if his relationship with Army Exchange Service superiors was strained, thus resulting in lack of trust, nevertheless, the accused had a golden opportunity to explain all to the Inspector General. He failed to do so in January 1945 and did so in May 1945 only when finally confronted with the overwhelming evidence of his dereliotions. Accused's explanation of his failure to make an immediate report to army officials as his excuse for the false documents was disbelieved by the court and is inconceivable under the circumstances. The intent to deceive is present, the excuses notwithstanding.

7. After arraignment the defense moved for a continuance "until 17 September 1945 due to the fact that /accused/ has secured the services of Captain Myer H. Marcus who urgently desires to defend him and will not be free until the 17th of September". This motion was denied. The record disclosed that the court which tried this case was appointed on 22 August 1945, that charges were preferred on 21 August 1945, that the investigation was completed on 25 August 1945, and that the charges were referred for trial on 25 August 1945 and formally served on accused on 27 August 1945. Accused was given a copy of the charges on 23 August 1945 and he was represented by the regularly appointed defense counsel, Major William G. McIlhiney and Captain Everett W. Held, during the investigation and thereafter. On 25 August 1945 the accused obtained the services of First Lieutenant Thomas K. Smith as individual defense counsel. Lieutenant Smith thereafter participated in the preparations for trial. On 3 September 1945 accused requested that Captain Marcus be detailed as an additional individual defense counsel and on 4 September 1945 was advised by

proper authority that Captain Marcus would not be available until 17 September 1945. It appears that Lieutenant Smith is a practicing attorney with experience as an acting staff judge advocate but had never handled criminal cases. Captain Held had studied law but has not been admitted to practice. Captain Marcus, who appeared only for purpose of the mentioned motion, is a practicing lawyer with experience in criminal cases (R. 8-10).

The arguments of defense counsel in support of the motion clearly reveal that their principal contention was not that accused was not adequately represented or that his counsel had not had time to prepare for trial but, instead, that he was entitled to the additional representation of an attorney possessing special qualifications in the field of criminal practice. It may be conceded for the purposes of this discussion that accused would have been entitled to a continuance under the circumstances of this case if his claim to the services of additional special counsel was well founded. However, we believe it was without merit. Accused was already represented by regularly appointed counsel whom he had accepted and by a special counsel whom he had selected. In Romero v. Squier (63 S.Ct. 982, 133 Fed. 2nd, 528) the accused was represented by military counsel and a civilian lawyer as individual defense counsel. He contended on appeal that he was denied the right of counsel in violation of the Sixth Amendment because his civilian counsel had been excluded from the court during the presentation of certain evidence. The court held:

> "We hold that any Army officer, chosen, as here, by the accused, admitted by a court-martial to practice for him the arts of a military defense, need not also be admitted to practice by some civil court, in which military law may never have had the slightest consideration, to be the 'counsel' in a court martial for which the Sixth Amendment makes a provision. So far as concerns the Sixth Amendment, a court-martial counsel, chosen by the litigant and accepted by that body to prosecute or defend litigation there, is the same kind of officer at bar of that court as is one entitled to practice at the bar of any other court. Cf. Dynes v. Hoover, 20 How. 65, 82, 15 L. Ed. 838.

* * * *

> "Here the accused accepted as his Defense Counsel the military officer, that is, as his principal counsel. It will be noted that the provision of the Article is that he shall have 'civil counsel if he so provides', followed by the disjunctive 'or' and the words 'military [counsel] if such counsel be reasonably available'. The military counsel having been so chosen by him and becoming his 'defense counsel', Article of War 17 gives him no right to a civil associate counsel".

Manifestly, under the principle of Romero v. Squier, supra, the accused in this case had no entitlement to additional individual counsel. It follows that in the absence of a showing that he did not have a reasonable opportunity to prepare a defense, he was not entitled to a continuance. There is no such showing in this case; instead, the record shows without contradiction that accused and his counsel tentatively agreed on 31 August 1945 that trial would commence on 4 September and that on 3 September the date of 5 September was definitely agreed on by all parties. The question of a continuance is one for the sound discretion of the court (see 377 Dig. Op., JAG 1912-40). We find no abuse of that discretion in this case.

This case is distinguishable from CM 281684 (IV Bull, JAG 273) in that accused here was not in confinement, was aware that he was entitled to special counsel and was in fact represented by special counsel.

Although not a part of the record of trial, a letter, dated 14 September 1945, written by accused to the reviewing authority has been examined by the Board of Review. Much of the letter is devoted to criticism of the courts-martial system and arguments on the issue of guilt and matters of clemency. In addition, accused contends that his counsel lacked interest in his case, failed to prepare properly for trial and refused or neglected to introduce evidence suggested by the accused. These matters might properly have been presented to the court at the time of trial. Accused does not point out in what particular his counsel were remiss or what particular evidence was not introduced or how the result of trial might have been affected. No supporting affidavits were submitted and we find no support for his contentions in the record of trial proper. To the contrary, the record indicates that accused was adequately defended. We can give little weight to his complaints in view of their nebulous and untimely character and in view of the compelling nature of the evidence of guilt. His request for clemency is, of course, a matter for consideration by the confirming authority.

8. The defense objection to the introduction of a transcript of the shorthand notes of accused's testimony at the Inspector General's investigation was sustained by the court. Subsequently the trial judge advocate asked the reporter to relate to the court accused's testimony at the investigation, using the transcript to refresh his memory. The defense stipulated that it had no objection to the use of the transcript instead of the notes and withdrew its objection to the reading of the transcript. This procedure, although somewhat irregular, substantially complied with the requirements as to the admission of such testimony on the principle of past recollection recorded (sec. 737, Vol. 3, Wigmore on Evidence, 3rd Ed.). In any event, in view of accused's

testimony at the trial, it is obvious that his substantial rights were not affected (Sneirson v. U.S., 264 Fed. 268).

9. The charge sheet shows the accused as 36-5/12 years of age. He entered active duty on 1 November 1942 and had no prior service. No evidence of previous conviction was introduced.

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

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

/s/ Robert C. Van Ness, Judge Advocate

/s/ John F. Fontron, Judge Advocate

CM IBT 725 (Colburn, Francis L.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o PM, New York, N. Y., 22 October 1945.

TO: Commanding General, USF, IBT, APO 885.

1. In the case of First Lieutenant Francis L. Colburn, 0-918602, Headquarters, United States Forces, India-Burma Theater, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings and sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 725).

/s/ William J. Bacon
/t/ WILLIAM J. BACON
Colonel, J.A.G.D.
Assistant Judge Advocate General.

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(Sentence ordered executed. GCMO 40, IBT, 22 Oct 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India,
9 October 1945.

Board of Review
CM IBT 734

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| UNITED STATES | ADVANCE SECTION, INDIA BURMA THEATER |
| v | Trial by GCM convened at APO 689, % Postmaster, New York, N.Y., on 24 August, 15 and 19 September 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for life. U.S. Penitentiary. |
| Private First Class Arbie L. Pickens, 34501410, 3847th Quartermaster Truck Company. | |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private First Class Arbie L. Pickens, 3847th Quartermaster Truck Company, did, at Yung Ping, China, on or about 11 July 1945, with malice aforethought, wilfully, deliberately, feloniously, unlawfully, and with premeditation kill one Second Lieutenant Paul D. Seghers, a human being, by shooting him with a carbine.

The accused pleaded not guilty to and was found guilty of the Charge and the Specification. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for the term of his natural life. The reviewing authority approved the sentence and designated the U.S. Penitentiary nearest the Port of Debarkation in the United States as the place of confinement. The order of execution was withheld and the record of trial forwarded to this office under Article of War 50-1/2.

3. Evidence for the Prosecution:

The accused, on 10 July 1945, was stationed at Convoy Control Station No. 7, Yung Ping, China (R. 27). On that date two convoys stopped at the station to spend the night. Officers of the convoys were quartered in two tents set side by side and six feet apart, the tents being located on a slope rising from the Burma Road and facing the road some two or three hundred feet away (R. 11, 32, 33, 35, 36). The deceased, Second Lieutenant Paul D. Seghers, was quartered in the tent to the right, his cot being to the left of the entrance at the front of the tent. About 0200 hours, 11 July 1945, someone entered one of the two tents (apparently the one on the right in which the deceased and four other officers were sleeping) in search of a lieutenant with whom he said he had had some difficulty previously that night and with whom he said he wished to straighten things up. Not finding the lieutenant whom he sought, he left the tent and entered the one adjacent (R. 24). This party, who was not recognized by the occupants of the first tent, had been drinking but was not totally drunk (R. 25). The accused entered the second tent (the one on the left) at about 0200 hours on the same morning, awakened Lieutenant Francis E. Burke by shining a light in his face and engaged the officer in conversation concerning some trouble which the two had experienced some time earlier that night. In the conversation the accused, among other things, stated, "I am sergeant of the guard and I thought I would drop in and straighten up the trouble I had with you before * * * we had some trouble and I want to straighten it out, * * * I don't want you going away mad at me". Lieutenant Burke responded that, "You didn't have any trouble with me, soldier, go back to your quarters, we want to get some sleep.* * * Hell, nobody is mad at you, get out of here and let us get some sleep". Thereupon Lieutenant Petrie, who was sleeping in the next cot, told the accused to get out as there were six in the tent who were trying to get some sleep (R. 7). The accused then told Lieutenant Petrie that since he (accused) had been ordered to leave he would have to do so, and he left the tent after telling Lieutenant Burke that he would see him next day (R. 8). During the conversation the accused was squatting down between the cots of Lieutenants Petrie and Burke about two and a half or three feet from the latter's head and held a carbine in his hands. He spoke in a conversational tone and seemed in control of his mental and physical faculties. On leaving the tent he walked in a normal manner although the path to the exit was obstructed. Each of the two officers opined that the accused was sober (R. 8, 9, 15, 16). A minute or so after the accused had left the tent Lieutenant Petrie saw him leaning into his (Lieutenant Petrie's)

jeep which was parked outside facing the tents. The lieutenant called, "Sergeant, what are you doing in my jeep?", to which the accused made some reply that was unintelligible (R. 9, 16). A second or two or perhaps even a minute after this, a shot was fired (R. 16, 26). Footsteps were then heard going down the slope (R. 26) and a few minutes later (the witnesses' versions of the time varying from five to fifteen minutes) a series of three or four shots were fired from down the slope toward the road. In the middle of this series the deceased, Lieutenant Seghers, cried out that he was shot and was found lying on his cot with a hole in his stomach through which his intestines were protruding (R. 10, 11, 17, 18, 26). The wounded officer was started toward Paoshan in an ambulance and given blood plasma by a doctor who had been secured. About halfway to Paoshan he was transferred to another ambulance coming out to meet him. At this time Lieutenant Petrie, at the request of Lieutenant Seghers, handed the latter's dog tags to Lieutenant Scholten, a doctor in the second ambulance, and told the doctor the name of the wounded man (R. 19, 20, 29). Lieutenant Seghers was taken to the 21st Field Hospital by Lieutenant Scholten to whom he gave his name and serial number which checked with his dog tags (R. 88). At the hospital Lieutenant Seghers was prepared for an operation and died on the operating table at about 1200 hours, 11 July. The examination disclosed a wound of the right elbow and one of the epigastrium. The colon of the deceased had been torn and the small bowel perforated six times. Death was caused by shock and hemorrhage due to gunshot wound (R. 89, 90, 93). Both the wound in the right elbow and that in the abdomen were possibly caused by the same projectile which must have been fired from a plane even with or below deceased. A .30 caliber slug was removed from just above the left sacro-iliac joint where it had lodged (R. 90, 92, 94).

Some time subsequent to the shooting, perhaps forty minutes or longer, the accused was found asleep in his tent. His carbine was at the head of his bed with one live shell in the chamber and a smell of gun powder in the bore. A clip about half full of ammunition was found on the floor about ten feet away (R. 30, 31, 35, 37).

After the shooting there was a small hole discovered in the side of the tent by the cot of deceased about one foot and one-half from the ground. The jeep of Lieutenant Petrie had a hole through the rear panel and through the right front side. There was a dent in the instrument panel a bit out of line with the hole in the back (R. 20, 21).

On the morning of 12 July three shell casings from .30 caliber bullets were found on the ground about seventy feet in front of and down the slope from the tent in which deceased had been shot (R. 33, 43, 52). The casings were all within a radius of two feet. They were partially embedded in soft earth, but were still visible and appeared not to have been there long (R. 45, 51).

A ballistics test revealed that the projectile taken from the body of the deceased had been fired from carbine No. 1803421 (R. 82). This carbine had been issued to the accused (Pros. Ex. 10; R. 58) and was the one found at the head of the accused's bunk after the shooting (R. 31, 39). A similar test disclosed that two of the shell cases found seventy feet from the tent were likewise discharged in the same weapon. No conclusion could be drawn as to the third cartridge (R. 83).

4. Evidence for the Defense:

In the early evening of 10 July 1945 the accused, who appeared to have previously had a few drinks, took a drink with some friends and then went to town (R. 98, 104). While in town he consumed more liquor (R. 107) and about 2100 hours, at which time he was pretty "high", started back to his company area (R. 99). On the road back he had an argument with Lieutenant Burke, apparently concerning a jeep (R. 105, 108). He was taken by a military policeman to the tent of Lieutenant Enfield, his commanding officer, at about 2300 hours at which time he was drunk, his clothing was muddy, he talked incoherently and staggered when he walked (R. 61, 66). Before leaving that officer's tent the accused entered the tent and removed a sliver from his finger (R. 63). Two enlisted men escorted the accused back to his quarters where they tried to straighten him out and get him to bed but the accused insisted that he had to visit some friends and left his tent while his two escorts were still there (R. 112, 113, 115). About midnight the accused awakened a friend of his, a Corporal Crowder, and told Crowder to tell the boys back in his company "hello" for him. At this time Crowder thought the accused talked normally (R. 99, 100). From the jungle hammock of Crowder the accused walked over to that in which Sergeant Lunsford was lying, got a quart of vodka from the sergeant and started to drink (R. 105). He told Lunsford that he was going to see the lieutenant and apologize to him. Sergeant Lunsford testified that the accused appeared to be drunk and staggering although he seemed to know what he was talking about. At this time he had a carbine on his shoulder (R. 106-109).

After about fifteen minutes conversation the accused left (R. 108).

The accused had always done his work as he was told and his record of military efficiency was either good or fair. His character was good and his commanding officers had never experienced any difficulty with him (R. 61, 69, 70).

The accused, after being advised of his rights as a witness, elected to remain silent.

5. Although the evidence connecting the accused with the fatal shooting is entirely circumstantial in nature, since no one saw him fire the lethal weapon, it is nevertheless cogent. The search by the accused, who was armed with a rifle, for Lieutenant Burke, even though it may have been inspired solely by a desire to apologize, his entrance into and conversation in the two tents, his exit from the second tent only after having been ordered to do so, the shot fired only a few seconds after Lieutenant Petrie had yelled at the accused as the latter was leaning into a jeep, and the firing, a few minutes thereafter, of three or four additional shots from the direction in which footsteps were heard to go down the slope, are all highly incriminating circumstances. In addition, it was established that the fatal bullet and two of the shell cases found seventy feet down the slope from the tents, were fired from the carbine which had been issued to, and was found in the possession of, the accused. No contention was made that the carbine had been stolen from, or loaned by, the accused and no inference that it was fired by anyone other than the accused may justifiably be drawn from the evidence. The conclusion that the homicide resulted from a shot fired by the accused is inescapable.

An essential element of the crime of murder, and that which distinguishes murder from other culpable homicides, is malice aforethought.

> "Malice does not necessarily mean hatred or personal ill-will toward the person killed, nor an actual intent to take his life, or even to take anyone's life. The use of the word 'aforethought' does not mean that the malice must exist for any particular time before commission of the act, or that the intention to kill must have previously existed. It is sufficient that it exist at the time the act is committed. (Clark)
>
> "Malice aforethought may exist when the act is unpremeditated. It may mean any one or more of the following

states of mind preceding or coexisting with the act or omission by which death is caused: An intention to cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not (except when death is inflicted in the heat of a sudden passion, caused by adequate provocation); knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, any person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not or by a wish that it may not be caused; intent to commit any felony" (par. 148a, MCM 1928, p. 163).

While it can hardly be contended that the accused was motivated by any animus towards the deceased himself as, so far as the record discloses, he neither knew nor had any grievance against the deceased, it was not necessary, under the circumstances of this case, to show the existence of personal enmity toward him. It seems reasonable to hypothesize either that the accused became angered at being ordered out of the tent and away from the jeep or that, after brooding over his real or imagined grievances against Lieutenant Burke, the smouldering and dormant resentment of the accused flared into an active desire to avenge them, and that consequently his shots were directed at one or perhaps even both of the officers with whom he had engaged in verbal altercations. There is no contention that the weapon was discharged accidentally and the number of shots fired, together with the time intervening between them, reasonably precludes any such supposition. The fact that the last three shots, one of which passed through the tent and one or more through a jeep outside, were all fired from the same place, as indicated by the two-foot radius in which the casings were found, supports the postulate that they were fired deliberately. The conclusion is justified that the accused was motivated by hostility toward either Lieutenant Burke or Lieutenant Petrie and that the shots were fired because of his animus. In such a situation the fact that the deadly slug found its mark in an innocent victim rather than in him for whom it was intended provides no defense as to the existence of malice aforethought on the part of the accused as to the former (CM 229638, 17 B.R. 217).

No tenable inference may be indulged that the accused acted in the heat of passion caused by provocation. While he may have been inspired by a real or a fancied grievance against Lieutenant

Burke and may have been aggravated by being ordered out of the officers' tent and away from the jeep of Lieutenant Petrie, nevertheless, such would not suffice to reduce the homicide from murder to manslaughter. No assault upon or threat against the accused by either officer was shown or even suggested. The character of the altercation between the accused and Lieutenant Burke is not disclosed but clearly no physical encounter is indicated. Furthermore, the language of Lieutenant Burke during his conversation with the accused was neither insulting nor abusive, but on the contrary negatived the existence of any actual ill will toward the accused. It violates common sense to construe the attitude of either Lieutenant Burke or Lieutenant Petrie as bellicose or unreasonably censorious. In any event, insulting and abusive words are not adequate provocation (par. 149a, MCM 1928, p. 166; CM 236723, 23 B.R. 105).

