

A UNITED STATES ARMY "SCOTTSBORO CASE"

^{Two}
~~Three~~ Negro soldiers who were serving their country in far away New Caledonia in the Southwest Pacific are now imprisoned for *life* on a charge of rape.

The record in this case of alleged rape reads like a fairy tale. It was more than a raw deal. It is one of the worst fake rape cases of all time.

The full story of this case is told in the following brief which has been submitted to War Department authorities by Judge William H. Hastie, chairman of the NAACP National Legal Committee, and Congressman Vito Marcantonio, both acting at the request of the prisoners. This brief was submitted after oral argument had been made. It demonstrates that the same prejudice and mistreatment suffered by Negroes in civilian life, follow them into army life and that an army trial, thousands of miles from the American mainland, offers them little, if any, protection.

N.A.A.C.P. Legal Defense and Educational
Fund, Inc.

69 Fifth Avenue
New York, N. Y.

BEFORE THE SECRETARY OF WAR
Washington, D. C.

IN THE MATTER OF FRANK FISHER, JR.

IN THE MATTER OF EDWARD R. LOURY

PETITION FOR CLEMENCY AND BRIEF
IN SUPPORT THEREOF

VITO MARCANTONIO,
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IN THE MATTER OF FRANK FISHER, JR.

IN THE MATTER OF EDWARD R. LOURY

PETITION FOR CLEMENCY

*To the Honorable
The Secretary of War*

Now come Frank Fisher, Jr., and Edward R. Loury, by their attorneys, and show that they are now confined in United States Penitentiary, McNeil Island, Washington, serving sentences of life imprisonment pursuant to convictions of rape, both arising out of the same incident, imposed by courts-martial sitting in New Caledonia, on June 14, 15, 16, 1943. Petitioners assert that they were unjustly and unlawfully convicted and that the facts now before the Secretary of War show that their continued detention is unjust and improper. In further support of this petition, petitioners submit herewith their sworn statements of material matter.

Therefore, petitioners pray that the Secretary of War, exercising the powers vested in him, release them forthwith from custody and from all further and future penalties and punishments consequent to the said unjust and unlawful convictions.

Vito Marcantonio

William H. Hastie

Attorneys for Petitioners

IN THE MATTER OF FRANK FISHER, JR.
IN THE MATTER OF EDWARD R. LOURY

BRIEF IN SUPPORT OF PETITION FOR CLEMENCY

*To the Honorable
The Secretary of War*

In support of their petition to the Secretary of War for clemency, the petitioners submit this brief.

Introduction

The petitioners, Frank Fisher, Jr., and Edward R. Loury, are now confined to the United States Penitentiary at McNeil Island, Washington, serving sentences of life imprisonment imposed by courts-martial in Noumea, New Caledonia, on June 15 and 16, 1943. The petitioners were convicted of the alleged rape of one Louise Mounien, a young French native woman of New Caledonia; and the convictions and sentences of life imprisonment, reviewed and approved by the Theatre Commander at Melbourne, Australia, have become final. The only legal recourse of the petitioners, therefore, is to the Secretary of War for clemency.

The petitioner, Frank Fisher, Jr., enlisted voluntarily in the Army of the United States in Little Rock, Arkansas on September 4, 1942, and was 19 years of age at the time of his induction. The petitioner, Edward R. Loury, enlisted voluntarily in the Army of the United States on February 28, 1942, and was 20 years of age at the time of his induction.

Both petitioners were members of the same Port Company and were stationed at Noumea, New Caledonia. Both of the petitioners are Negroes.

On the evening of May 2, 1943, the date of the alleged crime, the petitioners attended a carnival in Noumea and

later accepted a ride in a reconnaissance car offered by several other unidentified soldiers who had custody of the car. They rode in the car about a half mile from the town until they reached a hill on the road between Vallee des Colons and Coloniale Route No. 1. In petitioners' affidavits, submitted herewith, petitioners aver that this area was commonly known among the Negro soldiers, for whom all houses of prostitution in Noumea had been declared "off limits," as "Prostitute Hill." There the petitioners and a third Negro soldier, whose identity has never been learned, left the reconnaissance car which proceeded on its way. It was a clear night. Their attention was attracted to another soldier, whose rank was not then discernible, and a woman, returning from the nearby bushes to a "jeep" parked at the side of the road. As they were approaching the woman got into the jeep. The Negro soldiers entered into a conversation in English with her companion, who proved to be a white officer, Lieutenant Robert L. Engels. The conversation concerned the purchase of the sexual favor of the woman; and the testimony as to whether the discussion was friendly or unfriendly is in dispute. In any event, as a result of that conversation, the officer addressed the woman in French. She did not understand English and the Negro soldiers did not understand French. The woman got out of the jeep; whether willingly or unwillingly, being a matter of dispute. In any event she walked, in company of the soldiers and the lieutenant, without protest or objection, to a more secluded spot in the area. There is dispute as to whether up to this time there was bargaining with the woman as to the price to be paid for her favors. But in any event she engaged in three separate acts of sexual intercourse with the three soldiers and accepted on the spot three dollars therefor. It is uncontroverted that she offered no resistance, made no outcry, and made no attempt to attract the attention of two strangers who passed within a few feet of her while she was having sexual intercourse with one of the soldiers. The gathering broke up without harsh words

or recriminations. One of the soldiers went so far as to flash his light so that the officer and the woman might more conveniently get back to the jeep and go their way.

