

HEADQUARTERS THIRD ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
WAR CRIMES BRANCH
APO 403 US ARMY

Ludwigsburg, Detachment

23 April 1946

THE UNITED STATES

vs

Johann Melchior
and
Walter Hirschelmann
Case No. 12-1831

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused, two German male civilians, were tried at Ludwigsburg, Germany, on 22-24 January 1946, by a General Military Government Court appointed by Par. 9, Special Order #353, Headquarters Seventh Army (Western Military District), APO 758, 19 December 1945.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charge and Particulars

Plea Finding

Charge: Violation of the Laws of War

NG

G

Particulars:

NG

G (Except for the words "willfully" and "encouraged" as to accused Hirschelmann)

In that Johann Melchior and Walter Hirschelmann, German nationals, did, at or near Grossenlinden, Germany, on or about 9 September 1944, willfully, deliberately and wrongfully aid, abet, encourage and participate in the killing of two unknown members of the United States Army, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich, by shooting them with guns.

Sentence:

The court by at least two-thirds vote of the members present at the time the vote was taken concurring, sentenced the accused as follows:

Melchior : To life imprisonment

Hirschelmann: To life imprisonment

3. JURISDICTIONAL MATTERS:

a) It is settled law that civilian nationals of one belligerent nation may be tried and punished before duly constituted tribunals of another belligerent nation for violations of international laws governing land warfare. When a civilian wrongfully kills enemy persons who have fallen into their hands as prisoners of war, or aids, abets or participates in such wrongful killing, it is an offense falling within the scope of the rule. (Par. 348 FM 27-10)

b) This General Military Court was duly and legally appointed and the charges and particulars against each accused were properly referred to this court for trial by the Commanding General, Seventh United States Army, Western Military District of Germany. The required jurisdictional number of five (5) members of the Court panel were present throughout the trial. Each accused was properly represented by counsel and each announced ready for trial (R 3). This court was vested with full power to try the accused for the offense alleged. The sentence was legally within the power of the court to impose (Art. III MG 02).

4. EVIDENCE:

a) For the Prosecution: On 9 September 1944, at Grossen-Linden, Germany, two American fliers who had been apprehended were being held in custody at the schoolhouse (R 14). Both of the fliers had burns on their faces and one appeared to be wounded in the flank. Both were wearing U.S. Army uniforms at the time (R 15 & 30). While the fliers were being held, three men entered the room followed by the Policemeister Engel. One wore a Party uniform, one wore black boots and dark pants resembling those worn by the SS, with a civilian blouse, and the third wore a greyish green civilian suit (R 15). At about 1600 hours, Heinrich Falk was summoned by Policemeister Engel to come to the schoolhouse in order to transport two living and one dead pilot to Giessen, Germany (R 16). The two living pilots placed the body of the dead pilot in the carriage and Falk drove the carriage in the direction of Giessen, Germany (R 18 & 19). Policemeister Engel followed in the rear of the carriage (R 21). As the carriage proceeded on the road leading to Giessen and reached a point on the outskirts of Klein-Linden, three men in an automobile appeared and Engel ordered Falk to stop the carriage (R 21). Engel went to the car and talked to the three men, who were sitting in this car, for a period of ten minutes (R 21), and returned to the carriage and ordered Falk to turn the carriage around and drive in the direction of Grossen-Linden. After Falk had proceeded some 300 meters in that direction, Engel ordered him to stop. When he stopped, Falk saw three men standing behind the bushes. These men had apparently gotten out of the car (R 22). Engel told Falk to help unload the dead body, which he did, with the aid of one of the American fliers. The other flier then got off (R 22). While the vehicle was stopped the three men stepped from behind the bushes beside Engel. These men and Engel had weapons in their hands. One of the men who came from behind the bushes was wearing an SA uniform, another a green Loden suit, somewhat like that worn by hunters, and the third wore long boots, black trousers, and a blouse. The boots and

6. DISCUSSION:

a) All of the elements of proof of the alleged offense necessary to establish the guilt of both accused were properly adduced into evidence. The Court properly found that both accused deliberately and wrongfully aided, abetted and participated in the killing of two unknown members of the United States Army who were then unarmed surrendered prisoners of war in the custody of the then German Reich, by shooting them with guns. The Court properly found that in addition to the other elements accused Melchior had deliberately encouraged the commission of the crime. The identity of the victims as American soldiers was properly established (R 20).