Nor would the cause of the accused be aided had it been established that, in truth and in fact, the shots were not intended for any particular individual in either tent. Both tents were occupied by human beings and this fact was well known to the accused. The firing of a deadly weapon toward or in the direction of inhabited dwellings, even if they be merely tents, evinces a wanton disregard of, and reckless indifference to, the safety and lives of the persons therein. Being cognizant that the tents sheltered a number of persons, who at the time were in bed, the accused must have been fully aware that his acts would of necessity endanger and probably cause the death of, or grievous bodily injury to, one or more of them. In Section 325, Volume I, McClain on Criminal Law, page 293, it is stated:

> "So it is [murder at common law] where death results from discharging a fire-arm in the direction of another with reckless indifference to consequences, if the act is likely to result in the death of the person toward whom the shot is fired, or where it is caused by discharging a fire-arm into a crowd of persons with intent to kill some one, or with criminal recklessness * * *".

The only actual defense which the accused attempted to establish was that he was too drunk to form or entertain the specific intent essential to murder. However, the evidence taken as a whole fails to sustain such contention. It is obvious that the accused had, some hours before the shooting, indulged in alcoholic drink and he was described variously as being pretty

"high", drunk, staggering, and talking incoherently. However, at no time is he shown to have lost control of his faculties. At approximately 2300 hours, when he was taken before his commanding officer, he was able to extract a splinter from his finger--a feat requiring a considerable amount of stability and concentration. Approximately an hour thereafter, when he recognized and awakened a friend, he entrusted the latter with a rational message to take back to his old organization. In a conversation had immediately thereafter the accused appeared, in the opinion of Sergeant Lunsford, to know what he was talking about even though he was drunk. From that time until 0200 hours, a period of approximately two hours, the accused dropped from sight and there is no testimony as to his actions or condition during that time. The time elapsing, however, was sufficient for the accused to have thrown off many of the effects of alcoholism, and it may be assumed, in view of the evidence as to his condition at 0200 hours, that he had sobered up to a considerable extent during such time. Both Lieutenant Burke and Lieutenant Petrie testified that the accused was sober during the time he was in their tent. He carried on a coherent conversation in a normal tone of voice. When he left the tent he walked normally without staggering or stumbling over any of the obstructions in the tent. Under all the circumstances the court was amply justified in rejecting the contention that the accused was incapable, because of intoxication, of forming the specific intent required. In the opinion of the Board of Review, the evidence establishes the commission of murder as alleged in the specification of the charge.

6. As part of the prosecution's case Captain Enfield, the commanding officer of the accused, testified that the number of the carbine found at the head of the latter's bed on the night of the shooting checked with that on a list previously prepared. The list referred to was a copy of one prepared for and submitted to the 3874th Quartermaster Truck Company upon its request, and contained the names of personnel of such unit who had gone to China together with the serial numbers of the weapons they had taken with them. It does not appear from what sources such list had been compiled. Nor does it clearly appear who had prepared it. It was not an official document within the provisions of paragraph 117a, Manual for Courts-Martial, 1928, page 121, and not competent to establish that the carbine was that issued to the accused. However, no prejudice to the substantial rights of the accused resulted from the admission of such incompetent testimony as it was later proved by the Individual Equipment Record of the accused (Ex. 10) that the carbine in question had

been issued to him. This latter record is specifically included as one of the exceptions to the general documentary evidence rule set out in the above cited paragraph of the Manual and was clearly admissible in evidence.

7. The charge sheet discloses that the accused was 25-6/12 years of age at the time charges were filed. He was inducted on 20 December 1942 and had no prior service. No evidence of previous convictions was offered.

8. The court was legally constituted and had jurisdiction of the person of accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the sentence. Confinement in a penitentiary is authorized by Article of War 42 for the offense of murder. Murder is an offense of a civil nature and punishable by penitentiary confinement by sections 273 and 275, Criminal Code of the United States (18 U.S.C.A. 452, 454).

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

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

John F. Fontron, Judge Advocate
John F. Fontron

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
9 October 1945

Board of Review
CM IBT 738

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| UNITED STATES | ) ADVANCE SECTION, INDIA BURMA THEATER |
| v | ) Trial by GCM convened at APO 689, % Postmaster, New York, N.Y., 18 September 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 5 years. U. S. Disciplinary Barracks. |
| Private Marion (NMI) Thomas, 39272735, 4276th Quartermaster Service Company. | ) |

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

1. The record of trial in the case of the soldier above named has been examined by the Board of Review established in the office of The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, India Burma Theater.

2. In Specification 2 of Charge I accused is alleged to have stolen Rs 1106/-, value about $334.00, various Indian coins, value about Rs 80/- ($24.00), one iron safe, value about $10.00, and one silver anklet, value about Rs 5/- ($1.21), property of Sunor Ali. The reviewing authority approved only so much of the finding of guilty of this specification as provides that at the time and place alleged the accused did * * * * feloniously take, steal and carry away Rs. 1106/-, value about $334.00, various Indian coins, of some value, one iron safe of some value, and one silver anklet of some value, property of Sunor Ali". In regard to this specification, the evidence shows that accused and two other persons broke open the door of Sunor Ali's shop, entered, and carried away his safe which contained, among other things, Rs 1081/-, of which Rs 700/- were in notes and Rs 381/- "coins and changes", the latter being in a cloth bag. He described "coins" as being silver rupees and "changes" as two, four and eight anna pieces (R. 9, 10, 11, 12). After a careful reading of the record we are unable to find any evidence regarding the

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

alleged theft of the anklet. We therefore are of the opinion, and accordingly hold, that the record of trial is legally sufficient to support only so much of the findings of guilty of Specification 2 of Charge I as approved by the reviewing authority as involves findings of guilty of larceny, at the time and place alleged, of Rs 1081/-, value about $327.54, and one iron safe of some value, property of Sunor Ali. We further find the record of trial legally sufficient to support the findings of guilty of Specification 1, Charge I, and Charge I, and the Specification, Charge II, and Charge II, and legally sufficient to support the sentence.

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

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

John F. Fontron, Judge Advocate
John F. Fontron

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
19 October 1945

Board of Review
CM IBT 742

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| U N I T E D S T A T E S | INTERMEDIATE SECTION, INDIA BURMA THEATER |
| v | Trial by GCM convened at Chabua, India, 3 October 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for 1 year. United States Disciplinary Barracks. |
| Private Charles W. Carroll, 37322007, 152nd Military Police Service Company. | |

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

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

2. As to the Specification, Charge II, and Charge II, alleging, under Article of War 65, that accused used certain insulting and threatening language toward Technician Fifth Grade Glen E. Felmlee, a noncommissioned officer who was then in the execution of his office, there is no evidence that the noncommissioned officer in question was in uniform with the insignia of his rank visible, or that he was addressed as a noncommissioned officer by accused or anyone in accused's presence, or that the circumstances were such that accused had reason to know him to be a noncommissioned officer. "If an accused charged with violations of the 63rd, 64th, or 65th Articles of War does not know that the officer or noncommissioned officer concerned is such, there is no violation of those articles. MCM, pars. 133, 134b; Dig. Op. JAG 1912-30, Supp VII, sec. 1447(1)". (CM 211996, Giddens, 10 B.R. 195)(Also see sec. 423, Dig. Op. JAG,1912-40). Accordingly, the Board of Review holds the record of trial legally insufficient to support the findings of guilty of the Specification, Charge II, and Charge II.

3. The Board of Review finds the record of trial legally sufficient to support the findings of guilty of the Specification

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

of Charge I and Charge I, the Specification of Charge III and Charge III, and Specifications 1 and 2 of Charge IV and Charge IV, and legally sufficient to support the sentence.

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

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

John F. Fontron, Judge Advocate
John F. Fontron

New Delhi, India
2 November 1945

Board of Review
CM IBT 743 (CT 76)

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| UNITED STATES | ) | FOURTEENTH AIR FORCE |
| v | ) | Trial by GCM convened at APO 210 c/o Postmaster, New York, N.Y., 17 September 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for six months. |
| Private Charles M. Chambers 39835407, 1139th Quartermaster Company, 315th Air Service Group. | ) | |

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

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

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

CHARGE I: (Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Pvt Charles M. Chambers, 1139th Quartermaster Company, 315th Air Service Group did, at Hsingching, China on or about 1 August 1945, behave himself with disrespect toward 1st Lt. Frank A. Gisondi, his superior officer by saying to him "The damned officers of the organization have a click", "You are fucking right I'll go to bed", "You are fucking right I'm in arrest of quarters", or words to that effect.

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

Specification: In that Pvt Charles M. Chambers, 1139th Quartermaster Company, 315th Air Service Group, having received a lawful command from 1st Lt. Frank A. Gisondi, his superior officer, to go to bed, did at Hsingching, China on or about 1 August 1945, willfully disobey the same.

CHARGE IV: (Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification 1: In that Pvt Charles M. Chambers, 1139th Quartermaster Company, 315th Air Service Group, did, at Hsingching, china on or about 1 August 1945, knowingly and wrongfully apply to his own use a GMC 2½ ton 6X6, Cargo Truck, United States Army #4244508, of the value of about $3016.00, property of the United States furnished and intended for the military service thereof.

Specification 2: In that Pvt Charles M. Chambers, 1139th Quartermaster Company, 315th Air Service Group, was at Hsingching, China on or about 1 August 1945 drunk in Station.

Specification 3: In that Pvt Charles M. Chambers, 1139th Quartermaster Company, 315th Air Service Group, did at Hsingching, China on or about 1 August 1945 wrongfully, carelessly and negligently operate and drive a United States Army vehicle, GMC 2½ ton 6X6 Cargo Truck; to wit by driving said vehicle without due caution and regard for pedestrians who were walking on the side of the road.

Following arraignment the accused pleaded not guilty to all charges and specifications. He subsequently changed his plea to Specification 2, Charge V, to guilty. A motion by the defense for a finding of not guilty as to the Specification of Charge I and Charge I and the Specification of Charge IV and Charge IV was sustained by the court. A similar motion as to the Specification, Charge III, was overruled. Accused was found guilty of the Specification, Charge II, and Charge II, the Specification, Charge III, and Charge III, and Specifications 1, 2, and 3 of Charge V, and Charge V, and not guilty of the Specification, Charge I and Charge I and the Specification, Charge IV, and Charge IV. He was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor for a period of 6 months. The reviewing authority approved the sentence but withheld the order directing execution thereof pending action under Article of War 50½. The place of confinement was not designated.

3. On 1 August 1945, at 1200 hours, the dispatcher of the 1980th Quartermaster Truck Company dispatched a United States Army, 6X6, 2½ ton GMC truck, serial number 4244508, on a trip from Hsingching Army Air Base to Chengtu, China, with personnel on pass. The trip ticket was made out to Sergeant George R. Gardner, the regularly assigned driver of the truck. No other person was given authority to use the truck on 1 August (R. 7-9). Sergeant Gardner left the air base at 1300 hours with the accused accompanying him in the cab of the truck. They returned from Chengtu between 2100 and 2130 hours and Gardner parked the truck in the organization's parking area. Sergeant Gardner left the

the truck and did not notice where accused went. Accused did not ask permission to use the truck and none was given. (R. 9, 10). Sergeant Gardner testified that the truck had the original head and tail lights and that he had installed on the dash two small bright lights, one red and one blue or green, that could be seen from outside the cab (R. 22).

Sometime after 2100 hours, 1 August 1945, Corporal Johnnie C. Carter, who was accompanied by another soldier, saw accused in a 6X6 truck turning around in front of the orderly room of the 338th Air Service Squadron. Carter asked accused whether he was going to the line mess, and he and his companion got in the cab with accused. Accused appeared to have been drinking. He drove from side to side down the middle of the road, which is the only road to the line mess and which was crowded with pedestrians. One of the pedestrians was struck by the right side of the cab of the truck. Carter told accused that he had hit a man and asked him to stop but accused replied that he had hit a chair the man was carrying and he continued driving down the road to the 315th Air Freight where they stopped. Military police asked the three occupants of the cab to get out, took their names and organizations, and conducted them to the dispensary (R. 11-15).

Private First Class Herman Wynn testified that on the night of 1 August 1945 he was walking up the right side of the road to his quarters after seeing a moving picture show at Hostel No. 3. Several other pedestrians were also on the road. He was carrying a stool in his right hand. He heard someone shouting and turned just as a GMC 6X6 truck hit him, knocking him into a ditch. He was struck on the left side of the body by the bed of the truck. A jeep and a weapons carrier passed shortly after the truck hit him. The weapons carrier stopped where another soldier had been hit and the jeep stopped near it, then proceeded. No other 6X6 truck passed him on the road (R. 29-32). Private First Class Leonard Machen testified that on the night of 1 August 1945 he was struck and knocked down by a 6X6 truck as he was walking on the road between Hostel No. 3 and Hostel No. 4 after seeing a picture show. A jeep passed him after he was hit, and a weapons carrier stopped and he was carried to the dispensary in it. He saw no vehicles other then the three mentioned (R. 32, 33). Sergeant Joseph F. Kenny testified that on 1 August 1945 after leaving a show at Hostel 3 and while walking toward Hostel 4, he was knocked into a ditch by a truck that came from behind and struck a chair he was carrying on his left shoulder (R. 35).

Sergeant Harris, Corporal Fleming, Corporal Trovillion and Corporal Swindoll, all of the 1369th Military Police Company, attended a moving picture show on the evening of 1 August. They left the show at about 2300 hours and went to their jeep which was parked at Hostel No. 3 across from Group Headquarters. They waited until a 6X6 truck, which had been parked nearby, and a weapons carrier proceeded ahead of them (R. 17, 23). The 6X6 had red and blue lights inside of it (R. 18). They followed the two vehicles until they were halted by a group of soldiers who reported that a man had been hit by a 6X6 truck. Corporal Trovillion remained with the

man who had been hit and the other military police continued in pursuit of the truck. They were again stopped by another group of soldiers who reported that another man had been hit by a 6X6 truck. Then they continued the pursuit until the truck stopped in front of the 315th Air Freight (R. 17, 23). On pulling up beside the truck, they found accused at the wheel with Corporal Carter and Private First Class Kandt sitting beside him (R. 17, 24). A trip ticket dated 1 August 1945, issued at 1200 hours to Sergeant Gardner, was in the truck (R. 18). Accused denied hitting anyone. Corporal Fleming testified that accused "was in an intoxicated condition but not to the extent that it affected his physical ability". "He could walk and stand up under his own control. His speech was a bit affected." (R. 19). He stated that accused's reasoning was not rational, that it "was more or less a border-line case" (R. 20). Sergeant Harris testified that, in his opinion, accused "had been drinking heavily and was physically handicapped, although he walked from the truck and got in the jeep without assistance" (R. 25); that he was "on the border-line" (R. 27); that he was "irrational at times" (R. 28); that he was not irrational when he talked with Lieutenant Gisondi but "he did not seem to have any respect for the officer" (R. 29).

Accused Carter and Kandt were taken to a dispensary where a medical officer was called. After the medical officer arrived, two of the military police took accused to his organization where Lieutenant Gisondi, one of his officers, was called (R. 21, 25). Lieutenant Gisondi, talked with accused, who at that time talked rationally, and told him to go to his quarters. When he seemed reluctant to do so, he was taken there by the military police and turned over to a noncommissioned officer (R. 21, 26, 29).

Lieutenant Frank A. Gisondi, Adjutant of the 1139th Quartermaster Company 315th Air Service Group, testified that he was called from his quarters by two military police at about 2330 hours, 1 August 1945. He found accused outside in a jeep, arguing with a staff sergeant.. The Lieutenant asked accused what had happened. Accused said he had a drink with a few of his friends and was accused by the military police of being drunk but was not so. The lieutenant" saw [he] was not getting anywhere with him" so he told the accused he was in arrest of quarters and to go to his quarters. Gisondi shortly went to accused's quarters and saw that the military police had left accused in the hands of the First Sergeant. The latter two men were standing at the door of the quarters. Gisondi asked accused why he had not gone to quarters. Accused began to argue, saying, he was not drunk. The Lieutenant ordered him to go to bed but accused walked out on the walk and said that there was a clique in the organization, that he never had a chance in it, that he didn't care whether Gisondi was a lieutenant or a captain. Gidondi gave accused a direct order to go to bed and shut up. Accused did go to his quarters; then came back. Lieutenant Gisondi told the First Sergeant to call the military police and place accused in confinement. Accused then shook his finger in the Lieutenant's face, saying, "You are fucking right I am in

arrest of quarters. You are fucking right I will go to the guardhouse in confinement". Gisondi was not fully clothed at this time. He testified that in his opinion accused was drunk. His breath smelled of liquor, was "wobbly" on his feet, slurred his words, and at times seemed irrational. On an instance he addressed the Lieutenant as Sergeant, but at other times addressed him as Lieutenant and mentioned his name. The military police finally arrived and took accused away (R. 36-39).

4. The accused, having been advised of his rights, elected to remain silent. No witnesses were presented by the defense (R. 41).

5. The findings of guilty of Specifications 2 and 3, Charge V, are supported by evidence of a compelling nature and present no question of law requiring discussion.

6. As to the Specification, Charge III, alleging willful disobedience under Article of War 64, the evidence clearly discloses that accused received the order alleged from his superior officer and that he disobeyed it. However, the question arises whether, in view of accused's drunkenness, the disobedience was willful. There is no doubt that accused was drunk, but the issue before the court as to the specification was not simply whether he was drunk but, instead, whether he was so drunk as not to have the mental capacity to understand the order or to be incapable of entertaining the specific intent willfully and intentionally to disobey. This issue was squarely presented to the court by the evidence and by counsel's arguments in connection with the motion of the defense for findings of not guilty on the ground of accused's drunkenness. The court and the reviewing authority determined the issue against the accused. In so doing they exercised a function peculiarly within their own province as weighers of the evidence, a function which the Board of Review may not legally usurp, it being well established that the Board's only legal function in a question of this kind is to determine whether the inferences drawn by the court as to accused's mental capacity could legally have been drawn from the evidence and not whether such inferences should have been drawn (sec. 408 (2), Dig. Op. JAG, 1912-40).

Is there evidence of record from which the court could reasonably infer that the accused understood the order and was capable of entertaining the requisite specific intent willfully to disobey? The picture is that of one whose mental and physical faculties were impaired to the extent that he was unsteady, stubborn, excitable, quick to anger, loose and loud and thick of speech, and generally obstreperous. It does not appear that he was stupified or possessed by delusions. He clearly was not, in the vernacular of the barroom, blind drunk or falling-down drunk. The evidence shows that accused was capable of driving a truck, that he could walk and talk, and that he recognized objects and people. His driving was reckless in character but he was able at least to keep the vehicle in motion and on the road. His walking is described as "wobbly", which is to say, in the words of Webster, that he was "inclined to shake, sway or quaver unsteadily". We gather it was something less than a stagger. His speech is described as incoherent or irrational at times but his actual words as related by the witnesses indicated that it was more

in the nature of being indiscrete, excited and angry, that of an unreasonable drunkard as distinguished from an unreasoning one. He was sufficiently aware of the seriousness of his plight to protest his innocence and rationalize his conduct. At least one witness testified that accused was not irrational at the time of the alleged disobedience (cf. CM 223336, 1 Bull. JAG 159). In short, the evidence in its entirely was such that the court could reasonably conclude that accused was in that medial stage of intoxication where the inhibitions are relaxed, discretion is deteriorated, and temper is easily excited but substantial comprehension and volition is extant. Accused's own words indicate that he understood the order and intended, notwithstanding, deliberately to defy authority. It would indeed manifest a usurpation of authority and an undue tenderness for the interests of an accused should we, under the guise of legalism, disregard the factual determination of the court in a matter so peculiarly subject to the exercise of its common sense and knowledge of human behavior. Under all circumstances, we cannot hold that the court's finding was unjustified.