Thereupon, the officer, who also came under the observation of the strangers who had passed nearby and who might have been recognized by them, insisted to his companion that they drive to Military Police Headquarters. However, in her subsequent sworn statement before a French magistrate she testified that this was done over her objection.

ARGUMENT

I.

The Prosecutrix Consented to Intercourse with the Petitioners.

The evidence that Louise Mounien consented to intercourse with petitioners is so clear and overwhelming that it is a gross miscarriage of justice to continue their detention on convictions of rape, a crime which can be committed only by compulsion against a woman's will.

A. The Passivity of the Prosecutrix in the Absence of Threats by the Petitioners or of Any Offer to Injure Her Negatives the Charge of Rape.

It is conceded throughout the record and expressly admitted by Louise Mounien that she interposed no physical resistance to the indulgence of sexual intercourse with the petitioners. By her own admission she did not even make verbal protests (Loury Record, p. 27). Each time she was asked at the trial about this remarkable passivity, she explained merely that she was afraid.

Q. "Before the soldiers took you to the bushes were you afraid of them?"

A. "Yes."

Q. "Why?"

A. "I was afraid they would hurt me" (Loury Record, p. 22).

Q. "Were you afraid of the three soldiers?"

A. "Yes."

Q. "Why?"

A. "Because they might do me injury" (Fisher Record, p. 22).

Q. "Why did you not cry out when the soldiers were at the car?"

A. "Because I was afraid they would hit me."

Q. "Why did you think they would hit you?"

A. "Because I was afraid" (Fisher Record, p. 23).

There is no evidence of threats by the petitioners and no indication that they made any offer to injure the prosecutrix if she should resist. Indeed, at the preliminary examination of the prosecutrix by Captain John F. Saxon, as appears in the records now before the Secretary of War, the prosecutrix was expressly asked, "Did any one threaten or hit you or do anything to harm you?" She answered, "No." Thus, the conviction of the petitioners is based solely on the statement of the prosecutrix as to her supposed subjective reaction of fear, a state of mind admittedly not induced by any threat or overt acts involving a manifestation of intention to do her bodily harm if she should resist. The law is clear that such a state of fact cannot support a conviction for rape.

The Supreme Court of the United States has stated explicitly that rape cannot be committed "where no threats were made, where no active resistance was overcome; where the woman was not unconscious but where there was simply non-consent on her part and no real resistance." See *Mills v. United States*, 164 U. S. 644, 649. The applicable legal principle is ably stated and discussed in *Sowers v. Territory*, 6 Okla. 436, 50 Pac. 257, where the Court said:

"Does the evidence support the conclusion that the prosecutrix was prevented from resisting by threats of immediate great bodily harm, which threats

were accompanied by an apparent power of execution? Nothing less would justify a conviction. There must have been threats of great bodily harm,—immediate bodily harm, and those threats have been accompanied by a power of execution, which at the time was apparent to prosecutrix; not only this, but she must have believed at the time that those threats would be carried into immediate execution, unless she ceased from resisting, and acquiesced in the act of the accused. Nothing short of the presentation of these facts, and the satisfying of the jury of their truth beyond a reasonable doubt, would warrant the conviction of the accused. And nothing less than evidence, in this record, to reasonably convince our minds that the accused, for the purpose of accomplishing his purpose of having sexual intercourse, threatened her with immediate great bodily harm, was then possessed of power to carry such threat into execution, that such power was apparent to the prosecutrix, that she believed that the threat would be carried into execution if she resisted, and was thereby induced to acquiesce, will justify us in sustaining this judgment” (50 Pac. at 261).

The Iowa Supreme Court, indicating the extent to which this doctrine is applied, has made the following observation:

“We find no cases where a mere threat, even a threat to kill, unaccompanied by a demonstration of brutal force or dangerous weapon, is held to be a sufficient putting in fear to excuse non resistance.” *State v. Morrison*, 189 Iowa 1027, 179 N. W. 321, 323.

As still another court has stated the matter:

“There is no middle ground in the law between the highest offense upon woman—and that where both parties are to be treated as participants in violating the law.” See *Shulkus v. State*, 159 Wis. 475, 150 N. W. 503, 505.

This rule is a wise and necessary protection against just such imposture and injustice as have occurred in the present

case. For experience shows how often human behavior accords with Lord Byron's classic description of the critical encounter between Don Juan and the gentle Julia.

“A little yet she strove, and much repented
Then whispering, ‘I’ll ne’er consent,’ consented.”

**B. The Conduct of the Prosecutrix Was Not
Consistent With Her Claim of Coercion Against
Her Will.**

It has been shown that a conviction of rape cannot stand solely upon evidence of a woman's subjective fear in the absence of threats of bodily harm. But in this case, even the prosecutrix's statement of fear is so inconsistent with other facts now before the Secretary of War that the conclusion is inescapable that her description of her state of mind is false, and that she affirmatively consented to intercourse with the petitioners. From beginning to end, it is incredible that a woman compelled to have sexual intercourse against her will would have behaved as did the prosecutrix.

