

HEADQUARTERS THIRD ARMY  
OFFICE OF THE STAFF JUDGE ADVOCATE  
FOR THE GERMAN REAR  
APO 403                      IS 415

17 April 1946

THE UNITED STATES

vs.

Alfred Koller  
a German national

Case No. 12-1894

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused, a male German civilian, was tried at Ludwigsburg, Germany, on 2 April, 1946, by an Inter-Alliate Military Government Court appointed by par. 11, Special Order # 4, Headquarters Seventh United States Army (Eastern Military District) APO 750, 25 March 1946.

2. CHARGES, ISSUES, FINDINGS, AND SENTENCE:

Charges and Particulars	Findings	Sentence
Charge: Violation of the laws of war	FC	FC
Particular:	FC	FC

In fact Alfred Koller, a German national, did, at or near Toloven, Germany, on or about 20 November, 1944, wrongfully, and with intent to do him bodily harm, commit an assault upon an unknown member of the United States Army, who was then an unarmed surrendered prisoner of war in the custody of the then German Reich, by hitting him over the head with a stick.

Sentence:

The court by at least two-thirds vote of the members present at the time the vote was taken concurring, sentenced the accused to imprisonment for a term of five (5) years commencing the first of May, 1945.

3. DATA IS TO ACQUIRE:

Accused is a German citizen. Additional personal data is set forth in the discussion under citizenship.

4. JURISDICTION:

a) It is settled law that civilian nationals of one belligerent nation may be tried and punished by the duly constituted



tribunals of another belligerent nation for violations of international laws governing land warfare. When a civilian wrongfully assaults or beats an enemy person who has fallen into his hands as a prisoner of war, it is an offense falling within the scope of this rule.

b) This Intermediate Military Government Court was duly and legally appointed and the charges and particulars against this accused were properly referred to this court for trial by order of C.R. Bard, Col., J.C.D. and the charges preferred by Howard F. Bressel, Col. The required jurisdictional number of five (5) members of the court panel were present throughout the trial. The charge and particulars were served on the accused prior to trial. The accused was properly represented by counsel and the defense announced ready for trial. The court was vested with full power to try this accused for the offense alleged. The sentence was legally within the power of the court to impose.

#### 5. EVIDENCE:

a) For the Prosecution: On or about 1200 hours, 26 November 1944, a plane crashed in the vicinity of Boloven, Germany, and the pilot, Ross J. Houston, an American, paratrooled down near the village (R 7 to 10 incl., 13; exhibits 1 to 5 incl.). Several local people from the town gathered around the pilot. Among the first to approach the victim was the accused, who had picked up a stick as he approached the flier. The accused struck the victim from three to several times about the head, until he began to bleed and was caused to fall down (R 7, 8, 9; exhibits 1, 2, 3). The accused in his confession states that he struck the victim only on the back (R 11, exhibit 5). A member of the crowd told the accused "don't beat him any more" (R 7, exhibit 1) and shortly thereafter a lieutenant from the Luftwaffe and two soldiers from the anti-aircraft division, German armed forces, took the pilot to the office of the commandant of the Luftwaffe (R 7 to 11 incl.; exhibits 1 to 5 incl.).

b) For the Defense: The accused, in an unsworn statement, testified as follows: On the morning of 26 November 1944, I saw four aviators bail out of a plane in the vicinity of Boloven and one of them landed near our village. When he landed I jumped on my bicycle and pedaled to where he had landed, for the purpose of seeing what he looked like. As I approached him about twenty persons, mostly women, had already gathered around the pilot, who was "standing with the women." I noticed no gun on the pilot, he was neither wounded nor bleeding. I found a stick about 3/4 of a meter long and as thick "as my finger" and hit him over the back twice. He offered no resistance but as "he backstepped he stumbled" (R 18). Then a German soldier appeared and took the pilot away and I don't know what next happened. I have a pointer, which is my explanation for becoming excited and hitting the pilot (R 16 to 22 incl.).

#### 6. DISCUSSION:

a) The total proof adduced by prosecution consisted of four sworn statements, three of which were allowed to have been eye witnesses to the offense, and the confession of the accused. Four witnesses were called by the prosecution for the reason that they were residing in British territory. The statements apparently were taken by a field investigator of the War Crimes Branch and not by a War Crimes Investigating Team. The statements are extremely brief and the right of cross-examination of the witnesses was not extended to the accused at the time of the taking of said statements. However, it should be



noted that the accused in open court through his counsel admitted the war crime for which he had been charged, except for a relatively unimportant factual detail, that is, whether he had beaten the victim on the head or the back. The four sworn statements of these witnesses were sufficient to establish the corpus delicti of the offense and for admitting the confession of the accused as part of the prosecution's case.