It may be contended that there was lack of judgement and leadership on the part of the officer concerned in giving a direct order to the accused while the latter was drunk and that for that reason the accused should be excused his dereliction or that the finding should be reduced to failure to obey only. Assuming, and without implying, that there was such lack of judgement and leadership, it manifestly was immaterial to the issue of accused's guilt but was properly a matter for consideration as to the measure of punishment. It apparently was so considered by the court.

7. With respect to both the Specification, Charge II, and the Specification, Charge III, a question arises whether the evidence shows that accused recognized Lieutenant Gisondi as his superior officer. Although the evidence indicates that the officer was not in uniform at the time of the offense, it clearly appears that accused addressed him by rank and name. The court was, therefore, justified in concluding that accused recognized him.

8. As to Specification 1, Charge V, the record of trial includes no evidence of value of the truck alleged to have been applied to accused's use. The Manual states that it is customary for the side desiring the court to take judicial notice of a given fact to ask the court to do so, at the same time presenting any available authentic source of information on the subject (par. 125, MCM 1928). This apparently was not done in this case; however, the provision is not madatory. It would, of course, have been better practice to have established the value of the vehicle by evidence adduced at the trial. The list price of the truck described as shown by Army Service Forces Catalog, Ordanance, 5-3-1, 9 August 1945, an official army publication of which the court could take judicial notice (ib). is substantially that alleged; and it has been held, with respect to an army vehicle in a similar case (CM 237846, 24 B. R. 123, that the standard of value of government articles of distinctive character made specially for use in the military service, is the replacement cost (also see sec. 452 (18), Dig. Op. JAG, 1912-40, and CM ETO 5666, 1945). Moreover, as the evidence shows the truck was operatable the court would have been justified in finding that it was of some value, which finding would in itself support the sentence. Any indicated irregularities or omissions in proving the value alleged may therefore be regarded as immaterial (cf. CM ETO 5666, supra).

9. The following appears in the record of trial.

"The court was opened and the trial judge advocate stated, in the presence of the accused and his counsel, that he had one evidence of previous conviction, which is attached".

Attached to the record of trial is a statement, apparently of extracts from accused's service record but not identified as such, certified a true copy over the signature and title, "Thomas G. Hildebrandt, 2nd Lt., Air Corps", and setting out summaries of four sentences by courts-martial, three of which are for offenses commited more than one year before the commission of the offenses for which accused was tried in this case.

It would have been better practice to have offered accused's service record or a certified extract copy thereof as evidence of previous convictions; however, in the absence of objections, the irregularity may be regarded as waived (par, 79c, MCM, 1928).

The record does not disclose whether the statement showing the three convictions not within the authorized period was in fact submitted to the court. If so, the procedure was highly irregular, but, in view of the relatively light sentence imposed, does not appear to have adversely prejudiced the accused. The matter, however, should be brought to the attention of the reviewing authority for such action as he may deem necessary (SPJGJ 1944 (4686, 3 Bull. JAG 186)).

10. The charge sheet discloses that the accused is 24 years of age and was inducted at Salt Lake City, Utah, 7 October 1942. He had no prior service.

11. The court was legally constituted. No errors affecting the substantial rights of the accused were committed during the trial. In the opinion of the Board of Review the record of trial is legally sufficient to support the findings of guilty and the sentence as approved by the reviewing authority.

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

/s/ Robert C. Van Ness, Judge Advocate

/s/ John F. Fontron, Judge Advocate

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
31 October 1945

Board of Review
CM IBT 744 (CT 77)

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| UNITED STATES | FOURTEENTH AIR FORCE, CHINA THEATER |
| v | Trial by GCM convened at APO 627, % Postmaster, New York, N.Y., 8, 9, 10 August 1945. Dismissal, total forfeitures, confinement at hard labor for 3 years. United States Disciplinary Barracks. |
| First Lieutenant Gerald L. Clark, 01112085, CE, Fourteenth Air Force Engineer Command. | |

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

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

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that First Lieutenant Gerald L. Clark, XIV Air Force Engineer Command, did, at or near Tsuyung, China, on or about 9 February 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill a Chinese man, name unknown, a human being, by shooting him with a carbine.

The accused pleaded not guilty to the Charge and Specification and was found guilty of the Specification except the words "malice aforethought, deliberately, and premeditation". The accused was found by the court not guilty of the Charge but guilty of a violation of the 93rd Article of War. The court sentenced the accused to be dismissed the service,

to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for 3 years. The reviewing authority approved the sentence and forwarded the record of trial for action under the 48th Article of War. The sentence was confirmed by the confirming authority who designated the United States Disciplinary Barracks nearest the port of debarkation as the place of confinement, withheld the order directing execution of the sentence and forwarded the record of trial pursuant to Article of War 50½.

3. The review of the Theater Judge Advocate contains an excellent and comprehensive summarization of the evidence which, with minor modifications, is adopted as paragraphs 4 and 5 of this holding.

4. On the morning of 9 February 1945 a Chinese civilian nurse employed at the Army Air Base dispensary at Tsuyung was told by Chinese coolies that a man had been shot. She, together with Technician Fourth Grade Mason C. Hall, 232nd Medical Detachment, Aviation, hastened to a rice paddy in the rear of the base dispensary at which place they found a Chinese civilian suffering from a gunshot wound (R. 15, 31, 32). He was lying near a path approximately 100 yards from the Headquarters building in which the base dispensary was located and about in line with the center of the building (R. 16, 17, 19). By means of a sketch Hall showed the relative position of the wounded Chinese and the Headquarters building (R. 15). In the neighborhood of 1100 hours the wounded Chinese was carried to the dispensary (R. 18, 33), and the base surgeon, Captain Edward J. Douglas, was notified (R. 5). Arriving at the dispensary Captain Douglas found a Chinese in a state of profound shock due to a gunshot wound, evidenced by a small hole in the left side of the abdomen (R. 6). In spite of the administration of plasma, the Chinese died (R. 6) about 1300 hours of the same day (R. 8). An examination of the deceased by Captain Douglas before the body was removed from the dispensary disclosed that there were two holes in the body, one on the right side and one on the left, the one on the left being slightly to the front of that on the right (R.6). It was stated by Captain Douglas that the bullet which caused the death wound pierced the body, entering on the right and leaving on the left side (R. 8), with the primary cause of death being gunshot (R. 8). Captain Douglas testified that the wound was similar to that which would be made by a carbine bullet, a Chinese .28 caliber bullet and a .22 caliber Hornet (R. 8, 14). Captain Douglas stated that he performed no autopsy since the bullet had passed through the body (R. 14).

Technician Fourth Grade Earl L. Salisbury, Assistant Resident Engineer of Tsuyung Air Base, testified that the accused had told him that the deceased was Salisbury's old foreman and that he, the accused, had shot at him to scare him and that the bullet must have ricocheted and hit him (R. 24). This witness also stated that the accused had borrowed his carbine (R. 26) and after the shooting on 9 February had returned it telling the witness to keep it out of sight (R. 27). This witness further testified that Captain Douglas told him the day after the shooting that the bullet had lodged in the Chinese, telling him some time later that it was not necessary to worry about the rifle as he, Captain Douglas, had secured the bullet and destroyed it (R. 26). Captain Douglas, on being recalled by the prosecution, declared again that there was no autopsy and that the bullet had gone straight through the Chinese (R. 28).

Corporal William B. Easton, who was on 9 February 1945 Base Supply Sergeant at Tsuyung Air Base, testified that on the morning of 9 February he was in the room of Lieutenants Giaimo and Holland, both of whom were present, and a Mr. Chen, a hostel manager. The room was one of the rear rooms in the Headquarters building, and, as one faces the building, in the right hand section thereof (R. 35). The accused came into the room, looked out of the window, left the room and returned shortly thereafter with a carbine. He looked through the window saying, "I am going to see how close I can come to that guy", opened the window and fired (R. 36). Just as the accused fired the carbine, Easton looked out the window through which the accused was firing and saw a Chinese coolie, a man, about 220 yards away, in whose general direction the accused had pointed the carbine. After the shot Easton saw the Chinese take one or two steps and then fall on his face (R. 37). At the time the shot was fired the right side of the Chinese was facing the accused. Just after firing the accused said, "Christ, I hit him". Thereafter the witness, Lieutenants Holland and Giaimo and Mr. Chen left the room (R. 41). Easton drew a sketch showing the Headquarters building, the room from which the shot had been fired, and the relative position of the Chinese who had been shot (R. 38). The witness stated that he did not think the accused had been drinking (R. 44).

First Lieutenant Peter M. Holland, Air Corps, stationed at the Tsuyung Air Base on 9 February 1945, testified that he was in his room on that day with Lieutenant Giaimo, Corporal Easton and Mr. Chen (R. 46). It was about ten o'clock in the morning when the accused walked into the room, looked out the window in the back of the room, and said something to the effect that he

wondered if he could shoot that far. He left the room, returned shortly with a carbine, walked over to the window and the next thing witness knew a shot rang out, the bullet striking outside the room (R. 47). The ejected shell was later found in the room (R. 48, 92). At the time the accused fired the shot, this witness testified, he said something about he had hit him and also something about keeping it mum (R. 48). A minute or two after the shooting, Lieutenant Holland looked out the window and saw some Chinese out in the field (R. 48).

First Lieutenant Leonard Giaimo, Air Corps, testified that on the morning of the shooting he had been outside playing ball with Corporal Easton (R. 56). At about 1000 hours, a few minutes before the shot was fired, the accused was at the window in witness's room with a carbine, and was trying to hold the screen open. The witness looked out the window and saw someone about 250 or 300 yards away. He pulled the accused away from the window and said, "Don't Jerry, you are liable to hit him". The accused replied, "I just wanted to scare the shit out of him" (R. 52). Lieutenant Giaimo then stepped outside the door because he anticipated that a shot would be fired and did not want to be in the room at that time (R. 89). When the shot was fired, this witness, Lieutenant Holland, Corporal Easton and Mr. Chen were all outside the door in the hall (R. 56). Witness entered the room immediately after the shot was fired (R. 53) and saw the accused, who was alone in the room (R. 55), with a carbine in his hands (R. 51). The accused turned from the window and said, "Oh my God, I hit the bastard" or "son-of-bitch" (R. 51). Later the accused said, "You will just keep this quiet" or something to that effect (R. 52). The witness did not see the shot fired nor did he know in which direction the gun was discharged although it must have been fired outside the room (R. 56). Neither did the witness see the person shot nor did he know who he was (R. 54).

Chang Hyok Tshung, a hostel manager at Tsuyung Air Base on 9 February 1945, testified that he was in the room in question at the time the accused, facing the window, fired a gun (R. 76).

It was further testified by several witnesses that hunting and considerable marksmanship firing took place customarily in that area in close proximity to the Headquarters building. The Chinese also did a lot of firing around there and it was not unusual to hear shots fired. (R. 77, 80, 85).

5. The accused having been advised of his rights elected to remain silent.

A Chinese civilian, Mr. Chan Sou Hwa, a witness for the defense, testified that on the morning of 9 February 1945 he was walking toward the hostel at Tsuyung, that he heard two pistol shots, that the shots came from some graves by the side of the road to the south of his position (R. 63, 64), that he saw a man far off but could not tell whether he was wounded (R. 64). He heard these shots about eight o'clock in the morning but could not identify them further, nor could he identify the man he saw in the distance (R. 66, 67).

Colonel Henry J. Amen, Air Corps, testified for the defense, that he knew the accused (R. 68) and his character was good and that he had only the highest regard for his ability to get his job done. It was stated that the accused had always maintained complete control of his temper; the witness never seeing him, in spite of aggravation, lose such control (R. 69).

A report on the subject "Hostel Guards" that First Lieutenant Melvin L. Miller, Air Corps, commanding Tsuyung Air Base, had prepared on 9 February 1945 for higher headquarters was offered in evidence by the defense (R. 72, 86, 95, 99). It was stipulated that Lieutenant Miller had returned to the United States and had been discharged from the Army (R. 73). This report was signed but not sworn to. It was ruled to be inadmissible by the law member (R. 74, 86, 95, 99).

First Lieutenant Joseph E. Turley, 63rd AACS Group, a defense witness, testified that his quarters were in the Headquarters building right next to those occupied by Lieutenants Giaimo and Holland (R. 100). At the time the shot was fired, which was approximately the middle of the morning, this witness was talking to the hostel manager Chang in the hallway of the building. There were other people there but witness did not remember who they were (R. 101). He saw the accused come out of the room but did not know whether anyone else came out or had been in the room when the shot was fired (R. 102). It was customary for both Americans and Chinese to shoot in that general area (R. 106) and witness had, in the past, heard some shots fired in such close proximity that he thought they had been fired in Headquarters building itself (R. 103).

6. The accused was charged with murder and the court in its findings of guilty of the Specification excepted the words, "malice aforethought, deliberately and premeditation". The finding was consequently one of manslaughter only, even though the court did not specifically find the accused not guilty of the excepted

words. Their exception was tantamount to a finding of not guilty as to them (cf. CM 252521, 34 B. R. 67). Manslaughter, being an offense lesser than and included in that of murder (par. 148, MCM, 1928, p. 162), the finding is proper and the accused was rightfully convicted thereof provided the evidence established the commission of such offense and its constituent elements.

Although the testimony of those present at the time of the shooting varies to a certain extent as to some of the details, there was substantial accord as far as the basic facts are concerned. It is undisputed that on the morning in question the accused, armed with a carbine, entered the room from which the shot was fired, walked to the window, fired the carbine and thereupon remarked that he had hit "him". The discrepancies relate chiefly to the whereabouts of the witnesses when the shot was fired and the specific actions of, and the exact words spoken by, the accused just prior to the shooting. However, one of the recognized foibles of the human race is that members of this mortal tribe seldom agree on the particulars of any event which they have witnessed in common. Few individuals possess the same perceptive powers. Nor is human memory infallible, and the passage of time tends to obscure the details of an occurrence which at the time may have stood out in bold relief. But even should the subordinate details of an incident be shrouded with the mist of age, still the general outline may remain sharply etched in the imperfect clay of human recollection. Taking cognizance of human imperfection in the fields of perceptivity and rememberance, we find no fatal inconsistencies in the stories related by the eye witnesses. There is nothing to seriously challenge the assertion of Corporal Easton that he stood by the window as the accused fired in the general direction of a Chinese coolie, and observed the latter, when the shot was fired, take one or two steps and then fall on his face. Nor may we reasonably doubt that the accused had, as related by one witness, appeared at the window a few seconds before and vocally wondered if he could shoot that far, nor that, as related by still another witness, that the accused had been pulled away from the window by the latter witness, and upon being admonished not to shoot had replied that he, the accused, only wished to scare the "bastard". The testimony all falls into a general pattern, and although some individual pieces of the mosaic are misplaced, there emerges an intelligible picture which depicts the accused espying a Chinese coolie through a window, then going after a carbine and returning with it to the window, and finally, after having once been pulled from the window by a friend, shooting the unfortunate victim. Such we believe is established by the evidence.

Although no witness testified that the Chinese coolie died as a result of the shot fired by accused, there was competent

circumstantial evidence of sufficient probative value to identify him as the same Chinese who, a few hours later, expired in the dispensary from the effect of a gunshot wound. The shooting occurred at about 1000 hours and the deceased was brought to, and examined in, the dispensary at about 1100 hours. These two hours closely coincide, and any apparent inconsistency may be explained by the failure of either the accused or his companions to go to the wounded man's assistance, which doubtless would have resulted in his receiving earlier medical attention. The deceased was found in the same vicinity in which the Chinese shot by the accused had been seen to fall. The fatal bullet had entered his right side, that side of the Chinese which had faced the accused at the time the latter fired his shot. Significant also is the fact that there is no evidence that any other Chinese was on that morning treated for gunshot wounds. In addition to the above evidentiary facts, the accused himself stated to the Assistant Resident Engineer of the air base that the deceased was the latter's old foreman, that he, the accused, had shot to scare him and that the bullet must have ricocheted and hit him. Identification of the coolie as the person shot by accused was sufficiently established (CM 233688, Aivoli, 20 B.R. 49, 59; CM 252087, Fortney, 33 B.R. 345, 370).

That the homicide was without legal excuse is abundantly clear. Viewing the evidence in the light most favorable to the accused and taking at face value, as truly establishing his intent, the statement of accused that he meant only to scare the deceased, the shooting was still wholly unjustified. The firing of a weapon at a Chinese coolie for the purpose of frightening him may provide amusement for one possessing a distorted sense of humor, but it is certainly no innocent pastime. One who indulges in such perverted entertainment may not plead accident if the lethal cartridge inadvertently finds its mark in the one intended as the butt of the macabre jest. Nor did the attitude of the accused suggest that he considered the incident as an innocuous prank. Neither his adjurations to his companions to keep quiet about the shooting, his attempt to have the weapon concealed, nor his callous failure to render assistance to the victim, characterize him as possessing a clear conscience. Such conduct can be construed only as a realization by him of his own malfeasance. It is not compatible with innocence of wrong doing. In our opinion the finding of guilty is supported by the evidence of record.

7. The Specification alleges the victim to be "a Chinese man, name unknown". While an information or, in military law, a specification should describe the deceased with certainty, yet if his name be in fact unknown that may be so alleged. In

27 American Jurisprudence, page 644, the rule is stated thus:

> "Names or Persons Unknown.--It is the general rule that where the names or identity of persons whom it is necessary to name or identify in the indictment or information are in fact unknown to the grand jury or the prosecuting attorney, it is proper to aver that fact and describe them as persons unknown or as persons whose names are unknown. Such an averment is presumed to be true in the absence of any evidence on the subject".