1. The prosecutrix made no verbal exposition or protest (Fisher Record, pp. 14, 23; Lory Record, pp. 11, 27). Yet words of protest, indignation or pleading are so natural and instinctive to a woman confronted by the prospect of ravishment that neither fear nor language difficulty can explain the complete silence of Louise Mounien. This silence is consistent only with willingness.

2. She remained passive lying on her back upon the ground after each act of intercourse until the departing soldier had rejoined his fellows and the newcomer had arrived where she was lying (Fisher Record, p. 15; Lory Record, p. 25). The witnesses differ as to the distance traveled in this going and coming although Lt. Engels, the most competent at estimating distance, estimates that the distance was fifteen yards in each direction (Fisher Record, p. 12). Yet it is inconceivable that once out of the immedi-

ate reach of the offending male, any woman would lie quietly awaiting successive acts of ravishment.

3. She failed to cry out for help when a strange couple passed near the place where the sexual intercourse was taking place, although she admits that something startled her and that as a result she pushed against the shoulder of Loury who was then lying with her (Loury Record, p. 27; a more detailed description of this interruption appears in the testimony of Lt. Engels at pp. 11-12). Here is the clearest possible revelation of the guilty concern of the willing partner anxious to escape observation at the very time when any outraged woman would instinctively have shouted for assistance.

4. The prosecutrix accepted \$3.00 from the three soldiers immediately after having intercourse with them (Fisher Record, pp. 6, 23, 24, 25; Loury Record, pp. 6, 22, 31). It is believed that there is no case in Anglo-American jurisprudence in which a conviction of rape has been permitted when payment had been offered and accepted on the spot. It would be psychologically impossible for an indignant and grossly offended woman to accept such an offer from her attackers immediately after she had been ravished by three men. It is to be noted that this situation is entirely different from that of a woman who on a subsequent occasion accepts a sum of money offered her as an inducement to desist from criminal action against one who has attacked her. It is conceivable that a woman who has resisted an attack may, at some later date, be willing to accept a monetary compromise. But it is unthinkable that she could accept on the spot a dollar from each of her recent partners unless she had indulged them willingly. The statement of the prosecutrix that she accepted the money "to revenge myself" (Fisher Record, p. 25) is too ridiculous for serious consideration. It should suffice to point out that her alleged desire for revenge was very easily and fully satisfied by the payment of \$3.00 since she was unwilling to report the al-

leged attack to the public authorities (See paragraph 6, *infra*). Other facts are important with reference to the acceptance of money. First, in the preliminary investigation of this case, Lt. Bill Bantz of the military police, to whom Lt. Engels brought the unwilling Louise Mounien less than an hour after the alleged crime, states "one thing she did do after Engels said to was to show me the three dollar bills she was holding in her left hand. She didn't let go of them but she did show them to me." Second, in the preliminary investigation before Captain Saxon, the accused Fisher asked the prosecutrix: "How much money did we offer you before going into the bushes?" To this she replied, "I do not know."

5. In her appearance on May 8 before the French Magistrate, Henri Mainguet, the prosecutrix was asked what Fisher, the first of the soldiers to have intercourse with her, did immediately before the commencement of the sex act. She replied: "He was careful previously to pat me on the thighs with his hand so that I separated them." Here is a description of pleasurable sexual excitation, not the offending violence of ravishment.

6. The prosecutrix never complained of the alleged rape to the American or French authorities. In her own words before the French Magistrate on May 8: "It was my friend, the Lieutenant, who in spite of my refusal, wanted to go to the military police."

7. If any further evidence is needed that Louise Mounien was neither offended nor outraged by her commerce with the petitioners, attention is directed to her classic complaint before the French Magistrate with reference to the social rudeness of the men who had just completed intercourse with her. Commenting on the manner of their departure after the event, she said: "Before leaving the three Negroes talked in English to the Lieutenant. I did not understand anything. Then they went walking toward V—du T—without saying Bon Soir."

C. The Character and Social History of the Prosecutrix Made Her Story of Fright Unbelievable.

One other circumstance, the character and social history of Louise Mounien, shows how preposterous is her story of overwhelming fright and terror. The medical evidence obtained by the authorities before the trial, but not revealed at the trial, showed that Louise Mounien was infected with gonorrhoea before she met the prisoners or her companion, Lt. Engels.

Louise Mounien was examined by a Dr. Ginieys, surgeon at the Noumea Hospital on the 3rd of May, 1943 at the request of the French Commissioner of Police. This was less than 24 hours after the alleged rape. His examination was made the subject of two reports under dates of May 5 and May 8, 1943. In both of these reports he indicates that her body showed no sign of violence and nothing from a medical point of view to indicate that she had been raped. In both of these reports he indicates that the woman was infected with gonorrhoea.

Moreover, on May 7 an examination of Lieutenant Engels and of petitioners Fisher and Loury by Captain Salvatore L. Pernice, Chief of the Urological Service of the local command revealed that none of the three had gonorrhoea.

It would have been a medical impossibility for her gonorrhoeal condition to have been due to intercourse with Engels, Fisher, Loury or the unidentified Negro soldier, since the lesions at the neck of the uterus found by Ginieys within 24 hours of the alleged rape could not have been caused by any contact had with any person during the previous 24 hour period.

