

## Assault Consummated by Battery

If you find the accused not guilty of the offense alleged, or of the lesser included offense of assault with intent to commit voluntary manslaughter, or of the lesser included offense of assault inflicting grievous bodily harm, or of the lesser included offense of assault with a dangerous weapon, or of the lesser included offense of assault upon a child under the age of sixteen years, or of the lesser included offense of willful discharge of firearm under such circumstances as to endanger life, you should next turn to a consideration of the lesser included offense of assault consummated by a battery in violation of Article 128. In order to find the accused guilty of this lesser included offense you must be satisfied by legal and competent evidence beyond reasonable doubt:

- (a) That, on or about 16 March 1968, between 0830 hours and 1230 hours, at or near a ditch in the eastern section of My Lai (4), Son My Village, Quang Ngai Province, Republic of Vietnam, the accused did bodily harm to thirty (30) Vietnamese Nationals, more or less;
- (b) That he did so by shooting at them with an M-16 rifle;
- (c) That the bodily harm was done with unlawful force or violence.

The court is further advised that an "assault" is an attempt, with unlawful force or violence, to do bodily harm to another, whether or not the attempt is consummated. An act of force or violence is unlawful if done without legal justification or excuse. An "attempt to do bodily harm" is an overt act which amounts to more than mere preparation and is done with ~~present~~ apparent present ability to do bodily harm to another; The act must be without the lawful consent of the persons affected.

The court is further advised that an assault, in which the attempt to do bodily harm is consummated by the infliction of that harm, is called a battery. A "battery" is defined as an unlawful and intentional application of force or violence to the person of another, by a material agency. The act must be done without legal justification and without lawful consent of the persons affected.

"Bodily harm" means any physical injury to or offensive touching of the person of another, however slight.

The offense alleged and this lesser offense differ in that the offense alleged requires, as an essential element, that you be satisfied beyond reasonable doubt that the accused attempted to do bodily harm ; that, at the time, the accused intended to commit murder; and that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; whereas the lesser included offense does not include such element, but it does require you to be satisfied beyond reasonable doubt that the accused did bodily harm to thirty (30) Vietnamese Nationals, more or less.