The record proper contains no evidence as to the name of the deceased and consequently the verity of the averment of lack of knowledge may be assumed. We are cognizant of the fact that the original specification contained in the charge sheet which is among the allied papers, although not part of the record proper, did describe the deceased by name. But also among the allied papers is a letter addressed to the convening authority by the Assistant Staff Judge Advocate advising that the Specification had been amended because no evidence could be procured that the deceased did in fact bear the name alleged. We cannot assume this statement to be untrue. Nor, in view of the later averment, may it be assumed that the first allegation describing the deceased was in fact true merely because it was first made. Admittedly the victim of an offense should be described with sufficient particularity to apprise the accused as to the charge he must answer and to permit him to make his defense. The specification here in question, because of the paucity of descriptive averment, might well have been subjected to a motion to make more definite and certain, but in the absence of such a motion, and in the absence of indication in the record that the accused was misled or prevented from preparing his defense, we cannot say that his substantial rights had been prejudiced. Furthermore, we are of the opinion that the deceased was described in the Specification, and identified by the evidence of record, with sufficient certainty to enable the accused to plead the judgment rendered in the instant case in bar of any further prosecution for the same offense.

8. The defense offered an original letter from First Lieutenant Melvin L. Miller, Commanding Officer of the air base, to the Commanding Officer, Sector No. 1, CASAC, dated 9 February 1945 on the subject "Hostel Guards". This document was marked Defense Exhibit 2 and accompanies the record of trial. Paragraph three thereof contains an extremely brief account of the incident involved in the present case. The offer was first made

on the theory that the letter was an official statement prepared by a person whose duty it was to know and to record the matters therein stated. It may well be doubted whether the officer was under any duty to know the facts concerning a reported shooting on the base, or that the letter was an official record or report of the kind contemplated under the provisions of paragraph 117 of the Manual which sets forth as examples of documents entitled to admission as exceptions to the hearsay rule morning and guard reports, enlistment and physical examination papers, individual equipment records and outline figure and finger print cards. It is not, however, necessary to determine that question for the matters recited in the letter were obviously not based on personal knowledge. The entries consequently were not competent evidence of the facts therein stated (Par. 117a, MCM 1928; Par. 395 (18), Dig. Op. JAG 1912-40, pp. 213-4) and the court properly excluded the proffered exhibit. A later offer of the document as an impeachment of Captain Douglas, after the Captain had denied making the statements attributed to him in the letter, was likewise properly refused. The proffered letter was merely the unsworn statement of a person not in court and, being hearsay, incompetent even for impeachment purposes.

9. It is not deemed necessary to enter into an extended discussion of certain procedural and other irregularities appearing in the record and allied papers. Such matters have been adequately covered in the reviews of both the Staff and Theater Judge Advocates and, in our opinion, resulted in no prejudice to the substantial rights of the accused within the purview of the 37th Article of War.

10. The charge sheet shows the accused as 28-6/12 years of age. He was inducted 19 May 1942, commissioned as a second lieutenant 30 March 1943, and had no prior service. There is no evidence of previous convictions.

11. The court was legally constituted and had jurisdiction of the accused and the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. The Board of Review is of the opinion and accordingly holds that the record of trial is legally sufficient to support the findings and sentence. Dismissal is authorized upon conviction of a violation of Article of War 93.

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

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

John F. Fontron 307843 Judge Advocate
John F. Fontron

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(337)

New Delhi, India
15 November 1945.

Board of Review
CM IBT 757

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| UNITED STATES | ) BASE SECTION, INDIA-BURMA THEATER |
| v | ) Trial by GCM convened at APO 465, % Postmaster, New York, N.Y., 24 - 26 September 1945. Dismissal, total forfeitures, confinement at hard labor for 5 years. |
| Major Robert E. Envell, 0920144, TC, assigned to Headquarters, United States Forces, India-Burma Theater. | ) |

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

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

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

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

Specification 1: In that Major Robert E. Envell, T.C., assigned to Headquarters United States Forces, India Burma Theater, then being an Army Exchange Supply Officer of the Army Exchange Service, did, at Calcutta, India, on or about October 1944, knowingly, wilfully, and corruptly accept as gratuity from one Lalan Prashad Gupta, one emerald beads necklace of the value of about twenty-six hundred rupees; one table cloth with six napkins of the value of about forty-five rupees; one turqois ring with four small diamonds and four rubies of the value of about three hundred and seventy-five rupees, for the purpose of wrongfully influencing the official actions of the said Major Robert E. Envell in his capacity as Army Exchange

Supply Officer of the Army Exchange Service, in favor of Indian Textiles Co. Ltd., and Banerjee and Co., in the purchase of merchandise from the said Indian Textiles Co. Ltd., and Banerjee & Co., as vendors and the said Army Exchange Service as vendee thereof.

Specification 2: In that Major Robert E. Envell, T.C., assigned to Headquarters United States Forces, India Burma Theater, then being an Army Exchange Supply Officer of the Army Exchange Service, did, at Calcutta, India, from August to December 1944, knowingly, wilfully and corruptly accept as gratuity from one Lalan Prashad Gupta, 5 cases of Scotch Whiskey of the value of about twelve hundred rupees, for the purpose of wrongfully influencing the official actions of the said Major Robert E. Envell, in his capacity as Army Exchange Supply Officer of the Army Exchange Service, in favor of Indian Textiles Co. Ltd., and Banerjee & Co., in the purchase of merchandise from the said Indian Textiles Co. Ltd., and Banerjee & Co., as vendors and the said Army Exchange Service as vendee thereof.

Specification 3: In that Major Robert E. Envell, T.C., assigned to Headquarters United States Forces, India Burma Theater, then being an Army Exchange Supply Officer of the Army Exchange Service, did at Calcutta, India, on or about November 1944, knowingly, wilfully, and corruptly accept as gratuity from one Lalan Prashad Gupta, one gold-filled necklace pendant with emerald beads of the value of about two hundred rupees; one emerald ring with four diamonds in yellow gold setting of the value of about five hundred rupees; one ruby beads necklace of the value of about thirteen hundred rupees; one gold Benares bag of the value of about one hundred rupees; and six yards of gold brocade cloth of the value of about three hundred rupees, for the purpose of wrongfully influencing the official actions of the said Major Robert E. Envell, in his capacity as Army Exchange Supply Officer of the Army Exchange Service, in favor of Indian Textiles Co. Ltd., and Banerjee & Co., in the purchase of merchandise from the said Indian Textiles Co. Ltd., and Banerjee &

Co., as vendors and the said Army Exchange Service as vendee thereof.

Specification 4: In that Major Robert E. Envell, T.C., assigned to Headquarters United States Forces, India Burma Theater, then being an Army Exchange Supply Officer of the Army Exchange Service, did, at Delhi, India, on or about 10 November 1944, knowingly, wilfully and corruptly accept as gratuity from Jagget Narain and Sons, one sapphire stone; one emerald stone; two rubies in the aggregate value of about two thousand rupees, and one electroplated whiskey flask of the value of about twelve rupees, for the purpose of wrongfully influencing the official actions of the said Major Robert E. Envell, in his capacity as Army Exchange Supply Officer of the Army Exchange Service, in favor of Jagget Narain and Sons in the purchase of merchandise from the said Jagget Narain and Sons as vendors and the said Army Exchange Service as vendee thereof.

Specification 5: (Finding of guilty disapproved by reviewing authority)

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

Specification 1: In that Major Robert E. Envell, T.C., then Captain Robert E. Envell, T.C., assigned to Headquarters, United States Forces, India Burma Theater, did, in conjunction with First Lieutenant Robert B. Walker, T.C., on or about 13 October 1944, at Calcutta, India, knowingly, wilfully and fraudulently misappropriate the sum of about (Rs. 150/-) One hundred and fifty rupees, lawful monies of the Government of India, the property of the Army Exchange Service.

Specification 2: In that Major Robert E. Envell, T.C., assigned to Headquarters, United States Forces, India Burma Theater, did, at Kunming, China, on or about 19 February 1945, with intent to deceive Major Edward J. Lawler, CMP, and Major John F. Stoskopf, Jr, CAC, officially state to the said Major Edward J. Lawler, CMP, and Major John F. Stoskopf, Jr., that he, the said Major Robert E. Envell, did not have in his

possession since his arrival in China any star sapphires, rubies or opals, which statement was known by the said Major Robert E. Envell to be untrue, in that, the said Major Robert E. Envell did, in fact, have in his possession since his arrival in China star sapphires, rubies and opals, which fact the said Major Robert E. Envell then and there well knew.

Specification 3: (Finding of guilty disapproved by reviewing authority)

Accused pleaded not guilty to all Charges and Specifications and the court found him guilty of all Charges and Specifications, sentencing him to dismissal, total forfeitures and confinement at hard labor for 5 years. The reviewing authority disapproved the findings of guilty of Specification 5, Charge I, and Specification 3 of Charge II, approved the sentence, and forwarded the record of trial pursuant to Article of War 48. The confirming authority confirmed the sentence and forwarded the record pursuant to Article of War 50½. A letter accompanying the record of trial indicates that the United States Disciplinary Barracks will be designated as the place of confinement.

3. This case has been the subject of a comprehensive review by the Theater Judge Advocate, which is adopted in part and with appropriate modifications in this review.

4. Evidence for the Prosecution:
The accused is an officer of the Army of the United States, assigned to Headquarters, United States Forces, India-Burma Theater, APO 885, and attached to Headquarters, Base Section, India-Burma Theater, APO 465, from 1 July 1944 to 5 December 1944. He was assigned to duty with the Army Exchange Service (hereinafter referred to as A.E.S.) at Base General Depot No. 2 (now Base Section) Calcutta, India, APO 465. From 10 December 1944 to 11 April 1945 he was assigned to duty with the A.E.S. at Headquarters, Services of Supply, United States Forces, China Theater, at Kunming, China, APO 627 (Pros. Ex. 2; R. 8-9). Accused's duties at Calcutta were in the capacity of A.E.S. Supply Officer. He did not have direct procurement duties, as such, but he did approve all purchase orders made by the Procurement Section (R.15).

In the period between August 1944 and November 1944, inclusive, (after accused was appointed Supply Officer for A.E.S.)

Lalan Prashad Gupta, Manager of Indian Textiles Co., and of Banerjee & Co., gave the accused the following gifts: an emerald bead necklace, value about Rs 7,200/- selling price, or Rs 2,700/- cost price; a turquoise ring with four small diamonds and four rubies, cost price about Rs 375/-; five or six cases of Scotch Whiskey, value about Rs 240/- a case; a gold-filled necklace pendant with emerald beads, cost price about Rs 400/-; an emerald ring in yellow gold setting, value about Rs 500/-; a ruby bead necklace, value about Rs 3,000/-: a gold Benares bag, cost price about Rs 90/-; six yards of gold brocade cloth, value about Rs 300/-; a table cloth and six napkins. Cases of whiskey were delivered to Colonel Crane's room as requested by accused. It was never paid for. The jewelry was given to the accused as a gift as is customary in India in certain business transactions (R. 55-63).

On 7 August 1944 the accused issued orders to Lieutenant R. B. Walker, Officer in charge of the A.E.S. Procurement Department, to the effect that all purchase orders must have the approval of the A.E.S. Supply Officer, i.e., the accused (Pros. Ex. 2; R. 19).

On 4 September 1944 the accused gave a direct order to Lieutenant Walker to purchase pillow covers from Banerjee & Co. and from Indian Textiles Co. This was done despite Lieutenant Walker's protest that the prices of other firms would be cheaper and that he had not seen the merchandise (R. 19). Later, in October 1944, Gupta came to the A.E.S. Office. Lieutenant Walker refused to confirm an order with Gupta (who represented the same two firms) or to place other orders because he considered the prices too high. The accused interceded on Gupta's behalf and later ordered the placement of an order with Gupta in spite of the fact that prices of other firms, for similar articles, were cheaper (R. 118-121).

The A.E.S. had a petty cash account for the payment of small incidental expenses. The accused was the custodian of this account and had sole authority to make expenditures from it (R. 9). In early October 1944 Lieutenant Walker lost a watch from his office desk. This watch had been sent by an enlisted man for repairs through the A.E.S. watch repair service. Lieutenant Walker reimbursed the enlisted man in the amount of Rs 150/- out of his own pocket. Manasseh, the A.E.S. Indian office manager, suggested Lieutenant Walker sign two vouchers, totaling Rs 150/- to show a pretended purchase of samples (R. 20, 21). This was done

13 October 1944. The voucher, bearing the signatures of the accused and Lieutenant Walker, was included in the petty cash fund file (Pros. Ex. 3; R.9). Attached to this voucher was a certificate of payment dated 13 October 1944 for a total of Rs 150/- as charges for purported samples. This was signed by the accused as A.E.S. Supply Officer (Pros. Ex. 4; R.10). Both these documents were submitted to the A.E.S. Accounting Section (R. 10). On 21 October 1944, the accused submitted a voucher in the amount of Rs 150/- for replenishment of the petty cash fund (Pros. Ex. 5; R. 10). That same day the petty cash fund was reimbursed in the amount of Rs 150/- by check No. OB4 21555 drawn on the Imperial Bank of India. The check is made out to the accused as payee and is drawn on the A.E.S. Imprest Fund (Pros. Ex. 6; R.11). No supporting documents are available in A.E.S. files to show that goods for Rs 150/- had been received (R. 11, 12, 14). Major Kruegar, of the A.E.S. Accounting Department, upon examining the office accounts and noticing the Rs 150/- item, checked and noticed that there was no tally out sheet for this particular item. Upon making inquiries, he was informed by Lieutenant Walker that this amount was paid to Lieutenant Walker to reimburse him for having paid the enlisted man for the loss of the stolen watch (R. 13, 14, 17). The accused had authorized these documents to be prepared (R. 82).

On 10 November 1944, in Delhi, accused visited the store of Jagget Narain & Sons. He was accompanied by Lieutenant De Crane. He approached Uday Narain of that firm. He selected a blue sapphire, value Rs 1,500/- (Pros. Ex. 7), an emerald, value Rs 200/- (Pros. Ex. 8), and two rubies, value about Rs 300/-, and stated that he wanted to send them to his wife. He also selected an electro-plated whiskey flask, value Rs 12/-. The accused did not ask the price of these items and did not say anything about paying for them but took them with him when he left the store. Narain knew that the accused represented A.E.S. and never sent a bill to the accused for these items (R. 41-43, 45-47).

On 11 November 1944, the accused wrote a letter to his wife. This letter was censored by the Army Censor and was photostated by the Army Criminal Investigation Division. In this letter the accused mentioned that he would bring home a fortune in rubies, emeralds and sapphires (Pros. Ex. 10; R. 50-54, 78).

Some time in November 1944, Lieutenant Colonel Kepley was appointed Executive Officer of A.E.S. Because of high prices

for items contracted for through Gupta, Colonel Kepley felt impelled to re-negotiate certain contracts with Indian Textiles Co., and Banerjee & Co. A 30% reduction in price was made.

On 19 February 1945, at Kunming, China, Lieutenant Colonel Stoskopf, Jr., CMP, while conducting a Criminal Investigation Division investigation, searched accused's quarters. This was done under the authority of General Cheves and with the cognizance of Colonel Crane. The accused was present. That same day, after Colonel Crane had fully explained to him his rights under Article of War 24, and without threats, promise or coercion of any kind, accused consented to be questioned (R. 23, 26, 27). He was asked if he had precious stones such as star sapphires, rubies or opals in his possession and the accused replied, "No".

Some time early in April 1945, at APO 627, China Theater, the accused requested Colonel Crane to keep certain precious stones for him, about nine in number. One was a blue stone, one green, and the others were red. The blue and green stones were similar to Prosecution's Exhibits 7 and 8. The accused told Colonel Crane that this request had nothing to do with any Criminal Investigation Division investigation (R. 27-28, 30). Colonel Crane kept them in his trunk until May, at which time the Criminal Investigation Division (after having learned of their existence from the accused) expressly asked for them (R. 30).

On 13-14 April 1945, at the Karachi Air Port, Lieutenant Colonel Barry of the Criminal Investigation Division, together with Major Winkowski and Sergeant Donnegan of the Inspector General's Department, questioned the accused. His rights were explained to him under Article of War 24 and there was no resort to threats, duress, coercion or promises of any kind. On 20 to 22 May 1945, another Inspector General interview by the same personnel was held at New Delhi. At these interviews the accused indicated his willingness to make full statements (R. 63-65). Sergeant Donnegan made a stenographic report of these interviews (Pros. Exs. 11, 12, 13, 14, 15; R. 67). At these interviews the accused stated that 16 purchase orders signed by him, totaling Rs 2,798,434/- or 27.61% of total A.E.S. purchases, were placed becausehe thought that the merchandise was needed; that he did not first consult with other Procurement Officers; that on 11 August 1944, and 26 September 1944, he signed Purchase Orders Nos. 290, 291, 292, 450, totaling Rs 1, 128, 408/- for purchases from Indian Textiles Co.; that on 13 October 1944, he signed an order, amount Rs 38,000/-, with Indian Textiles Co.; that on 11 August 1944 he signed an order, amount Rs 197,500/-, with

(344)

with Banerjee & Co.; that on 12 October 1944, an order in amount Rs 513,500/-, with Banerjee & Co.; that on 26 October 1944, an order for 2,000 pillow tops with Banerjee & Co., was put in by Lieutenant De Crane on specific order from the accused; that he did not receive any commission but he did receive gifts from Indian Textiles, Jagget Narain and other vendors; that from Indian Textiles he received an emerald ring with four diamonds and four rubies, a table cloth with six napkins, about 40 yards of saree cloth, a fancy pocket book, emerald beads, ruby beads and several cases of Scotch whiskey; that from Jagget Narain he received a big sapphire, an emerald and two rubies; that he knew these items were being given to him as a gratuity; that altogether he received as gifts about 11 precious stones, two rings, a cat's eye ring and a silver ring; that when the Criminal Investigation Division examined his belongings he had placed the jewelry in his office; that although the Criminal Investigation Division asked about this jewelry he did not tell them about it because they were antagonistic toward him; that he sent most of the items home to his wife; that Indian Textiles Co., gave him these gifts as a Christmas present to his wife and not in order to foster business; that he authorized the payment of a total of Rs 150/- to Lieutenant Walker out of the Army Exchange Service petty cash fund for the loss of an enlisted man's watch and to accomplish this he falsified the A.E.S. records and that this was a fraudulent act; that in November 1944 he received from Jagget Narain a blue sapphire, an emerald and two rubies; when requested by him, Gupta of Indian Textiles Co gave him cases of Scotch whiskey for which he did not pay; that he usually got these gifts from the vendors by hinting that he would like them; that he never paid for any of them and he has never received any bill or invoice; that he gave Colonel Crane a star sapphire bracelet which he had obtained from a vendor (R. 67-93).