Yet each of these three reports, in possession of the military command, and relevant both as to the woman's credibility as a witness and as to the fact of rape, were withheld from the courts-martial.

Louise Mounien admitted to the French Magistrate that she had intercourse with Lt. Engels twice during the three hours immediately preceding her involvement with the petitioners, once just before their arrival. Moreover, she stated at this same hearing that she had intercourse with Engels daily for ten or more days preceding the alleged rape, although he says that she was a pick-up whom he had met for the first time that day and who immediately consented on this first meeting to have intercourse with him. The record of preliminary investigation by the French authorities shows that Louise Mounien had been but two months in the community of Noumea, but did not include her history prior to that time. During that period, according to her testimony before Captain Saxon, she "had known many American soldiers." The record before the Secretary of War shows that her landlord revealed to the French authorities that many American soldiers came to her door at night and that, although he did not know what actually transpired, he was much displeased with his tenant's conduct.

The French police agent Mervarts reporting on his investigation of the woman's reputation in the community states:

"Mr. Henri Poircutte of Faubourg Blanchot Street, said that Louise Mounien had worked for her about a week and a half and that she had no complaints to make. However, Louise Mounien had a lover, an officer in the American Army, who came to get her, whom she went to meet at Hotel Pacific. For about a week Louise Mounien had not come to work, though she left all her clothes."

Finally, it appears in the Loury record, at page 21, that the only words descriptive of sexual intercourse which Louise Mounien understood were the obscenities of the street and the brothel.

In brief, Louise Mounien, whether viewed as a professional or as a promiscuous amateur, was a young woman of

loose morals, accustomed to daily cohabitation with casual acquaintances among military personnel, and had barely finished with two other acts of sexual indulgence before her commerce with the petitioners. The picture of her as a frightened innocent, terrified by the very approach of the petitioners, does not make sense. It would be ludicrous, were not two men now serving terms of life imprisonment on the strength of this absurd imposture. The simple fact apparent on the record of this case and the record of pre-trial investigation is that the petitioners did not rape Louise Mounien. They did have intercourse with her, but neither by force or against her will.

II.

Prejudice and Bias Characterized the Dealings of the Military Authorities with the Petitioners.

Beyond the foregoing evidentiary facts there are circumstances strongly indicating that bias and persecution rather than objectivity and fair prosecution have motivated and characterized the handling of this case.

First; the recommendation of the investigating officer, Captain John F. Saxon, who concluded and reported that the evidence did not warrant a charge of rape, was ignored. Captain Saxon had the advantage of examining all persons concerned within a short time after the events in question. He undoubtedly was aware of the conflicting accounts of these events as narrated by Louise Mounien and Lt. Engels. He had access to the medical reports and character investigations of the French civil authorities. He had the testimony of Lt. Bill Bantz of the Military Police that within an hour after the alleged rape "Louise Mounien did not seem to have been crying nor did she seem to be in the least bit hysterical."

Second; beyond ignoring Capt. Saxon's recommendation, the military authorities saw fit to withhold from the court

martial the considerable body of evidence which had led this officer to his reasonable conclusion. In such circumstances, it is clear that the local military command was determined to convict the accused, not to risk acquittal by making a fair and full presentation of the evidence.

Third; the affidavits of Frank Fisher and Edward R. Loury, submitted herewith and prayed to be considered in support of the petition for clemency, show that the accused were first interviewed by counsel appointed to defend them on Sunday afternoon and that the trial began the next day, Monday morning. It is reasonable to infer that counsel never had an opportunity to conduct an independent inquiry or to examine the evidence which Capt. Saxon had obtained.

Fourth; the same affidavits show that appointed counsel urged the petitioners not to testify on their own behalf, and that it was only after Loury insisted in open court that he was finally permitted to take the stand.

Fifth; the same affidavits show that the most brutal and plainly unlawful coercion was employed by military personnel to force incriminating statements from the petitioners. Threats, grilling for five days with only a few hours sleep and the brandishing of firearms, all characterized this third degree.

Sixth; well knowing, not only that the defense claimed such statements to be involuntary, but also that military personnel who had obtained these statements had admitted at Fisher's trial that they exhibited firearms and in other ways intimidated accused, appointed counsel affirmatively consented to the admission of this illegal evidence in Loury's trial (Loury Record, p. 17). The importance of this conduct is emphasized by the fact that the same appointed counsel defended both Fisher and Loury, but entirely different courts tried them. Thus, the court trying Loury had before it no evidence of coercion, although counsel for the defen-

dants well knew that such evidence existed as shown by testimony in Fisher's case on the preceding day.

Seventh; when Louise Mounien testified in French, the soldiers who acted as interpreters revealed their share in the determination of the military command to obtain a conviction. Thus, at the trial of Fisher, when Louise Mounien was asked whether she tried to prevent Fisher from getting her out of the vehicle where she had been sitting, she replied "No." Thereupon, the military interpreter, of his own initiative, rephrased the question so as to elicit an affirmative answer (Fisher Record, p. 21).