b) Both accused claim to have participated in the killing of which they are charged only because they were ordered to do so by Kreisleiter Bruck. (R 69, 72 & 86). The fact that the accused herein committed the offense under superior orders is not an absolute defense. However, the court can consider such fact in determining accused's culpability for the offense of in mitigation of the punishment to be imposed. (Sec. 545, 1 MD WM 27-10 15 Nov 44 Cir 110 USPT 8 Aug 1945). In so much as the court did not impose the death sentence upon either accused indicates that the court considered the fact that accused were acting in compliance with superior order in affixing the sentence which the court imposed on the accused. The determination as to what weight will be given to superior orders is within the discretion of the court and must be determined in each individual case in the light of the particular circumstances. The decision of the court on this matter should stand unless the reviewing authority feels that the court abused its discretion. A careful examination and consideration of the attached record does not reveal any abuse of discretion herein.

c) Accused Melchior admits that he shot one of the fliers in the log to prevent his escape (R 72). It is a well recognized principal of law that an officer who shoots a prisoner, who is in his custody, to prevent his escape cannot be found guilty of a homicide (See 534 Wharton's Criminal Law). However, this principal must be considered in the light of particular circumstances. There is no evidence that the fliers had made any attempt to escape until the time when they found themselves confronted with three men with weapons in their hands. In fact, it is very reasonable to assume from the evidence that these fliers thought they were being taken to a Prisoner of War Inclosure. When they found themselves faced with three men with loaded weapons, they did the only natural thing and that was to try to save their lives. There is nothing in the evidence which discloses that the accused were actually taking those fliers to an inclosure. If so, they could have put them in the car or continued the journey with the carriage. The facts presented here are not consistent with those of a policeman who is taking an accused to jail. Therefore the Court was within its authority in finding that the act of accused Melchior was not in furtherance of his duty to prevent an escape.

d) Each of the accused denies that he fired any of the fatal shots. There is no question that they were present and were actually engaging in a group act which resulted in a homicide. Therefore, accused must be considered as abettors and as

each are liable as principals for the commission of the crimes perpetrated by the entire group (R 15, 72, 86, 87) (Sec. 257 Wharton's Criminal Law. Chpt. 321, Sec. 332-35 Statutes 1152).

e) There is evidence in the record from which the court could have properly determined that each of the accused participated in a conspiracy to ambush the fliers while they were being taken to a Prisoner of War Enclosure (R 15, 20-24). By joining in such a conspiracy they become liable for the full extent of their acts which were a natural and probable consequence of their general evil intention (Sec. 157, Wharton's Criminal Law).

f) Each accused contends that the statements which were introduced as exhibits by the Prosecution were not voluntarily made but were made under duress (R 8, 9, 10, 11, 44, 45). Inasmuch as each accused acknowledged his guilt in such statements such must be considered as a confession by each accused. It therefore became the duty of the Court to determine whether they were voluntarily made (Par. 114 MCM 1938). However, under Rule 12 (Rules for MG Courts), the Court could have still admitted such statements into evidence even though it was not voluntarily made so long as the Court felt that such statements had probative value. Inasmuch as these statements are so strongly corroborated by other evidence, it cannot be said that the Court abused its discretion in admitting such statements into evidence (R 20-24).

g) The Court in its findings excepted the words "willfully" and "encouraged" when making its findings as to accused Hirschelmann. However, the Court still found the accused guilty of an offense in violation of the international law governing the land warfare. Inasmuch as by such exception the Court did not change the general nature of the charge and offense, it was within the authority of the Court to make such an exception and accused were not prejudiced thereby (Par. 78c MCM 1938).

h) After an examination of the record of the entire proceedings it is believed that there are no errors or irregularities appearing therein which injuriously affect the substantial rights of the accused.

i) The sentence imposed on each accused is legal and appropriate to the violations of the international rules of land warfare (Art. III MG O 2).

7. DATA AS TO ACCUSED:

a) As to accused Johann Melchior: Accused is 40 years old, a German civilian whose last residence was at Weeharlshelm, Germany (R 2). He was a member of the NS DAF (PH Sheet Vol. II).

b) As to accused Walter Hirschelmann: Accused is a 48 years old German civilian who last resided at Giessen, Germany (R 2). Member of the Nazi Party, Nazi Labor Union, and Nazi Welfare Society (PH Sheet Vol. II).

8. PETITION FOR REVIEW:

No petition for review was filed on behalf of either accused in this case.

9. RECOMMENDATIONS FOR CLEMENCY:

No recommendation for clemency has been filed on behalf of either accused. The facts do not indicate any circumstances which would warrant clemency for either accused.

10. RECOMMENDATION:

It is recommended that the findings and sentence be approved and sentence be executed as to each accused. The proper order for carrying out this recommendation has been appended for the signature of the reviewing authority.

/s/ M. C. Setzkorn
W. C. SETZKORN
Capt. Inf.
Chief of Trial Section

I concur.

/s/ Charles E. Cheever
CHARLES E. CHEEVER
Colonel, JAGD
Staff Judge Advocate