Lieutenant Sackman of the A.E.S. Accounting Branch made a survey of purchase orders placed by A.E.S. for purchases during 1944-1945 (R. 32). He checked the purchase orders whereon the accused had signed in the space marked "ordered by" (R. 38). The A.E.S. placed business with Indian Textiles Co. between 13 April 1944 and 5 February 1945 in the amount of Rs 2,110,568/-, or about 28.16% of all A.E.S. purchases (R. 32). Between 11 August 1944 and 13 October 1944 the accused placed orders with Indian Textiles Co. in the amount of Rs 1,427,604/- (R. 32). Between 13 April 1944 and 5 February 1945 A.E.S. placed orders with Banerjee & Co. in the amount of Rs 1,143,625/-, or about 15.51% of all purchases. Of the Banerjee orders accused placed orders in the amount of Rs. 956,000/- (R.33). Between 13 April 1944 and

5 February 1945 A.E.S. placed orders with Jagget Narain & Co. in the amount of Rs 742,265/- for curio items and a total of Rs 400,025/- for local necessitous items. This is about 14.75% of A.E.S. orders for necessitous Exchange items (R. 33). Between 13 April 1945 and 5 February 1945 the total amount of orders placed with Ram Narain Shaw for local necessitous items was Rs 368,283/- or about 13.58% of such items (R. 33). Orders placed by the accused were with Indian Textiles Co., Banerjee & Co. and others (R. 33). The total aggregate amount of purchases made by the accused is Rs 2,748,434/- or about 27% of all A.E.S. purchase orders. Of this amount the accused placed orders with Indian Textiles Co., Banerjee & Co. and Shroff & Co. in the amount of Rs 2,652,791/- or 96% of purchase orders placed by him (R. 34).

5. Evidence for the Defense:

The accused, upon being fully advised of his rights, elected to take the stand in his own defense and make a sworn statement (R. 99). He stated that he is 42 years of age and that he worked in five and ten cent stores rising from the position of stock clerk to that of store manager for Kresge's, earning $250.00 per month. He entered the military service in November 1942 as first lieutenant and attended an army course at Princeton University. He was assigned as Assistant Exchange Officer at the New York Port of Embarkation and finally came to the India-Burma Theater. He was then appointed Post Exchange Officer at APO 465. When Major Mann died he was assigned as A.E.S. Supply Officer upon Colonel Crane's recommendation. Conditions at A.E.S. were not cordial and many of the officers would not speak to each other. He was often compelled to run personal errands for Colonel Crane. He first met Gupta of Indian Textiles Co. and Ram Narain Shaw through Captain Hemenway of A.E.S. The accused began to affix his own signature on all purchase orders as "Approved, A.E.S. Supply Officer" and he would often sign purchase orders without having previously gone over their contents. Purchase orders would be placed with various vendors depending on the requests from various exchanges and he would sign the orders. The accused admitted that he received the gifts from the Indian vendors as stated but that these gifts did not influence him in the placement of orders. The accused would merely mention to the vendors that certain items would make good Christmas gifts and he considered these gifts were made merely as friendly gestures on the part of the vendors. At Colonel Crane's request the accused would solicit Scotch whiskey from Gupta who knew it was intended for Colonel Crane and the Colonel also knew from where he, the accused

(346)

acquired the whiskey. That when he wrote the letter to his wife telling her of his riches he was merely bragging. Manasseh, an Indian civilian, was in charge of the office clerical help at A.E.S. He suggested to Manasseh that Lieutenant Walker should be paid Rs 150/- for the loss of an enlisted man's watch and when Manasseh typed up the documents he, the accused, signed them." The A.E.S. handled approximately $30,000,000.00 worth of business annually, but not in a businesslike manner. He never knowingly, wilfully and corruptly accepted the gratuities from the vendors for the purpose of being influenced in the purchase of merchandise. Upon investigation by the Criminal Investigation Division and the Inspector General's Department statements were taken from him on 13 and 14 April, 20 to 23 May (1944) and 19 February (1945) for a total of about 1,450 questions. The Chief of the A.E.S. never explained to him his duties as Supply Officer. Lieutenants Walker and Colburn were the Procurement Officers for A.E.S. and he did not get along very well with them. On 17 August 1944 he issued an informal staff memo to the effect that all purchase orders bought by the Procurement Department must have the approval of the Supply Officer. He signed and approved purchase orders total Rs 2,748,434/- and that orders in the amount of Rs 2,652,791/- were placed by him with Banerjee & Co. and Indian Textiles Co. That he received gifts from Gupta and Jagget Narain and he considered these gifts merely as friendly gestures. At one time he ordered Lieutenant Walker to cancel an order with Jagget Narain and to place it with Indian Textiles Co. At one of the investigations he stated that Colonel Crane told him not to tell the Criminal Investigation Division anything but that he later changed his mind because he felt that this was wrong. He often consulted with Gupta, Gidwani and Uday Narain but never placed an order with them. He merely signed the purchase orders. He accepted their gifts only on the basis of friendship. Supply and Procurement for A.E.S. was in his charge (R. 99-118).

6. The evidence requires but little recapitulation. As to Charge I under Article of War 96, accused was found guilty of four specifications alleging the acceptance by the accused of divers gratuities from individuals enumerated therein. The evidence shows that accused assumed his duties as Army Exchange Service Supply Officer on 1 July 1944. A month later, on 7 August 1944, he issued orders to subordinates in the procurement section to the effect that all purchase orders must have his individual approval. He thus placed himself in a position where, because of his authoritative status, he was now able to assert direct influence over these subordinates in accord with his personal discretion

as to the purchase of goods. Subsequently, the accused began receiving gifts from the vendors as alleged. According to the evidence, the accused did, at times, specifically order subordinates such as Lieutenant Walker to place orders with certain favored vendors. At other times through his Executive Officer, Lieutenant De Crane, he placed contracts with additional favored vendors. The accused, at the time of the official Inspector General's Investigation, fully admitted his acceptance of these gifts. This confession on the part of the accused was given voluntarily without coercion, threats or promises and only after he had been fully advised as to his rights. The confession was properly proved by the sergeant reporter who, with the consent of accused, refreshed his memory from his transcript of the testimony. In addition, during trial the accused again admitted accepting these gifts. The record shows adequate proof of the corpus delicti, aliunde the confessions, in compliance with paragraph 114a of the Manual for Courts-Martial. The proof, therefore, as to Specifications 1, 2, 3 and 4 under Charge I is complete.

Further detailed comment on the facts is unnecessary. Corruption has been defined as an act of an official or fiduciary person who unlawfully and wrongfully uses his station to procure some benefit for himself or for another person contrary to his duty (20 C.J.S. p. 239). The accused's derelictions come within the purview of the two existing prohibitions, (1) federal statutes covering offenses relating to official duties (Chapter 5, Title 18, U.S.Code), and, (2) Army Regulations, par. 2e (2), AR 600-10, 8 July 1944). The federal statute, Section 207, Title 18, U.S. Code, relates to officials accepting a bribe and prohibits an officer of the United States in any official capacity by virtue of the authority of any department of the government from asking, accepting or receiving any gratuity with intent to have his decision, in his official capacity, influenced by reason of such gratuity. The federal courts have held that an army officer representing the War Department is considered to have necessary authority and would afford a basis for the offense (13 Fed. Dig. 375). The gravamen of the offense is acceptance by the officer of a gift to influence his official conduct and the official action sought to be influenced need not necessarily have been prescribed by statute but may be found in an established usage which constituted common law of the affected department. Similarly, the extent of the officer's jurisdiction is immaterial for by official action is meant such as properly belongs to the

office and is intended by the officer to be such (Ibid). Army Regulations provide, in part, that an officer should not accept a gift or other emolument from a person or firm with whom it is the officer's duty as an agent of the government to carry on negotiations, and any substantial departure from this underlying principle would constitute conduct punishable under the Articles of War (par. 2e ( AR 600-10, 8 July 1944). It has been held that the acceptan. by the accused of gifts under such circumstances is not merely indiscreet and flagrantly improper but is dishonorable and conduct of a nature to bring discredit upon the service in violation of Article of War 95 (CM 234644, 21 B.R. 116; CM 24429 28 B.R. 249). In this regard "it is of little importance whether the transaction was suggested initially by accused or by the salesman. The prime question is whether the accused voluntarily entered into it" (CM 239845, 25 B.R. 285). In view of all the above it is believed that the findings of guilty of Charge I and Specifications 1, 2, 3 and 4 are sustained within the fabric of the law not only by the accused's confession but also by the evidence presented in support thereof.

We now consider Charge II, violation of Article of War 95. The first specification thereunder alleges a misappropriation of Rs 150/-. Winthrop defines ungentlemanly conduct under Article of War 95 as 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. It has been held that wrongful appropriation of monies is such disgraceful behavior (Winthrop's Military Law and Precedents 1920 Ed., pp. 713-714). The accused's sole explanation for his falsification of A.E.S. accounts is that he did it not for his own benefit but as an act designated to reimburse Lieutenant Walker for the unfortunate but, nevertheless, careless loss of an enlisted man's watch. However, "because of the deliberate frauds involved, accused's acts must be characterized as conduct unbecoming an officer and a gentl-man within the meaning of Article of War 95" (CM 192530, 1 B.R. 396). The accused's confession at the official investigations and his reiteration of the same in open court is corroborated by the prosecution's evidence elicited through the testimony of Lieutenant Walker and Major Kruegar, and by the introduction of the falsified documents. Even though Lieutenant Walker is also concerned in this offense, nevertheless his testimony is admissible against the accused (par 114c, 120d, MCM, 1928).

We turn now to Specification 2 of Charge II, the making of a false official statement. This too had been admitted by the

accused at the Inspector General's Investigation and was corroborated in court by the testimony of Lieutenant Colonel Stoskopf. This offense is charged properly, for an accused's false statement made in the course of an official inquiry is an offense chargeable under Article of War 95 (Dig. Op. JAG 1912-40, sec. 453 (18)).

As in Charge I, we see that the findings of guilty of Charge II and its specifications are sustained not only by the accused's confession but also by evidence of corroboration presented by the prosecution in support thereof.

7. At the proper time for challenges and after the members of the court had indicated, pursuant to paragraph 57 of the Manual, their lack of knowledge of grounds of challenge, the defense questioned the competency of the court and moved that the court declare itself incompetent for the following reasons: (1) that three members of the court, naming them, may be prejudiced as they are commanding officers of units which may be recipients of Army Exchange dividends; (2) that the law member of the court is not a member of the Judge Advocate General's Department as provided by Article of War 8; (3) that one member of the court (Major Brodnax) is Provost Marshal of Base Section, India-Burma Theater (the convening authority) and, as such, may be prejudiced; (4) that the trial judge advocate (Major Bradley, JAGD) is a highly competent lawyer and was formerly Staff Judge Advocate of Base Section whereas the defense counsel are not law school graduates and are inexperienced in military law. In resisting the motion the trial judge advocate properly pointed out that the court may not receive a challenge to more than one member at a time (see AW 18) whereupon the defense contended that it was not exercising its right to challenge but, instead, was presenting a motion as to the competency of the court. The motion was overruled and the defense then stated it had no challenge for cause and had no objection to any member present.

Defense objections (1) and (3), supra, manifestly constitute no more than mere assertions on the part of the defense that certain members of the court had personal or official interests in the result of trial. Paragraph 58e of the Manual clearly contemplates that questions of this type be raised by challenge for cause and Article of War 18 prescribes that the court shall not receive a challenge to more than one member at a time. Therefore, so far as objections (1) and (3) are concerned, the court

properly overruled the motion and instructed the defense to proceed with its regular challenges (see CM 199465, 4 B.R. 81, sec. 375 (2), Dig. Op. JAG 1912-40). The defense then stated that it had no challenge for cause and, after exercising a peremtory challenge, that it had no objection to any member present. It is clear from the record that the defense was fully aware of its right to challenge. It has been held that where the defense did not assert its right to proceed with challenges for cause, that right was finally disposed of when the defense accepted the court as it then stood, subject, of course, to the fact that a subsequent show of bias would afford ground for further challenge (CM 199465, supra). The accused in this case may, therefore, be considered to have disposed of whatever right he had to further challenge (see CM 196619, 3 B.R. 32; CM 199858, 4 B.R. 180).

It is noted that if objections (1) and (3) had been asserted as individual challenges, the court would have been justified, in the absence of a showing of actual interest, in overruling them, and that it appears quite unlikely that a showing of actual interest could be predicated on such nebulous grounds. The insistence of the defense in offering objections (1) and (3) in the form of a "motion as to the competency of the court" in itself indicates that it was aware of the unlikelihood of establishing the objections as challenges.

As to objection (2), supra, it has been held that the appointment of an officer other than a member of The Judge Advocate General's Department as law member imports a decision by the appointing authority that an officer of that category is not available for duty and that such decision reached in the exercise of a sound discretion by the appointing authority must be held to be conclusive upon the question of availability (CM 209988; 9 B.R. 169; sec. 365 (9) Dig. Op. JAG, 1912-40). It may be contended that an abuse of discretion is indicated by the fact that Major Bradley, a member of The Judge Advocate General's Department, was available for appointment and served as trial judge advocate. However, a memorandum included in the miscellaneous papers accompanying the record of trial discloses that Major Bradley participated in the preliminary investigation and consideration of this case, and, for that reason, was disqualified to sit as law member. It follows that the defense objection as to the failure to appoint a member of The Judge Advocate General's Department as law member was untenable.

As to objection (4), supra, there is no prohibition against the appointment of a member of The Judge Advocate General's



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Department as trial judge advocate, nor is it required that defense counsel have legal training. The selection of trial judge advocates and defense counsel is a matter for the exercise of sound discretion by the appointing authority in the interests of efficient administration of justice and exercise of command. We find no abuse of discretion in this connection. There is no indication of prejudice or hostility on the part of the trial judge advocate, nor of incompetency on the part of defense counsel, and careful consideration of the record of trial shows that it was fairly conducted and that accused's rights were adequately protected.

For the foregoing reasons, we consider that the mentioned motion of the defense was properly overruled.

8. The accused is 42 years of age, was appointed first lieutenant, Transportation Corps, 12 November 1942, and had no prior service.

9. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of accused were committed during the trial. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as confirmed by the confirming authority and the sentence.

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

(Sick in hospital), Judge Advocate
Robert C. Van Ness

John F. Fontron, Judge Advocate
John F. Fontron

(352)

CM IBT #757 (Envell, Robert E.) - 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 19 November 1945.

TO: Commanding General, India-Burma Theater, APO 885.

1. In the case of Major RobertE. Envell, 0-920144, TC, assigned to Headquarters, United States Forces, India-Burma Theater, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings as confirmed by the confirming authority and the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 757).

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

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(Sentence ordered executed. GCMO 42, IBT, 19 Nov 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.

(353)

New Delhi, India
21 November 1945

Board of Review
CM IBT 759

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| UNITED STATES<br><br>v<br><br>Private Albert J. Zdon, 36342442, 1343 Army Air Forces Base Unit, India China Division, Air Transport Command. | INDIA CHINA DIVISION, ATC<br><br>Trial by GCM convened at APO 627, % Postmaster, New York, N.Y., 27 October 1945. Dishonorable discharge, total forfeitures, confinement at hard labor for life. United States Penitentiary. |

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

1. The record of trial in the case of the soldier above named has been examined by the Board of Review which submits this, its holding, to The Assistant Judge Advocate General in charge of The Judge Advocate General's Branch Office, United States Forces, India-Burma Theater. (Paragraphs 3 and 4 of this review are adopted from the Staff Judge Advocate's review.)

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

CHARGE: Violation of the 92nd Article of War.

Specification: In that Private Albert J. Zdon, 1343 Army Air Forces Base Unit, India China Division, Air Transport Command, did, at Luliang, China, on or about 26 September 1945, with malice aforethought, willfully, deliberately, feloniously, unlawfully, and with premeditation kill one Private First Class Elmer J. Key, 1343 Army Air Forces Base Unit, India China Division, Air Transport Command a human being by shooting him with a United States Caliber .30, Carbine rifle.

(354)

Accused pleaded not guilty to and was found guilty of the Charge and Specification and was sentenced to be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for the term of his natural life. The reviewing authority approved the sentence, designated the United States Penitentiary nearest the Port of Debarkation as the place of confinement, but withheld the order directing execution of the sentence pending action under Article of War 50½.

3. Evidence for the prosecution:

The accused together with Private William C. Dineen, Private First Class Elmer J. Key, Private William D. Orr, Private Frank Popovich and Private Cletis Sprinkle were in the "Noncoms" Club at the 1343rd AAF Base Unit on the evening of 25 September 1945 (R. 10, 43, 51, 75). A party was in progress and they all partook of intoxicating beverages to a certain extent (R. 10, 43, 51, 75). At about 2330 hours the six soldiers left the club in a weapons carrier and rode in to "Boomtown" on the outskirts of Luliang, China (R. 10, 21, 43, 44, 51, 53). They took some liquor with them and on the way the accused appeared to be intoxicated and was loud in his conversation (R. 14, 23, 44, 51, 53, 73). On arriving in town (which was off limits) they stopped and went into a house and there partook of more drinks (R. 19, 21, 22, 44, 53). At about 0200 hours in the morning of 26 September 1945 they left town to return to the base (R. 22, 68). At that time the accused appeared to be drunk, was loud and boisterous and laid down in the back of the truck (R. 12, 14, 21, 22, 55). On the way back he insisted on getting off the truck several times and the other soldiers had to hold him on (R. 14, 57, 68, 79). Finally the deceased, Private Key, slapped the accused several times and told him to be quiet (R. 11, 15, 57, 69, 76), and the accused said in substance that that was the last time Private Key would slap him and that when they returned to the base, he was going to shoot him (R. 11, 15, 57, 69, 76). Soon after this and at a point about one mile from the base they stopped the truck and the accused got off and the remaining soldiers continued on to the base (R. 11, 21, 63).

The five soldiers arrived back at the base about 0200 hours, without the accused, and went directly to the mess hall for sandwiches and coffee (R. 12, 71). After eating, Private Popovich, Private Sprinkle and Private Dineen left the mess hall to go to their barracks and when they were a short distance from the mess hall, they heard a shot (R. 12, 71). On glancing back they saw a person, whom they could not recognize, near the mess

hall (R. 12, 13, 71). A few minutes later they heard another or several gunshots (R. 13, 71). All three soldiers then ran from the scene (R. 13, 14, 71).