Eighth; the imposition of a sentence of life imprisonment in this case on the most flimsy evidence when under the French Penal Code prevailing in New Caledonia, the most severe penalty for the most atrocious rape is twenty years imprisonment (see subsequent discussion herein) is a further indication of the bias which characterized this entire proceeding.

These indications of bias and prejudice must be considered in the light of the fact that the accused were Negroes, 8000 miles from home without the benefit of friends or counsel of their choice to assist in their defense. All persons concerned in the proceedings against them were white Americans, who as such had lived in an environment where social attitudes concerning whites and Negroes having sexual relations with the same woman are strong and prejudiced. The foregoing analysis of the proceedings against these petitioners shows that those concerned with the prosecution and trial were unable to eliminate that prejudice from their minds and conduct. No reasonable person can believe that white soldiers would have been convicted or even tried for rape in the circumstances of the present case.

III.

Numerous and Material Contradictions in the Testimony of the Principal Prosecution Witnesses Make Their Testimony Unworthy of Belief.

There are patent conflicts not only in the testimony of the prosecutrix and the witness Engels in successive statements following the alleged crime but also between their respective statements. Lt. Engels, before the Military Police on May 2, stated unequivocally that the largest defendant, identified as Fisher, "had a gun." In each successive statement on this point his story became weaker until, on June 15, at the trial of Edward H. Lorry we find him saying "I thought he had a gun." In complete disagreement with Engels, Louise Mounien stated that none of the defendants were armed.

This discrepancy, and others which appear in the records, raise such grave doubts as to the credibility of the chief prosecuting witnesses that we are setting down some of the more important ones below. Their testimony is at complete variance on points which go to the very gravamen of the alleged offense. It is inconceivable that a verdict of guilty could have been predicated on testimony such as this. Some of the most serious and glaring of the conflicts are set out at this point.

TABLE I

LOUISE MOUNIEN

* L —1—

“None of them (defendants) was armed.”

Statement made before Mervarts May 3, 1943.

—2—

“The officer (Engels) told me to get out of the jeep.”

Statement made to Mervarts May 3, 1943. See also Fisher Record p. 19 and Loury Record p. 20.

ROBERT L. ENGELS

—1—

“One soldier, the biggest of the three had a gun. He threatened to use the gun if I didn’t obey his orders.”

Statement made May 2, 1943 to Military Police.

“I was convinced that he was armed although I cannot say I actually saw a gun.”

Statement before Captain John F. Saxon May 22, 1943

“He didn’t say he was going to shoot me, but he tried to make me believe he was armed.”

Statement made at Fisher Trial—Fisher Record p. 8.

“Well he was very belligerent to me and told me ‘Do you know what a .45 can do to you?’ So I thought he had a gun.”

Statement made at Loury Trial—Loury Record p. 8.

—2—

“I told her not to leave the jeep, and she said she wouldn’t.

Statement made at Fisher Trial Fisher Record p. 7. See also Loury Record p. 8.

TABLE I (Continued)

—3—

LOUISE MOUNIEN

“No, I never touched him (Engels)”.

*Statement at Loury Trial—
Loury Record p. 23.*

—4—

“I yelled but there are no houses thereabouts and no one could have heard me.”

*Statement made before Mer-
varts May 3, 1943.*

“Q. At any time did you cry for help?

“A. No.”

*Answer to question given at
Loury Trial—Loury Record
p. 27.*

—5—

“It was my friend, the Lieutenant who, in spite of my refusal, wished to go to the Military Police.”

*Sworn Statement before
Henri Mainquet, Police Com-
missioner of New Caledonia
on May 8, 1943.*

“Q. Did you refuse to go (to the Military Police)?

“A. No.”

*Sworn Statement at Loury
Trial—Loury Record p. 28.*

—3—

ROBERT L. ENGELS

“When she was in the jeep she was whimpering and scared and grabbed me by the arm.”

*Statement at Fisher Trial—
Fisher Record p. 13.*

—4—

“Q. Did you hear any cries from the time she left the car until the time she returned to the car?

“A. No, sir.”

*Answer to question given at
Fisher Trial—Fisher Record
p. 14.*

—5—

“Q. At no time did she refuse to go to the Military Police?”

“A. No, she didn't.”

*Answer given to question at
Fisher Trial—Fisher Record
p. 16.*

IV.

The Life Sentences Would Be Unjustifiable Even If the Convictions Had Been Lawful.

Had the convictions been lawful and the evidence upon which they were based shown the guilt of the petitioners beyond a reasonable doubt, the harshness of the sentences imposed would still have been unjustifiable. Military justice does not exist for the purpose of wreaking vengeance upon the guilty; nor does it base its measurement of punishment upon the race of the accused. It bears some reasonable relationship to the penal law of the community in which it is administered. It is pertinent, therefore, to call attention to the facts as to the laws governing the punishment of rape in the French Colony of New Caledonia.

The laws of France do not take effect in the colonies *ipso facto*, even when made for a given colony. In order to become effective in a colony a law must be promulgated by the governor of the colony.

In regard to New Caledonia, this rule is stated in Section 74 of the law of December 12, 1874. A simplified procedure of promulgation in the case of an emergency is provided for by the law of November 28, 1866. Moreover, if a code or a law was enacted in a colony by a decree, the code or law acquires the nature of a decree and, consequently, could be changed by decree and not necessarily by an act of legislation (Dareste, *P. Traite de droit colonial*, Vol. 1, pp. 257, 267). It must be also borne in mind that the status of each colony varies. For these reasons the applicability of a provision of French law must always be specially traced with regard to a given colony.

The French Penal Code was made applicable to New Caledonia and Oceania by the law of January 8, 1877, and by the decree of March 6 of the same year (P. Dareste, *Traite de droit colonial*, Vol. 1, p. 297).

Rape as dealt with in Section 332 of the French Penal Code is punishable with hard labor "for a term" (a temps)

if committed against an adult person. In such cases, according to Section 19 of the Penal Code, the court may inflict a term at hard labor not less than 5 and not more than 20 years. Rape must be considered a "crime" in a technical sense, somewhat equivalent to our term, "felony" (Secs. 1, 7), and cases involving rape must be tried by the tribunal competent in adjudicating "crimes" in general.

The administration of justice in New Caledonia was regulated originally by the law of November 28, 1866, the procedure being regulated by the acts of March 27, 1879 and February 28, 1882. However, all these provisions were virtually superseded by the decree of April 7, 1928, amended on June 22, 1934, and February 11, 1935. (See G. Dalloz, *Addition au Repertoire Pratique de Legislation*, Paris, 1938. Colonies, No. 526.7, 528.2. *Journal Officiel* of February 11, 1935, p. 1922.)

According to Section 48 of the law of 1928, the Court of Assizes is competent to try the cases qualified as "crimes." The court consists of the president, two professional judges who are appointed, and four assessors, selected by lot from a list of notable citizens over 30 years of age enjoying political and civil rights (Sec. 49).

According to Section 65 as amended by the law of 1935, the president, judges, and assessors decide jointly on the issue of guilt and penalty so that a simple majority of four voices determines the verdict. If none of the proposed penalties receive the majority, the most favorable verdict for the accused shall be pronounced.

Thus if the attitude of the New Caledonia community towards sex offenses was deemed material in these cases, no such harsh and excessive punishment as was meted out to the petitioners was required. The American military command in New Caledonia, at the invitation of The Adjutant General, has already made representations to the War Department that clemency in these cases would have an adverse affect upon relations with New Caledonia civil authorities. To make such a suggestion as a justification for a

life sentence for a crime, the maximum punishment for which in New Caledonia is 20 years at hard labor, is to go clearly beyond any concept for which military justice exists. It merely emphasizes the anti-Negro prejudice of the military command in New Caledonia.

Conclusion.

Pertinent to an objective and judicial consideration of this application for clemency are factors wholly apart from the evidence upon which the petitioners were tried, convicted and sentenced. It is against a background of social factors that consideration of the immediate facts surrounding the trial, conviction and sentence must be had if an impartial determination as to this petition for clemency is to be made.

The two petitioners are Negro. The fact of their race is relevant because of the pattern of inequality of treatment of the Negro in American civil life, which has found its reflection in the treatment of Negroes in the armed forces. For no reason other than race Negroes are segregated into separate units in the armed forces. In the larger number of instances these Negro Americans are commanded by white officers, but in no case are white troops commanded by Negro officers. Thus 10.6 per cent of our armed forces who are Negro enter military life faced by the patent fact that despite whatever merit they may have, they will be circumscribed, segregated and discriminated against solely because of the fact of race.

The petitioner, Frank Fisher, Jr. voluntarily enlisted in the United States Army at the age of 19. Until his conviction in the instant case, he had no criminal record either in civilian or military life. He is married and the father of two children, his wife and children living in his home city of Texarkana, Texas.

The petitioner, Edward R. Loury, voluntarily enlisted in the United States Army at the age of 20. Until his convic-

tion in the instant case, he had no criminal record in civil life and was guilty only of two typical "G. I." misdemeanors during his military life—neither of a serious nature. He had allotted to his sister, whom he was sending through school, a part of his army pay.

Neither of these two young Negro soldiers had the advantage of education beyond elementary grades, in separate Negro southern schools. Both of them were left orphans at an early age and experienced the misfortune of being moved from one to another relative during their early youth.

Thus we have two Negro youths who have volunteered for the army and have been taken nearly eight thousand miles from their homes, suddenly brought to trial for a serious offense. They had no Negro chaplain to whom they might turn for counsel. There was no Negro officer to whom they might look for aid in their defense. Limited in education, thousands of miles away from home in a strange environment where a strange language is spoken, these Negro boys found themselves walled in by hostility—a hostility born of every fact of racial segregation practiced in the Army of the United States and in civil life in America.

They were tried and convicted. And the final opportunity open to them for a review of their trial and conviction had its locus in Melbourne, Australia, several thousand miles away from New Caledonia, where they were tried and several thousand miles more away from continental United States. It was here in a review by white officers, that two uneducated Negro youths had their right of final appeal concluded against them.

The need for a high morale both in civil life in America and in our armed forces, as essential to the cause of our nation's victory, makes it imperative that men in government positions of responsibility remove all cause for reasonable doubt among Negro Americans that the Negro soldier does not receive justice.