Staff Sergeant Odis R. Turner, Mess Sergeant, testified that he was present in the mess hall at 1343rd AAF Base Unit on the early morning of 26 September 1945, when Orr, Key, Popovich, Sprinkle and Dineen came in to eat (R. 24); that after eating, Dineen, Sprinkle and Popovich left for their quarters leaving only Orr, Private Key and himself present (R. 24). Private Key went back through the kitchen to the store-room to obtain his jacket and while he was gone Sergeant Turner heard a gun fire on the outside (R. 24). Immediately after this the accused walked into the mess hall with a carbine in his hands which was held parallel to the floor and with the barrel pointed out towards Sergeant Turner who was standing in the door leading into the kitchen (R. 24, 25, 27). The accused started walking through the dining tables towards the kitchen which was approximately 60 feet away, still holding the carbine pointed towards Sergeant Turner (R. 25, 26, 31). At the same time Sergeant Turner noticed Private Key coming into the kitchen out of the store-room which was in the rear of the kitchen (R. 25, 26, 27). Just before the accused arrived at the door leading from the mess hall into the kitchen, Sergeant Turner ran out of the building (R. 25, 31). Immediately after he went outside, Sergeant Turner heard about six shots fired inside the kitchen (R. 25, 30, 31). He then ran for the military police and upon returning to the mess hall within a short time he found the accused standing nearby with two military policemen (R. 31). Private Key was lying on the ground about 10 yards from the mess hall "with his shirt off and his breast all bloody" (R. 26, 33). Sergeant Turner then went into the kitchen and there found two empty carbine shells on the floor (R. 40).

Private William D. Orr testified, in part, that he was sitting in the mess hall at about 0230 hours on the morning of 26 September 1945 drinking coffee. The deceased Key had gone into the kitchen out of his sight (R. 45, 65). He heard a shot outside the mess hall and ran to one of the doors (R. 45, 65). As he did so, the accused came in the other door on the opposite side of the mess hall carrying a carbine in his hand (R. 45, 46). When he saw the accused, he yelled about three times "Run Key run" (R. 47). The accused started walking towards the kitchen and just before he arrived at the kitchen door, Private Orr ran out of the mess hall and "took cover" (R. 48, 60). As soon as he was outside the mess hall, Private Orr heard five or six shots,

and a voice called out "help" several times (R. 49, 60). Private Orr then went to the dispensary and woke up the person in charge and from there to the Officers' Quarters, where he notified the medical officer (R. 50). On returning to the vicinity of the mess hall he found Private Key on a stretcher near the Nurses Quarters with several persons attending to him (R. 50). Private Orr further testified that at no time during the night of 25 and 26 September 1945 did Private Key have a firearm on his person (R. 63).

The testimony of Major Wendell H. Kisner, Medical Corps, Chief of Surgical Service, 70th Field Hospital, APO 627, was stipulated to the effect that on 26 September 1945 at about 1035 hours the deceased, Private First Class Key, was admitted to the 70th Field Hospital, APO 627, and that at that time Private Key was suffering from a wound, perforating, gun-shot, severe, wound, of entrance upper anterio-lateral aspect of the right thorax; that Private Key was treated by Major Kisner until about 1540 hours, 27 September 1945, at which time Private Key died at the 70th Field Hospital from the injuries described.

The prosecution introduced into the evidence a written statement or confession made by the accused on the afternoon of 26 September 1945, after showing that such statement was voluntary and that the accused was, prior thereto, explained his rights under the 24th Article of War (R. 97). The statement was in substance as follows:- The accused, the deceased Private Key and several others went into Luliang, China, on the night of 25 September 1945 (Pros. Ex. 4). On the way back from Luliang, while in a truck, the deceased slapped and hit the accused across his face, head and neck several times, and finally put the accused off the truck (Pros. Ex. 4). The accused caught a ride in a "jeep" back to the base, went to his tent and there obtained a rifle (Pros. Ex. 4). "I was very angry and wanted to talk to the deceased and find out why he 'picked on me' when he got drunk" (Pros. Ex. 4). The accused found the deceased Key at the mess hall and when he tried to talk, Key rushed him (Pros. Ex. 4). The accused then fired one shot over the head of Private Key and one shot along his side, but Private Key "kept coming" (Pros. Ex. 4). When the deceased Private Key was about 5 feet from the accused, the accused shot him in the right shoulder (Pros. Ex. 4). Immediately afterwards some people came in and took the accused out of the kitchen to the dispensary (Pros. Ex. 4). The accused further stated that he did not recall any other shots other than the ones described (Pros. Ex. 4).

4. Evidence for the defense:

The accused, after having been duly advised of his rights with regard to testifying, elected to make an unsworn statement through his counsel (R. 106). On the night of 25 September the accused accompanied Private Key to Luliang at Key's insistence. The accused became very intoxicated and Private Key abused the accused, calling him "all kinds of a bastard" and then slapped the accused and made him get off of the truck. The accused returned to the base in a jeep and decided to talk to Key about the treatment the accused habitually endured at Key's hands when Key was intoxicated (R. 106). With this in mind the accused obtained his carbine, since Key was a large man and had beaten up some "pretty big boys", and walked to the mess hall (R. 107). Upon entering the mess hall the accused told Key that he wanted to talk to him, whereupon Key replied "I'll get you, you bastard", and rushed the accused (R. 107). The accused became frightened and fired once over Key's head, and when Key advanced to within approximately 5 feet of the accused, the accused fired from the hip at Key's shoulder (R. 107). Key did not stop but took the weapon from the accused. The accused had no intention of shooting Private Key when he got the weapon (R. 107).

Private Cletis Sprinkle testified that on the night of 25 September 1945 the accused was very drunk (R. 99, 100) and that Private Key had a reputation for being a "bully" or "tuffy" (R. 101, 102).

Captain Francis S. Baxter testified that the deceased had the reputation of being "a tough man to tangle with" and that he had had a lot of fights (R. 103).

5. The evidence shows that at least thirty minutes after deceased had slapped accused and been threatened by him, the accused, having in the meantime armed himself with a carbine, appeared at the mess hall in such an obviously ugly mood that bystanders fled in fright, and there shot deceased, who was unarmed. Three principal issues are presented by the evidence - i.e. - (1) was the homicide excused on the ground of self defense? (2) did deceased so provoke accused that the latter shot in the heat of passion instead of with malice? (3) was accused's drunkeness a defense?

We believe the court was justified, for two reasons, in rejecting accused's claim of self defense. First, the Manual for Courts Martial (par. 148) provides that 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.

The fact that accused expected an attack, armed himself, and went to a place where accused was likely to be did not in itself sacrifice his right to self defense (State v. Evans, 124 Mo. 397, 28 S.W. 8, and other cases cited in CM 235044 (21 B.R. 271)). But accused's conduct went beyond this. When his act in arming himself and admittedly seeking out deceased is considered in connection with his previous threat to take deceased's life, his firing of the carbine before entering the mess hall, the threatening position in which he held the carbine on entering and his ominously deliberate advance toward deceased, the conclusion is inescapable that he was in fact an aggressor and, therefore, precluded from asserting self defense.

As to the second reason justifying the court in rejecting any claim of self defense, the Manual provides:

> "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" (par. 148, MCM, 1928). (Underscoring supplied)

Even accepting as true accused's statement that deceased advanced on accused, saying, "I'll get you, you bastard," and failed to stop when a shot was fired over his head, the fact remains that accused was armed with a gun which he could have used as a club to protect himself, that he failed to retreat, and that he does not claim, nor can it be gathered from the evidence, that he was under apprehension of receiving any more than a violent beating from deceased. For these reasons alone his claim of self defense is untenable under the quoted provisions of the Manual (See discussion in 21 B.R. at page 272, citing Acers v. U.S., 164 U.S. 388; Blackburn v. State, 86 Ala. 595, 6 So. 96; State v. Thompson, 9 Ia. 188).

Eliminating self defense as an excuse, and no justification or other excuse appearing, it follows that, in the absence of provocation, the homicide was murder, malice, the distinguishing characteristic of murder, being presumed from the use of the carbine, a deadly weapon (par. 148a, MCM, 1928, par. 112, ibid) (CM 242390, 27 B.R. 57). The Manual provides that provocation

required to reduce murder to manslaughter 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 (par. 149a, MCM, 1928). Where sufficient cooling time elapses between the provocation and the blow the killing is murder, even if the passion persists (ibid). Assuming that deceased's acts in slapping and roughly handling accused while they were in the truck were unjustified, it is difficult to conceive that such acts would cause uncontrollable passion in the mind of a reasonable man. There is no indication that any physical injury was inflicted or intended by the deceased; and it appears quite likely from accused's statement that his anger flowed from pre-existing animosity. In any event, as the evidence shows that at least thirty minutes intervened between the occurrences in the truck and the fatal shooting, the court was wholly justified in considering that passion then engendered had abated or should have abated (See CM 251456, 33 B.R. 287; CM 246101, 29 B.R. 381).

Turning now to the occurrences at the mess hall, we find that the only hint that deceased there provoked accused lies in the latter's statement that the deceased rushed threateningly toward him, saying, "I'll get you, you bastard." Deceased at this time was confronted by an armed, menacing antagonist. The precipitious flight of the others present in the mess hall when accused entered is indicative of the imminence and extremity of deceased's danger. It seems clear, therefore, that any threatening advance he may then have made was merely a feeble attempt to extricate himself from his desperate plight. Accused, by his conduct, forced deceased into the situation and can hardly be heard to complain because deceased decided not to flee and endeavored to protect himself in what appears to have been the only manner open to him. By thus having sought or induced the alleged provocation, accused is estopped from claiming it as an excuse for the killing (See par. 149a, p. 166, MCM, 1928).

There is evidence that the accused was drunk at the time of the commission of the offense; however, the evidence as a whole, and accused's unsworn statement in particular, clearly shows that he was capable of entertaining the state of mind requisite to murder. His unsworn statement admits rational, deliberate thought processes on his part prior to and at the time of the shooting, and his recollection of what occured was not impaired. The court was therefore justified in rejecting drunkeness as a defense (cf. CM 251541, 33 B.R. 269).

(360)

We believe that the nature and sequence of the events herein permit no other conclusion but that the accused, following a not unusual or particularly provoking episode with deceased, formulated a plan for revenge which he, notwithstanding the passage of a period of time within which his desire for revenge reasonably should have abated, deliberately and with premeditation carried out by brutally killing the deceased in cold blood (cf. CM 251541, supra). The court was amply justified in finding the accused guilty of murder.

6. The charge sheet shows that the accused is 28-1/12 years of age and was inducted at Chicago, Illinois on 27 May 1942. He had no prior service. Evidence of one previous conviction under Articles of War 65 and 96 was introduced.

7. The court was legally constituted and had jurisdiction of the person of the accused and of the offense. No errors injuriously affecting the substantial rights of the accused were committed during the trial. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings and the sentence. Confinement in a penitentiary is authorized by Article of War 42, murder being an offense of a civil nature punishable by penitentiary confinement under sections 273 and 275, Criminal Code of the United States (18 U.S.C.A. 452, 454).

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

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

John F. Fontron, Judge Advocate
John F. Fontron

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
28 November 1945

Board of Review
CM IBT 760

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| UNITED STATES<br>v<br>Captain Carroll C. Garretson, 0-391003, Inf., ORC, Office Strategic Services, SU Detachment No. 404. | BASE SECTION, IBT<br>Trial by GCM convened at APO 465, % Postmaster, New York, N. Y., 15 October 1945. Dismissal, confinement for one year. U. S. Disciplinary Barracks. |

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

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

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

CHARGE I: (Finding of not guilty)

Specification: (Finding of not guilty)

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

Specification: In that Captain Carroll C. Garretson, Inf., Office of Strategic Services, Service Unit, Detachment Number 404, did, at Rangoon, Burma, on or about 4 July 1945, knowingly and willfully misappropriate fifty (50) automatic pistols, of the value of about $2000.00 and one (1) sub-machine gun, of the value of about $35.00, total value of about $2035.00, property of the United States furnished for the Military Service thereof.

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| CHARGE III: | (Finding of not guilty) |
| Specification 1: | (Finding of not guilty) |
| Specification 2: | (Finding of not guilty) |
| CHARGE IV: | (Finding of not guilty) |
| Specification 1: | (Finding of not guilty) |
| Specification 2: | (Finding of not guilty) |

Accused pleaded not guilty to all Charges and Specifications, and was found guilty of the Specification of Charge II, and Charge II, and not guilty of the remaining Charges and Specifications. He was sentenced to be dismissed the service, and to be confined at hard labor for two years. There was no evidence of previous convictions. The reviewing authority approved the sentence and forwarded the record of trial to the Commanding General, United States Forces, India-Burma Theater, for action under Article of War 48. The confirming authority confirmed the sentence but reduced the period of confinement to one year. The order of execution was withheld and the record of trial forwarded to this office for action under Article of War 50½.

3. Evidence for the prosecution:

Accused, an infantry officer, is assigned to the Office of Strategic Services, Service Unit Detachment 404, and at the time of trial was on temporary duty with Headquarters, Base Section, APO 465 (R. 6). On 8 March 1945 Captain Woodworth inventoried supplies and equipment at the Chittagong Radio Station and among the items were 52 government issue .45 caliber pistols. During the latter part of April, accused arrived at Chittagong and took with him one sub-machine gun and a case containing 50 or 51 of the pistols. No receipt was signed by accused as Captain Woodworth had not signed for the property (R. 6; Ex. 1).

In April 1945 Major Trees was commanding officer of Office of Strategic Services, Detachment 101, field unit located at Kyaukpyu, Burma. Accused was executive officer of that unit. About the middle of that month Sergeant Houts, who was a former FBI agent, was in the tent of Major Trees and accused, both the latter being present, and during the conversation Major Trees asked Sergeant Houts if he was averse to making "a little extra

money", explaining that he believed Houts' experience in the FBI made him "wise to the ropes" and that he would be able to keep them out of trouble. Major Trees told Sergeant Houts that accused had just returned from Chittagong and had 51 .45 caliber automatic pistols which had not been signed out to anyone and accused believed they could be sold for quite a profit (R. 7). At first Sergeant Houts was not interested, but a couple of days later, having decided it was his duty "to see what was going on", he told them he would enter the "deal" with them. He told Mr. McCarthy (Chief of the X-2 Branch of Office Strategic Services (R. 48)) on 18 April that he was going to investigate the matter but he made no report thereon to anyone until 15 July (R. 11, 12). Within a week of 29 April the two officers and Houts again talked about the pistols and Major Trees was of the opinion that a higher price could be realized if they were sold in China. Accused, speculating concerning the price, was of the opinion they might be sold for $500 to $1,000 apiece. During May Sergeant Houts saw accused in Rangoon and accused stated he thought a Mr. Sastri might dispose of the pistols, but several days later said Sastri had decided not to take the weapons (R. 8, 9). According to Sastri, accused actually asked Sastri about "disposing" of firearms (R. 20, 28, 29) but the latter told him "it was too dangerous a game for me" (R. 20). On the night of 3 July, before accused left for Calcutta, Sergeant Houts was called to accused's quarters and was told that Lieutenant Colonel Tun Aung, Burmese Rifles, was a safe man to whom to deliver the pistols. They took the pistols to Aung's home (R. 6; Pros. Ex. 2) where it was decided to bury them until he could find a way to dispose of them. Upon arriving at the house accused said, "Colonel, you remember Sgt. Houts, don't you. He's the fourth member of the deal" (R. 8, 9). Several days later Sergeant Houts told Colonel Aung that he received a letter from accused and that accused was under suspicion and wanted Houts to "get the pistols and return them to the supply room". The tin box in which the pistols and one M-3 sub-machine gun were located was dug up and Sergeant Houts took it to his headquarters in Rangoon (R. 8, 9). No such letter was actually received but Houts had told Colonel Aung this to get into his confidence (R. 18). The 50 pistols and one sub-machine gun are property of the United States Government, furnished for the military service thereof, and have a total approximate value of $2, 035.00 (Ex. 2).

4. Evidence for the defense:

Colonel Wilfred J. Smith, Office of Strategic Services, testified that in May 1944 the Office of Strategic Services was

primarily concerned with the destruction of enemy installations. Teams were sent out with small groups of natives to harass or embarrass the enemy by any methods that could be devised and all the arms and ammunition were given to the officer in charge of the team, to be used in the field at his discretion. They were not accounted for except in result. Weapons were frequently given to people who were in a position to harass the enemy, and the officer's disposal of weapons was not questioned. The discretionary disposal, however, was limited to field units. Before an operation was organized, the commanding officer would be consulted by the officer in charge of the operation. Office of Strategic Services military personnel operated under Army regulations and disciplinary action was enforced under the Articles of War (R. 66, 69).

On or about 3 June, Major Edwards, V-Force, of the British Army, discussed the "Tavoy" operation with his colonel, Lieutenant Colonel Tun Aung, Major Trees and accused. This operation contemplated going to Tavoy in P-Boats to release some prisoners, one of whom was Lieutenant Colonel Aung's wife (R. 76). The final details of this operation were not scheduled and it was never carried out (R. 69, 73). Supply of arms and ammunition for this operation was discussed and the Americans were to furnish these items (R. 70, 72).

Lieutenant Colonel Aung discussed the Tavoy operation with Major Trees, accused, and other officers on or about 15 May 1945. He was to furnish the information and men, and the Americans the arms. A plan to go by sea was proposed and drawn up by the Office of Strategic Services, but this was disapproved by higher headquarters at Kandy. Colonel Aung then formed a plan to follow the coastline to Tavoy. Early in July, accused delivered some pistols to Lieutenant Colonel Aung, stating that he was going away and asking that they be looked after until his return within a month. These guns were for the Tavoy operation which they still hoped to carry through. Nothing was ever discussed about purchasing the weapons (R. 76-77). The guns were buried so that the children about the place would not know there were guns in the box. When accused brought them to Lieutenant Colonel Aung he told him if anyone asked about it to say it was a box of rum or machinery. For this reason Lieutenant Colonel Aung told Mr. McCarthy, who was investigating Office of Strategic Services activities, that the box contained rum. He did this as the guns belonged to the Office of Strategic Services and he did not want to get the officers involved (R. 80). It would also have been difficult to explain his possession of them to the British (R. 81).

Within ten days he received orders to report to northern Burma and, not having heard from accused as promised concerning what to do with the guns, he went to the Office of Strategic Services headquarters and saw Sergeant Houts. That evening Sergeant Houts took the guns away (R. 82). He did not recall any statement by accused to the effect that Sergeant Houts was the fourth man in on the deal (R. 81).