In the light of this social background we made bold to say that a heavy responsibility rests upon the Secretary of War to satisfy his conscience that these two Negro boys were in fact given a fair trial, that they were in fact guilty beyond a reasonable doubt, that in fact the sentence given them was a fair sentence. If the aims of military justice are to arrive at an honest and fair determination of guilt or innocence, then no good purpose will be served by failing to consider the affidavits of the petitioners attached and made a part of this position, which described wilful and brutal misconduct on the part of white officers who questioned these boys and subjected them to "third degree" tactics. It is to be remembered that defendants were not given an opportunity to testify to the acts of duress set forth in these affidavits. Nor will a good purpose be served by limiting oneself to the bare record of the court martial, records which on their face lead to the conclusion that the petitioners were victims of an inadequate if not a negligent defense. This is not a case in which to rely upon the technical ground that since a review has been had of the legal sufficiency of the conviction all that is pertinent is a determination of the needs of military discipline.

Responsible officers of the United States Army have concerned themselves with considerations above and beyond the bare details of these cases. They have implied that clemency in these cases should depend upon considerations of the feeling of civil authorities in New Caledonia, and have, in one instance, gone further to recommend as one ground for refusal of clemency: "press reports of the case attributed to Representative Vito Marcantonio." Denial of clemency on such a ground would make a mockery of military justice so far as it affects several hundred thousand Negro soldiers who have pledged their lives for the defense of American democracy.

It is then in all high seriousness that we ask the Secretary of War to consider the full and total picture surround-

ing this case in making his determination as to clemency. The petitioners are innocent of the crime of rape. There is no room in the United States Army for a "Scottsboro Case". The petitioners wish to be returned to the army to serve as soldiers in defense of their country.

Respectfully submitted,

VITO MARCANTONIO,
WILLIAM H. HASTIE,
Attorneys for the Petitioners.

Statement of Edward R. Loury.

STATE OF WASHINGTON }
 COUNTY OF PIERCE } ss.:

EDWARD R. LOURY, being first duly sworn, on his oath deposes and says:

My name is Edward R. Loury. It is also frequently spelled Edward R. L-o-w-r-y.

The following is a true and complete statement, to the best of my knowledge, of the facts relating to my arrest and conviction for rape before a military court martial at Noumea, New Caledonia, in May and June, 1943.

I am twenty years of age. I was born in Louisville, Kentucky. I have lived most of my life in Chicago. I entered the United States Army February 28, 1942. On January 19, 1943, I was assigned to the same company as Frank Fisher, Jr., and stationed near Noumea, New Caledonia. This was the 211th Port Company, Transportation Corps.

On May 2, 1943, returning from a carnival near Noumea in a recon car, three of us, Fisher, myself and a third soldier saw a man and a woman coming out of the bushes near a parked jeep. We stopped and Fisher asked the man, Lt. Robert Engels if we could have relations with the girl. He (Lt. Engels) said she lived her own life, that he had just picked her up, and arrangements were made for us to have relations with her.

While I was having intercourse with her, she pushed me on the shoulder. I stopped and stood up. I saw a soldier and a girl approaching us. They came to a few feet from where we were lying, saw us, and then turned around and went back the same way they came. Louise Mounien, the girl with whom I was lying, didn't say anything, and after they were gone we resumed our intercourse. Afterwards, Fisher gave her two bills, and I gave her a ten dollar bill. I intended to give her a one dollar bill, but made a mistake.

It was a bright moonlight night, but too dark to read bills very well.

Four days later, on May 6, 1943, our company commander, Capt. Norman Jones, called the company together, and three officers, including Lt. Engels looked us over. Capt. Jones said something about an officer and a girl having been beaten up and in the the hospital, and that he hoped it wasn't anyone in his company.

Immediately after this inspection we were restricted to camp. That is, the entire company was restricted. When Fisher was arrested, I was put under company arrest. Capt. Jones said that he knew that if Fisher was mixed up in anything, I was too, since we were together much of the time.

The night of the same day of Fisher's arrest I was taken by two M. P.'s to the company orderly room, where I met Lt. Teeples and Sgt. Donahue. They started talking to me about the rape of a girl, and then took me to the M. P. station. They questioned me all the rest of the night, and then requested me to make out a statement saying that Fisher and I had been armed with a .45 and had forced Lt. Engels with the .45 to let us have relations with Louise Mounien. They read me a statement which they said was made by Lt. Engels and the girl, and asked me to make a similar statement. When I refused they had me taken downstairs and locked up in a cell. My shoestrings were taken away.

That evening or night, they called me up again to make a statement. I said that if I was charged with rape I wanted defense counsel before making any statements at all. Lt. Teeples said to me, "If you won't play ball with us, we will have to play ball on your head." I asked him what he meant and he showed me a black jack. "Do you know what this is?" he asked. "Yes", I said, "but you're not going to use that on my head. Other people aren't supposed to hit the head of my mother's son." He said that mother or no mother we were now over here in New Caledonia now,

that he was sent from Washington, D. C. to crack this case, and "I'm supposed to do what I see best. If I have to shoot you and hang you to a tree to be sure we have the man who did this, I'll do that".

I still wouldn't make the statement he wanted me to. He then told me that I looked like a Christian, and he didn't want to hurt me, but that he wanted to go to bat for me. All he wanted from me was a statement that Fisher had a .45 and threatened Lt. Engels with it.