During April Major Trees was commanding officer of the Office of Strategic Services Detachment in Kyaukpyu. Accused and Sergeant Houts were in that command. Major Trees had 50 pistols and one sub-machine gun in a footlocker in his tent. Some time during that month Sergeant Houts visited in the tent and remarked about the number of pistols there. Major Trees laughingly replied they would be worth quite a bit of money in China. Accused at the time was in the front part of the tent working with two shotguns and only entered into the conversation "in reference to something about going hunting". There was no conspiracy wrongfully to dispose of the automatic pistols for their own benefit, and there was never any further discussion in the presence of accused and Sergeant Houts (R. 84). The Tavoy operation had been discussedbut the reaction of higher headquarters was "not so good" as Tavoy was not within Major Trees' jurisdiction at that time (R. 85). If it had been, he could have gone "on this plan on his own and could have disposed of the firearms as he saw fit as long as it was used against the enemy". Even though higher headquarters had not approved this particular plan and the Americans did not participate, Major Trees had authority to give the pistols to Colonel Aung for operational use(R. 85-86). Major Trees relinquished his command on or about 4 June and on 11 June left the guns in possession of accused who told him he intended to use them with Lieutenant Colonel Aung. Major Trees was in favor of this and did not consider it a violation of the proper disposition of them (R. 87, 89). He never mentioned the guns to the officer succeeding him (R. 89). A supply room was set up at Headquarters, Arakan Field Unit in Rangoon but the pistols were not kept there (R. 88).

Accused, having had his rights explained to him, elected to be sworn and testify as a witness in his own behalf. He stated that he has previously given property or equipment to an agent to use against the enemy; that he felt within his rights when he had Sergeant Houts deliver the guns to the home of Colonel Aung; that he never disposed of any property intending to defraud the United States Government; that the guns were not delivered as a result of an agreement to get money for them; that he never conspired with Major Trees and Sergeant Houts to dispose of the

pistols and sub-machine gun; that he never told Colonel Aung to bury the guns nor could he remember having told him to tell others that it was a box of rum or machinery; that he never made the statement to Colonel Aung that Sergeant Houts was the fourth man in on the deal; that he never asked Sergeant Houts to come in on a deal whereby the guns would be sold for a profit and that he does not recall having given pistols away without ammunition during the course of operation, but that he has given away considerable equipment without consulting anyone. He obtained the pistols about the middle of April and they were in the tent during the conversation concerning which Sergeant Houts testified. He cannot accurately explain what the conversation was about as he was not actually engaged in it but was standing in the front part of the tent examining two shotguns he had brought from Chittagong. It was current news that there had been smuggling of arms over the Hump into China and some parallel was drawn between that and the equipment on hand but he did not know what was said. He did not tell Colonel Hunter, who would be the responsible officer, about the pistols as he thought he was doing the right thing at the time in delivering them to Colonel Aung. Although higher headquarters had disapproved the specific plan presented by Rangoon Office of Strategic Services, it was not said that those who wanted to continue such an operation could not be armed and supplied. The arrangements had been made before the arrival of Colonel Hunter and, having promised to help Colonel Aung, he thought he was doing the right thing in completing the mission. Accused did not approach Mr. Sastri with reference to selling firearms, but did, as he had with many others, ask concerning the disposition of firearms to individuals who might help annoy the enemy. He had, after entry into Rangoon, made an efficiency report on Sergeant Houts in which he stated that Sergeant Houts was well educated and had all the qualifications of a good man with the exception of his unwillingness to take an estimated risk (R. 92-104).

Mr. Durai of Rangoon, Burma, testified that he had known Mr. Sastri for about 15 years, knew his reputation and would not believe him under oath (R. 64, 65).

5. Rebuttal evidence for the prosecution:

Colonel Hunter arrived in Rangoon on 3 June 1945 to succeed Major Trees as Commanding Officer of the Office of Strategic Services Detachment. Authority to conduct a "Tavoy Operation" had been denied by higher headquarters at Kandy. No one, including junior officers, had any authority to conduct this operation, for the reason that it would not have been approved

by the Theater Commander because it was outside the boundaries of the Detachment. Supplies to the Detachment were tallied out only on shipping ticket. All operations were supplied in this manner. If the "Tavoy Operation" had been authorized it would have been supplied with carbines and tommy guns and not with pistols, for the latter would be unsuitable for such a mission. The accused, as an Operations Commander, would have certain authority to issue equipment, but, if he issued such equipment without the authorization of higher authority he would have been subject to reprimand. Since the operation had been disapproved the accused would not have authority to issue any equipment to another party to carry out the mission. On 4 July the accused already had been relieved of his duties as Operations Officer (R. 105-109).

6. Accused has been charged with and convicted of misappropriation of Government property furnished for the military service. To substantiate a charge of this nature it is incumbent upon the prosecution to prove (a) that the accused misappropriated certain property as alleged, (b) that such property belonged to the United States and that it was furnished or intended for the military service thereof as alleged, (c) the facts and circumstances of the case indicating that the act of accused was knowingly and willfully done, and (d) the value of the property as alleged (MCM 1928, par. 150i). The gist of the offense of misappropriation and misapplication is the misapplication of the property to an unauthorized and wrongful purpose (CM 243287, Poole, 27 B.R. 321). In that case the board of review further said:

> "Giving consideration to the comments of Winthrop, to the almost synonymous meanings of the terms in ordinary use, and to what is believed to be the purpose of Congress in including the words in the statute, the Board of Review is of the opinion that an accused may be guilty of either misappropriation or misapplication of property, whether he was in original lawful possession thereof or obtained it by trespass. Both larceny and embezzlement are offenses of strictly limited application, and it is well known that many guilty persons have escaped punishment because charges were laid under one theory and the proof disclosed that the other was applicable. Furthermore, larceny contemplates the intention of depriving the owner permanently of his property, as does embezzlement. It is believed that Congress desired to provide less restricted offenses, along with larceny and embezzlement,

to cover those cases where a person subject to military law makes wrongful and unauthorized use of Government property devoted to the military service, without regard to whether such person obtained control of the property rightfully or wrongfully".

It has also been held in CM 255831, Grawundar, 36 B.R., 197, that the meaning of misappropriation is "devoting to an unauthorized purpose" and that fraudulent intent is not an essential element thereof. This Board of Review has previously held that misappropriation means devoting to an unauthorized purpose and need not be for the benefit of the accused. When property is so devoted it matters not that the Government may receive some benefit as the offense is made out when the property is, in fact, devoted to the unauthorized use, and benefit to the Government is a matter of extenuation rather than defense (CM IBT 349, Stoddard). We further believe the fact that a practice exists in a command of making use, not authorized by regulation or order, of Government property can constitute no defense. Such practice if sanctioned, although improperly so, by superior authority, may be shown in mitigation (cf Dig. Op. JAG 1912, p. 138).

7. Taken in its most favorable light for the defense, it clearly appears that accused obtained the footlocker of pistols and the sub-machine gun without receipt therefor from Captain Woodworth at Chittagong, took them to Kyaukpyu, and later to Rangoon. The day before leaving Rangoon, after he had been relieved as Operations Officer, he turned them over to Lieutenant Colonel Aung from whom they were later recovered by Sergeant Houts. According to his own testimony, the proposed Tavoy operation, plans for which had been made by officers of the Office of Strategic Services, had been disapproved by higher headquarters at Kandy. If this had been approved, he could have rightfully turned over the weapons to Colonel Aung to further the operation, but it was his contention that in spite of the disapproval he was nevertheless within his rights in giving this equipment to any person who would be in a position to harass the enemy. However, there is further evidence that at such time accused had been relieved of his position as Operations Officer and that supplies to his former detachment were tallied out only on shipping tickets, all operations being supplied in this manner. Further, it was revealed that as the operation had been disapproved, the accused would have no authority to give weapons to any party to carry out the mission that was contemplated even

though he had not been relieved as Operations Officer.

8. In its more unfavorable aspect, it appears that accused, Major Trees and Sergeant Houts, who claimed to have entered the arrangement for investigating purposes, entered into an arrangement whereby the arms were to be disposed of for a profit and that they were turned over to Colonel Aung for this purpose. Previously accused had approached N. S. Sastri with a view to having him dispose of the pistols and sub-machine gun for them, but Sastri refused as it was too dangerous. When the equipment was delivered to Colonel Aung by Sergeant Houts and accused, the latter mentioned that Sergeant Houts was the fourth man in on the deal. This we believe to be significant of the intentions of accused. Also, it is further significant that the possession of the equipment, which was not signed for, was never reported to the commanding officer succeeding Major Trees either by accused or Major Trees, nor was it turned over to the supply room in Rangoon which was the normal and proper place for storage of such items. We believe there is ample evidence to justify the court in rejecting the explanation of accused that he turned the weapons over to Colonel Aung, believing that he had authority to do so, notwithstanding the disapproval by higher headquarters of the proposed operation. It indeed seems strange that this would be his purpose in light of the fact that the weapons were given without ammunition and after his removal as Operations Officer.

9. Regardless of which theory the court followed, whether that most favorable or unfavorable to accused, we are of the opinion that the court was justified in its findings in view of the foregoing principles and authority hereinabove cited.

10. N. S. Sastri, a Hindu, was sworn under the form prescribed by Article of War 19. During his testimony one of the members of the court questioned the efficacy of such oath upon a non-Christian, whereupon the following transpired:

> "PROSECUTION: Mr. Sastri, when you raised your right hand and said "So help you God", did that have the same effect as if you had taken the Hindu oath, as to telling the truth?
>
> "ACCUSED: Yes, in the name of God. (Mr. Sastri was then given the Hindu oath and sworn)" (R. 27).

* * * *

"Q. [By defense] Would you say that nothing that you have said in court today is untrue?

"A. [Mr. Sastri] I would" (R. 28).

We do not believe there is any substantial question as to the sufficiency of the oath originally administered, as the witness himself indicated that he considered it binding on his conscience (see par. 95, MCM 1928). In any event, we think such is obviated by the fact that he reaffirmed his testimony after being sworn according to his religion. In 70 C.J., p. 486, it is stated:

> "Where a witness after he is sworn reaffirms testimony which he gave before he was sworn, such testimony thereby becomes competent".

11. It is noted that the sentence provided for dismissal and confinement but did not include forfeitures. It is true that a "sentence involving dismissal and confinement should specifically provide for forfeiture of all pay and allowances due or to become due". However, "this omission is immaterial since total forfeitures will become absolute upon the execution of the sentence to dismissal" (CM 242464, 27 B.R., 84, Robbins).

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

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

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

John F. Fontron, Judge Advocate
John F. Fontron

CM IBT # 760 (Garretson, Carroll C.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL, USF, IBT, APO 885, c/o Postmaster, New York, N. Y., 29 November 1945.

TO: Commanding General, India-Burma Theater, APO 885.

1. In the case of Captain Carroll C. Garretson, 0-391003, Infantry, ORC, Office Strategic Services, SU Detachment No. 404, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings of guilty and the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published order are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published order to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT # 760).

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

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(Sentence ordered executed. GCMO 43, IBT, 29 Nov 1945)

WAR DEPARTMENT
BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL
WITH THE
UNITED STATES FORCES INDIA BURMA THEATER.



New Delhi, India
28 November 1945

Board of Review
CM IBT 762

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| UNITED STATES<br><br>v<br><br>Captain Robert D. Ellis, 0-733293, Air Corps, AUS, Office Strategic Services, Service Unit, Detachment 505. | BASE SECTION, IBT<br><br>Trial by GCM convened at APO 465, % Postmaster, New York, N. Y., 25 October 1945; Dismissal, total forfeitures. |

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

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

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

CHARGE I: (Finding of not guilty)

Specification 1: (Finding of not guilty)

Specification 2: (Finding of not guilty)

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

Specification 1: In that Captain Robert D. Ellis, Air Corps, Office Strategic Services, Service Unit Detachment 505, acting in conjunction with First Lieutenant Jack H. Gilmore, Signal Corps, Office Strategic Services, Service Unit Detachment 505, did, at Behala, India, on or about 12 August 1945, without the consent of the

owner, wrongfully and wilfully take and carry away from the person of Ram Sevak Singh, Police Sentry, one musket rifle, 410 bore, value about twenty-nine Rupees, lawful monies of the Government of India, the property of Ram Sevak Singh.

Specification 2: In that Captain Robert D. Ellis, Air Corps, Office Strategic Services, Service Unit Detachment 505, acting in conjunction with First Lieutenant Jack H. Gilmore, Signal Corps, Office Strategic Services, Service Unit Detachment 505, did, at Calcutta, India, on or about 12 August 1945, without the consent of the owner, wrongfully and wilfully take and carry away from the person of Fouzder Singh, Constable of Police, one Police Service belt with buckle, value about two Rupees and thirteen annas, lawful monies of the Government of India, the property of Fouzder Singh.

Specification 3: In that Captain Robert D. Ellis, Air Corps, Office Strategic Services, Service Unit Detachment 505, acting in conjunction with First Lieutenant Jack H. Gilmore, Signal Corps, Office Strategic Services, Service Unit Detachment 505, did, at Behala, India, on or about 12 August 1945, commit an assault upon Jogendra Narain De, Assistant Sub-Inspector of Police by pointing at him and pressing against him, the said Jogendra Narain De, a dangerous weapon, to wit, a .45 caliber Thompson submachine gun, under threat of death.

Specification 4: In that Captain Robert D. Ellis, Air Corps, Office Strategic Services, Service Unit Detachment 505, acting in conjunction with First Lieutenant Jack H. Gilmore, Signal Corps, Office Strategic Services, Service Unit Detachment 505, and Private First Class Frederick J. Scherman, at Calcutta, India, on or about 12 August 1945, grossly disorderly in uniform, in a public place, to wit, Alipore Police Station, by creating a disturbance under threats with firearms in the presence of others in search of a civilian prisoner; interfering with the orderly business of the civilian police and by forcibly disconnecting police telephone communications.

Specification 5: In that Captain Robert D. Ellis, Air Corps, Office Strategic Services, Service Unit Detachment 505, acting in conjunction with First Lieutenant Jack H. Gilmore, Signal Corps, Office Strategic Services,

Service Unit Detachment 505, did, at Calcutta, India, on or about 12 August 1945, commit an assault upon Z. Rasul, Sub-Inspector of Police, by pointing at him, the said Z. Rasul, a dangerous weapon, to wit, a .45 caliber Thompson submachine gun.

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

Specification: In that Captain Robert D. Ellis, Air Corps, Office Strategic Services, Service Unit Detachment 505, acting in conjunction with First Lieutenant Jack H. Gilmore, Signal Corps, Office Strategic Services, Service Unit Detachment 505, and Private First Class Frederick J. Scherman, at Behala, India, on or about 12 August 1945, grossly disorderly in uniform in a public place, to wit, Behala Police Station, by creating a disturbance under threats with firearms in the presence of others, interfering with the orderly business of the civilian police, in search of a civilian prisoner and by discharging firearms in and about a public compound of the Bengal Police.

Accused pleaded not guilty to all Charges and Specifications. The court found him not guilty of Specifications 1 and 2, Charge I, and Charge I, and guilty of Charge II and the five Specifications thereunder, and guilty of Charge III and its Specification. The accused was sentenced to be dismissed the service and to forfeit all pay and allowances due or to become due. The reviewing authority approved the sentence and forwarded the record of trial pursuant to Article of War 48. The confirming authority approved the findings of guilty of all Specifications of Charge II, and Charge II, and approved so much of the findings of guilty of the Specification of Charge III, and Charge III, as involves a finding of guilty thereof in violation of Article of War 96. The sentence was confirmed and the record forwarded pursuant to Article of War 50½.

3. The review of the Theater Judge Advocate contains a comprehensive summarization of the evidence which, with appropriate modifications, is adopted as paragraphs 4 and 5 of this holding.

4. The accused is Branch Chief with the Office Strategic Services, SU - Det. 505, and has been stationed at APO 465 (Calcutta, India) since 21 February 1945 (Pros. Ex. 7).

On 12 August 1945, at about 9:45 P.M., Jogendra Narain De, Assistant Sub-Inspector of Police, was on duty in the Behala Police Station, Calcutta, India (R. 10). Mokammal Hossain was

the clerk on duty (R. 18). Ram Sevak Singh was the sepoy on duty as police sentry at the gate. He was armed with his rifle, No. 601 (Pros. Ex. 2; R. 25). The accused, accompanied by Lieutenant Gilmore, Private First Class Scherman, and a servant, drove up to the gate in a jeep. The three soldiers were armed with tommy guns. Singh ordered them to halt but they took no notice of him and entered the station. Singh then went to the door of the station. The three men pointed their weapons at him and tried to take his rifle. Lieutenant Gilmore wrested the rifle from Singh and put it in the jeep. The weapon was not returned to Singh. The value of the rifle is about Rs. 29 (Pros. Ex 5; R. 43, R. 24-28).

Gilmore entered the police station, pointed his tommy gun at Sub-Inspector Jogendra Narain De, caught him by the right hand and took him into the next room. Accused and Scherman then came into the second room (R. 10-12). Accused was armed with a pistol (R. 19) while Scherman had a tommy gun (R. 12). Accused and Scherman searched the room, two prisoners' cells and the stolen property room, while Gilmore stood on the threshold of the room with his arms, a pistol and tommy gun. According to the Indian witnesses, the accused and his companions were searching for a certain Davis, sometimes referred to as Davis Driver (R. 12-13, 16). When they entered the room in which Hossain was working, the accused and Scherman said to Hossain, "Where is Davis. Produce him at once" (R. 19). Not finding Davis, accused and Scherman took Hossain out the back door (R. 13, 20). Lieutenant Gilmore pointed his tommy gun and pistol at Inspector De, the muzzle of the gun touching the Inspector's ear and said, "You will die, you will die, you will die, if you don't produce Davis Driver". The Inspector was frightened that the gun might go off accidentally (R. 13-14, 16). Inspector De noticed that his sentinel, Constable Singh, who earlier had been armed with a musket, was now standing unarmed on the veranda (R. 14). Gilmore then fired two shots toward the outside and called Singh inside. The accused and Scherman took Inspector De and Hossain upstairs to the constables' quarters which they searched. Several shots were heard, two of them being fired by Scherman, in the presence of accused, on the stairway (R. 15, 20). The accused and Scherman took Hossain to the second officers' quarters and, since the gate was locked, told Hossain to open it, stating that "If you don't open the door I will kill you". Hossain then had a servant open the gate and the accused and Scherman searched the room. Two more shots were heard, one inside and one out. Accused and Scherman then went away (R. 20-22). From ten to fourteen shots were heard during the entire period (R. 27).

On 12 August 1945, at about 2200 hours, at the Alipore Police Station, Calcutta, India, the accused and Lieutenant Gilmore, together with an Indian boy, entered the police station. Sub-Inspector Ranjit Ray was sitting in the office talking to a private citizen on business. The accused asked if a bearer by name of David had been arrested by the police. Ray checked the lock-up register but could find no one under the name of David. Accused then said there were fifty men outside with tommy guns and that the boy must be found. The accused then took his seat near Ray and they discussed David's possible whereabouts. Private First Class Scherman entered the room with a gun in his hand and put the muzzle on the right side of Ray's neck. Ray protested to accused, saying that he was trying to help, but accused said nothing. Scherman then went near the telephone plug and pulled it out of the wall. He then went into the O.C's (Officer in Charge) quarters and brought out the O.C's servant at the point of a gun. Scherman again went to the telephone plug and attempted to tear the plug from the wire. Gilmore took Scherman's gun and brought in some constables. In the meantime, the O.C., Rasul, entered the room and Ray introduced him to accused, Gilmore and Scherman, explaining that they were trying to find David. The accused was present all this time (R. 34-39). Sub-Inspector Zowadur Rasul, Officer in Charge of the Alipore Police Station, had been lying sick in his quarters when he heard the noise in the office. He got up and entered the office. There he saw the accused sitting in front of Sub-Inspector Ray. Scherman was behind Ray with the telephone wire in his hand and was trying to tear it up. Gilmore was standing on the staircase with his fingers on the triggers of his two guns and pointed one of them at Rasul. The second was pointed at Ray and the others in the office. Scherman wrapped the wire around a chair leg and pulled the plug from the wire. The accused and his companions then left the police station (R. 37, 29-33).

On 12 August 1945 at about 2200 - 2230 hours, Fouzder Singh, police constable of Watgunj had just finished his work and was walking home from Kidderpore Road to Munshigunj Road by way of the steps. An American soldier got out of the jeep, standing some distance away, came up behind Singh and took his police belt. Singh did not want to give up his belt, but an unidentified soldier came up and pointed a tommy gun at him. Two or three shots were fired and they then drove off. The man who took the belt was Lieutenant Gilmore. The jeep bore the No. 505. Singh's belt was No. W-36, Calcutta Police, and its value is about Rs. 2/13 $.86 (Pros. Ex. 6; R. 39-43).

On 13 August 1945, K. C. Bashook, Agent, C.I.D., was investigating the aforementioned events. The accused came into the office of the Commanding Officer, OSS Det. 505, and stated that he was the person involved in those incidents. From there they

proceeded to Camp Z, where the accused is Branch Chief, and the accused there made a voluntary statement to Agent Bashook. This statement was made without inducement, reward, threats or promises of any kind (Pros. Ex. 7; R. 44-45). In this statement the accused stated that on 12 August 1945, in the afternoon, he had a few drinks; at about 2000 he heard that two civilian employees named David and Henry had been involved in some trouble with the civilian police; that Lieutenant Gilmore said he was going out to get David; that, after dinner, at the Orderly Room he noticed Lieutenant Gilmore, Private First Class Scherman and two others opening the safe and taking out some weapons; accused said nothing and later made up his mind to accompany Lieutenant Gilmore to the police station; accused had taken his pistol and went over to the jeep which contained Lieutenant Gilmore, Private First Class Scherman and Henry. This was about 2130 hours; the accused drove the jeep to the Behala Police Station, entered the office on the ground floor and asked if David was confined there; when accused got out of the jeep to enter the police station he noticed that Private First Class Scherman had a tommy gun with a clip in it and was carrying the gun in ready position; in the police station accused explained that he did not want to cause any trouble; he heard a commotion and a lot of people entered the room; Lieutenant Gilmore was outside and accused assumed he was armed; a guard accompanied him while he searched the living quarters in the building and then returned to the other building and went up the stairs to the first floor (second story); at this time accused heard several bursts of gun fire just outside the police station; upon going outside he noticed a group of people near the entrance to the office; Lieutenant Gilmore and Private First Class Scherman were among them; accused and the others then drove to the Alipore Police Station at the suggestion of one of the Indians in the office. Accused and Lieutenant Gilmore entered into the station and asked for David; Private First Class Scherman entered, carrying his tommy gun; after a lengthy discussion with the Indian in charge they left the police station and Henry (another Indian employee) directed them to David's home near Kidderpore Bridge; Lieutenant Gilmore went with Henry and they returned with David and the four of them returned to the camp where a medical technician treated David. The weapons were turned over to the Sergeant of the Guard and accused went to bed; accused's weapon was loaded but had no shell in the chamber and he never used it that night; the accused had authority to bear arms on duty and was on official business when he went to the Behala Police Station; accused and the others were in full control of their faculties at all times during that evening and were not under the influence of alcohol; accused did not authorize the discharge of weapons by Lieutenant Gilmore and Private First Class Scherman and told them to cease using them;

Lieutenant Gilmore is authorized to carry weapons outside the camp but Private First Class Scherman is not; the accused had no intention of using any force at the police station and the guns were not taken for that purpose.

5. First Lieutenant Gilmore stated that on 12 August 1945 accused was Chief of the M.O. Branch for OSS in Calcutta. This included both the downtown area and area Z where Lieutenant Gilmore was stationed and of which he was the Commanding Officer. Henry and David were two Indians employed by accused and Lieutenant Gilmore as bearers and coolie pushers and were, sometimes, used as informers. On 12 August it was learned by Henry that David was locked up by the police. Accused and Lieutenant Gilmore left the camp for the purpose of ascertaining if that was so. Lieutenant Gilmore had bail money with him. Accused was armed with a .45 pistol. Accused and Lieutenant Gilmore went to the Behala Police Station where Lieutenant Gilmore, in the absence of the accused, relieved Ram Sevak Singh of his musket. Lieutenant Gilmore did some firing on the front steps and "emptied" his weapon. The accused did not threaten any one at the Behala Police Station. The accused made an off-hand statement that there should be no more firing. Upon arriving at the Alipore Police Station, Private First Class Scherman was told to remain in the jeep. Private First Class Scherman's tommy gun was not loaded. Lieutenant Gilmore had a tommy gun but accused did not. Lieutenant Gilmore took constable Fouzder Singh's buckle near David's house. Accused did not help Lieutenant Gilmore in this, and did not know for some time thereafter that witness even had the buckle. Lieutenant Gilmore intended to return the rifle he had taken from Ram Sevak Singh. Lieutenant Gilmore exhibited the bail money at the Behala Station on one occasion. When Lieutenant Gilmore put the rifle in the jeep the accused got into the jeep. Lieutenant Gilmore intended to return the rifle all the time but couldn't do so immediately because they were followed by the M.Ps. The three of them were dressed in uniform at the time of the incidents. Lieutenant Gilmore took the police constable's belt and buckle as a souvenir. At the time he took the belt and buckle the other two were in the jeep about 35 to 50 feet away. The accused drove the jeep at all times (R. 47-55).

The accused, upon being advised of his rights, elected to take the stand and make a sworn statement. He stated that on 12 August 1945, at about 2000 hours, he accompanied Lieutenant Gilmore to assist in making bail for David. He took his .45 pistol because he always carried it at night. Upon arriving at the

Behala Police Station he informed the men in charge of their mission. He talked to De and Ghatak and to Constable Hossain, all of whom seemed very co-operative. Hossain conducted accused and Private First Class Scherman to various parts of the building which they searched. He did not see Lieutenant Gilmore threaten De or take a rifle from the sentry, Ram Sevah Sing, nor did he threaten anyone himself. While at Behala he heard weapons fired (R. 56-57). Both Lieutenant Gilmore and Private First Class Scherman had tommy guns at Behala. He made no effort to take Scherman's weapon after the latter fired in the air from the steps. The constable was not afraid. Scherman had obviously been drinking (R. 59-60). From Behala they went to the Alipore Station. He discussed with Lieutenant Gilmore the previous firing of weapons and got the impression that the situation was under control and there would be no more shooting. Gilmore put the clips for the tommy guns in the glove compartment of the jeep. At Alipore they parked the jeep and told Scherman to stay in it. He entered the station, wearing his pistol, and talked to Ray. Ray was helpful and had four prisoners brought into the room. He did not see Lieutenant Gilmore point a weapon at anyone (R. 57). Lieutenant Gilmore had left his tommy gun in the jeep at Alipore, but subsequently Private First Class Scherman came in with his tommy gun, and as Ray seemed nervous, Gilmore took the gun away from him (R. 61). He saw Private First Class Scherman pull a plug out of the wall but did not think it serious (R. 62). Ray told them that often a boy would be picked up and then released and suggested that David might be at home. They then drove to David's home and stopped at the steps leading to Kidderpore Bridge, where Lieutenant Gilmore and Henry went into a small house and returned with David. The two boys were put in the jeep, after which Lieutenant Gilmore again left for a short time. After leaving Behala the accused became aware of the rifle in the jeep, but it was not returned that night because the M.Ps were following them. It seemed best to all of them that it be returned next morning and the accused did return it, of his own volition, at such time (R. 58). Accused and Lieutenant Gilmore had Rs. 1000 bail money, which they exhibited at Behala (R. 62-63). The accused was the senior officer present and drove the jeep (R. 59). He never fired his gun at any time (R. 61).

6. It is not necessary to recapitulate the facts disclosed by the testimony above summarized. That testimony clearly establishes the series of assaults, the taking of property, and the disorderly conduct, by various members of the group of which the accused was a member, all as alleged in the Specifications.

However, since the evidence does not show that the accused personally joined in every wrongful act alleged, the chief question for determination is whether he was individually accountable and criminally responsible for the unlawful acts of his associates. Before passing upon that matter, it may be noted that there was testimony, albeit contradicted, that the accused was personally involved in the taking of police sentry Singh's rifle, for he is shown to have been threatening the sentry with a tommy gun at the time Gilmore seized the weapon. Since the court could credit such testimony, which we may not weigh, the accused was consequently, as to such offense, a principal in the first degree and rightfully found guilty thereof. It may also be observed that the personal participation of the accused in the taking of the rifle at the Behala Police Station, as well as the accused's personal insistence, in intemperate language, that David be produced, that he (accused) be allowed to search certain quarters for David and his subsequent threats while making the search, was conduct of an unruly and disorderly nature, not to mention its defiant and arrogant character.

We now turn to the question whether the accused was legally found guilty of the offenses individually perpetrated by his companions. It is conclusively established, and conceded by the accused himself, that the purpose of the enterprise upon which the Americans embarked, was to obtain the release of David. Such objective, if to be accomplished by lawful means through legitimate channels, was not illegal. However, the evidence justifies the assumption that more was intended than the peaceable bailment of an unfortunate prisoner. The conduct of the accused and company throughout reasonably warrants its interpretation as manifesting a common design to defy authority. Apparently, David was to be produced by a show of armed force, calculated at least to over-awe if not, in fact, to strike terror into the souls of Calcutta's stalwart guardians of the peace. The validity of this view is attested by the type and number of weapons selected for the asserted "peaceful" liberation of the incarcerated David, as well as the menacing manner in which they were displayed and discharged in the presence of those entrusted with the preservation of law and order. The venture thus undertaken was not innocent in character but one unpleasantly reminiscent of certain malodorous and sinister enterprises engineered by lawless elements in the late un-lamented prohibition era. The evidence is patently susceptible of a finding that the accused combined with Gilmore and Scherman to commit a wrongful act, and acted with preconcert in its attempted fulfillment. The law concerning criminal responsibility in such a situation

is well defined. In Vol. 1, McClain on Criminal Law, sec. 196, it is stated:

> "It results from the principle stated in the preceding section that every one connected with carrying out a common design to commit a criminal act is concluded and bound by the act of any member of the combination perpetrated in the prosecution of the common design. But it is not necessary that the crime committed shall have been originally intended. Each is accountable for all the acts of the others done in carrying out the common purpose, whether such acts were originally contemplated or not, if they were the natural and proximate result of carrying out such purpose; and the question whether the result is the natural and probable effect of the wrongful act intended is for the jury".

The same rule is thus stated in par. 258, Vol. 1, Wharton's Criminal Law, 12th Ed., p. 343:

> "All those who assemble themselves together with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically designed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime". (See also CM IBT 630, Thomas)

Under the principle above enunciated, the accused was clearly responsible for, and rightfully found guilty of, the assaults alleged in Specifications 3 and 4 of Charge II. In addition, it must be noted that accused was actually present, under arms, and was making insolent demands at the very times the assaults were committed. He made no effort to prevent any violence but, on the contrary, he refused, when appeal was made to him, to remonstrate with his companions or to interfere with their turbulent endeavors. As the senior officer present, he was, under military regulations, in command of his military inferiors and responsible for their proper behavior. His duty thus became to curb their unlawful activities, not to countenance them. His non-interference may only be considered to have been designed by him and to have, in fact, operated, if not as an actual incitement to their lawless conduct, at least as an encouragement to and protection of the malfeasants. For such reason he must rightly accept responsibility for the assaults committed by his subordinates (par. 246, Vol. 1, Wharton's Criminal Law, 12th Ed.).

The same considerations apply to the disorderly conduct alleged in Specification 4, Charge II and the Specification, Charge III, as apply to the assaults, and the accused was rightfully found guilty of such Specifications.

Specification 2, Charge II, alleges that accused, in conjunction with Lieutenant Gilmore, took a belt buckle from Constable Fouzder Singh. The evidence discloses that Lieutenant Gilmore was the person who actually relieved the constable of this property while an unidentified party pointed a tommy gun. It may not be assumed that the unidentified individual was the accused and, consequently, for the purpose of this opinion, it must be considered that he was not actually on the scene, but was in or near the jeep at the time of the wrongful taking. The appropriation was accomplished at neither of the two police stations to which the accused went that night, but was near some steps leading to the Kidderpore Bridge. At such time the constable was not officially connected with the supposed detention of David, and the theft cannot be said to have had any connection with, or to have been incidental to, the efforts to liberate the latter. Nor can it be considered that this offense was one which might reasonably have been anticipated would be committed in carrying out the unlawful enterprise in which the accused originally participated. But even though the accused may not be criminally liable for this theft on the theory that the offense was incidental to that which was the specific object of the original confederacy, may not the inference justifiably be drawn that he aided and abetted in its commission? If so, he is still guilty as a principal. As to what constitutes aiding and abetting, the following citations are pertinent:

> "'Aiding and abetting' in the sense that those words are used in criminal law contemplate conduct calculated to incite, encourage, or assist the perpetration of a crime. * * * as a general rule they comprehend all assistance rendered by acts or words of encouragement, incitement, or support, or presence, actual or constructive, with pre-concert, with the intention of rendering assistance if necessary" (22 Corpus Juris Secundum, p. 158).

> "Keeping watch while a crime is being perpetrated so as to facilitate the escape of the actual perpetrator or to prevent his being interrupted is an aiding and abetting and renders one guilty as a principal in the second degree" (ibid, p. 161).

We are well aware that mere presence of an accused at the scene of a crime, if he takes no part by word or act, and in the absence of pre-concert, is not a sufficient basis for an inference of his participation therein as an accessory or principal (CM 205564, Rose, 8 B.R. 197, 199). However, the presence of an accused at the commission of a crime by another is evidence to be considered in determining whether he did, in fact, aid or abet its perpetration, and "it has been held that presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred" (22 Corpus Juris Secundum, p. 161). An analysis of the evidence in the instant case reveals a situation which reasonably imports that the accused was more than merely present at the scene of the crime. He drove the jeep to a spot some 35 or 50 feet from the place where the theft occured and there parked it. Two of the three occupants of the car, not one, accosted the constable and unceremoniously relieved him of his official insignia. At the conclusion of the theft the two miscreants returned to the jeep, from which shots were then fired precluding the bereaved constable from approaching the vehicle. After all this had transpired the accused drove the car and its occupants away from the scene. We are of the opinion that from such facts the court was warranted in drawing the inference that the accused did aid and abet the commission of the offense and thereby participated therein.

7. The two charges of disorderly conduct alleged respectively in Specification 4, Charge II, under the 96th Article of War, and the Specification, Charge III, under the 95th Article of War include, as constituent elements thereof, assaults which are elsewhere separately charged as violations of Article of War 96. The finding of guilty as to disorderly conduct charged as a violation of Article of War 95 was ultimately approved as being in violation of Article of War 96. To the extent that the disorderly conduct consisted in making assaults elsewhere separately alleged, multiplicity is involved (par. 27, MCM 1928), although it was not legally objectionable to have charged, in the first instance, the identical acts as a violation of both Articles of War 95 and 96, since an officer may properly be convicted under both of these Articles of War on the same facts (cf CM 252775, James, 34 B.R. 189, 193; CM 238771, Lineburger, 24 B.R. 345, 350). However, no duplication involved in the instant case can be said to have resulted either in harm to the accused or in prejudice to his substantial rights. Inasmuch as each Specification alleged a violation of the 96th Article of War, since the acts therein charged constitute conduct prejudicial to good order and were of such nature as to bring discredit upon the military

service, a conviction upon any one of such Specifications would warrant the sentence of dismissal. Consequently, the sentence is supported by the record and the punishment imposed can in no sense be said to be illegal or unwarranted (cf CM 220398, Yeager, 12 B.R. 397, 401; CM 235258, Smith, 21 B.R. 355, 367).

8. The charge sheet shows the present age of the accused as 29 years. He enlisted as an aviation cadet 31 March 1942. He was appointed Second Lieutenant, Air Corps, AUS and entered upon active duty on 21 November 1942. There is no evidence of previous conviction.

9. The court was legally constituted and had jurisdiction of the accused and the offenses charged. No errors injuriously affecting the substantial rights of the accused were committed during the trial. It is the opinion of the Board of Review that the record of trial is legally sufficient to support the findings as confirmed and the sentence. Dismissal is authorized upon a conviction of Article of War 96.

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

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

John F. Fontron, Judge Advocate
John F. Fontron

CM IBT 762 (Ellis, Robert D.) 1st Ind.

BRANCH OFFICE OF THE JUDGE ADVOCATE GENERAL with USF, IBT, APO 885, c/o PM, New York, N. Y., 29 November 1945.

TO: Commanding General, United States Forces, India-Burma Theater, APO 885, U. S. Army.

1. In the case of Captain Robert D. Ellis, 0-733293, Air Corps, AUS, Office Strategic Services, Service Unit, Detachment 505, attention is invited to the foregoing holding by the Board of Review established in this Branch Office of The Judge Advocate General that the record of trial is legally sufficient to support the findings as confirmed and the sentence, which holding is hereby approved and concurred in. Under the provisions of Article of War 50½, you now have authority to order the execution of the sentence.

2. When copies of the published orders are forwarded to this office, they should be accompanied by the foregoing holding and this indorsement. For convenience of reference and to facilitate attaching copies of the published orders to the record in this case, it is requested that the file number of the record appear in brackets at the end of the published order as follows: (CM IBT 762).

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

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(Sentence ordered executed. GCMO 44, IBT, 29 Nov 1945)