Staff Sgt. Donahue and a secretary was there. I was kept in the office of the M. P. station most of the night while they questioned me. They kept reading over and over again the statement they wanted me to sign. When I refused to make a statement they would show me this one all made out and tell me that all they wanted me to do was to sign it.

All I can remember of the statement he showed me was that it said that on May 2, 1943, I was out with Fisher and another soldier whose name they said I refused to disclose; that we had tied up an officer and girl in the bushes and beaten them up. I had previously started to sign the statement, but when I read it over, I said it wasn't true, and I refused to sign it.

They then took me to Major Hatch's office. Capt. McCullough and Major Moffat were there. Major Moffat read the 24th Article of War to me several times, telling me what my rights were in the courtroom, and that I had the right to make a voluntary statement. Then they took me back to my cell.

I was brought back upstairs very shortly. Capt. McCullough said that I had better talk now. I said that I wasn't talking. He said that my friend Fisher had told them everything, and that they knew where we had got the gun.

I told them that whatever Fisher had said, I was not making any statement until they had given me defense

counsel. One of them said that they wouldn't give me counsel until the last minute. In fact they did not. Then one of them read the 24th Article of War again, and I was taken back down to the cell.

It was about 2:30 A. M. when I was taken down to my cell and I wasn't questioned any more that night.

I got a bad chill that night, and the next morning the doctor looked me over and ordered me to the hospital. However, I was not taken to the hospital that day. About 11:30 P. M. I was taken back upstairs and they questioned me again.

Lt. Teeples said that he saw by my report that I was supposed to go to the hospital. He then said that they didn't have to send me to the hospital, but that they would put me back down in the cell, and it would save them using a slug on me.

I asked him what he meant. He said that at sunrise they would have to shoot me. I told them that they might as well start shooting. Lt. Teeples then said that I didn't act like I was afraid. Sgt. Donahue jumped up and asked if I wanted to fight him. I said it didn't matter, that if he wanted me to, I would. Then they tried to get me to sign the statement, but I refused. All the time I was there that night two soldiers were taking shorthand notes.

Then they stopped questioning me for a while and I went to sleep. After I had slept in the chair for a while I was wakened by Sgt. Donahue and Lt. Teeples shaking me on each side. They said they were ready to go, and for me to come on. They grabbed my arms and said they were going to shoot me that night. Lt. Teeples said, "Your people won't know anything about you. They will think a Jap got hold of you."

They asked me if there was anything I wanted to send back home to my people. I told them that they didn't have to send anything if they didn't want to.

They took me back to my cell about 3:00 A. M. It was cold there and I had no blankets. About 3:30 A. M. they called me back upstairs and asked me again to sign a state-

ment. When I refused they said that since I wasn't going to the hospital they would let me have two blankets. Lt. Teeples said they would look in on me every day and that I would have to sign a statement.

I wasn't bothered the next day. On the next night, the fourth since my arrest, they started questioning me again. I was feeling very sick, but I still refused to sign the statement, and they took me back down to my cell.

Lt. Teeples came down to my cell on the fifth day and asked me how I was getting along. I told him I wasn't getting along very well. He asked me if I was ready to sign a statement and I replied that I was not, until I had defense counsel. He said "You're in this very deep now, and there is no way out for you."

I was feeling very bad and didn't want to be bothered any more. I told him that, and he made out a statement and read it to me. I wouldn't sign that one, and he asked me to make out one in my own handwriting, which I refused to do. Finally, however, I told him I would make a statement and he helped me to write out what he wanted. He wanted to take me some place to have the statement sworn to, but I said I wouldn't swear to it. I was taken upstairs and signed the statement, and they said that I swore to it, but I never did.

At my trial, my defense counsel would not let me testify but I insisted on my right to do so. My counsel did not help me any with the testimony I gave.

I saw the two officers who represented me as defense counsel for the first time at about 3:30 P. M. the Sunday before my trial. Pvt. Fisher was tried the next day and the same officers represented him. I was tried the following day. I only saw them the one time before the trial.

I asked my counsel to question witnesses about the way our signed statements were forced under threats and third degree. Major Moffat testified at the trial that my statement was made before him voluntarily. To the best of my recollection our defense counsel didn't ask Major Moffat

any questions at all. Lt. Teeples, Capt. McCullough and Sgt. Donahue were not called as witnesses at all.

I got to testify for myself by simply going and sitting down at the witness chair after a recess and against the advice of my counsel. The prosecutor, the Judge Advocate, and some of the men on the jury asked me questions, but I do not think my own counsel asked me any questions or helped me out in any way.

Just before my case was tried, and while I was still in the M. P. station I talked with Lt. Engels. He told that he thought he was a fool for reporting in the first place what had happened. He said that he had brought all this on himself. The more he talked the angrier I became, and I didn't say much to him. Later, before the trial I was sent to the stockade, and I did not see him again.

I have carefully read the foregoing statement, made corrections in the same in my own handwriting, and signed or initialed each page. It is true and complete to the best of my knowledge.

EDWARD R. LOURY.

Subscribed and sworn to before me this 24th day of January, 1943.

JOHN COUGHLAN
Notary Public for the State of
Washington residing at Seattle