6) Counsel for the accused raised several objections to the admissibility of evidence during the course of the trial, which shall be discussed in the order in which they appear in the record:

(1) The defense objected to the admission in evidence of the sworn statements of the four witnesses in lieu of hearing said witnesses in open court (R 4, 5).

The rules for admission of evidence in Military Government Courts are that the court shall in "general admit oral, written and physical evidence having a bearing on the issues before it ..... hearsay evidence, including the statement of a witness not produced, is thus admissible, but if the matter is important and controverted every effort should be made to obtain the presence of the witness ...." (Military Government, Germany, Technical Manual for Legal and Prison Officers, 2nd Edition, par. 9, para 43). Earlier in the trial and immediately after the arraignment and also in the course of the defense's argument on its objection the accused, through his counsel, admitted that he had committed an assault upon the pilot by beating him on the back. Defense counsel, anticipating the expected proof, denied that the accused had beaten the victim over the head and therefore the witnesses should be called so that he could have the right of cross-examining the witnesses. The court properly ruled that the documents were admissible. The subject matter of the controversy, that is, whether the accused had beaten the victim over the head or the back, was not an important factual matter since the accused had already admitted the material elements of the offense for which he was charged when he admitted that he had beaten the victim over the back. The court's determination was neither arbitrary nor an abuse of discretion. The substantial rights of the accused have not been prejudiced.

(2) The second ground of the defense's objection to the admission of the documents is that "the particular prisoner of war was not an unarmed and surrendered prisoner of war at the time he beat him ..... only afterwards ..... only a parachuted flier not yet surrendered" (R 5).

Counsel's reasoning behind this objection is not too apparent at this point of the proceedings since it is an objection to the admission of certain documents and not a motion for a finding of not guilty. Since the basis of the defense's motion for a finding of not guilty, which appears later in the record, is a restatement of the argument on the above objection, the two will be discussed together. The test to determine the status of an enemy combatant is not whether he is armed, but has he ceased to fight and asked for mercy. "When an enemy combatant ceases to fight and asks for mercy, he is soliciting quarter ..... thus a combatant who ceases to fight and is willing to be captured may not be killed or wounded .... An enemy whose aircraft has landed on territory held by the opponent may not be attacked if he does not continue to resist or try to escape, for he will be captured in any event". (Law of Land Warfare, J.A.C.S. Text #7, p. 32, 33).



(3) Defense counsel objects to the admission of the accused's confession for the reason that it is in violation of the best evidence rule.

No prejudicial error was committed by the court in admitting the sworn statement of the accused as a confession and in not confusing the rule for the admission of confession with the best evidence rule.

c) The offense for which the accused stands convicted is a war crime, but approximates an assault and battery to do bodily harm. The court had power to impose any sentence up to and including death. The only evidence of the character of the stick used by the accused came from himself. He states that it was  $3/4$  of a meter in length and about as thick as his finger. He is not charged with nor does the evidence establish that the "manner of use" or "other circumstances" are such as to characterize the instrument as a dangerous weapon (See MCM, 1928, page 180; Black's Law Dictionary, Third Edition, page 504). The maximum punishment under the table of maximum punishments for Court-Martials for the offense of assault with intent to do bodily harm is confinement at hard labor for one year (Ar. 104 c, MCM 1928; see also United States Code, 1940 Edition, Title 18, P. r. 455). Winthrop in his discussion of the sentence of military commissions states that imprisonment for a term of years is "sometimes, and properly, assimilated to the term prescribed for similar offenses by the local law" (Winthrop's Military Law and Precedent, 2nd Edition, 1920 Reprint, page 843). It is considered a sentence of imprisonment for two years is an appropriate sentence. Under all civilized law punishment is meted out according to the seriousness of the offense.

d) All the elements of proof of the alleged offense necessary to establish the guilt of the accused were properly adduced in evidence. The sentence is legal. The trial was fairly conducted. Neither in the procedure nor in the admission of evidence do any errors appear so prejudicial to the accused as to offend against the rules of fairness and justice applicable in Intermediary Courts.

#### 7. PETITION FOR REVIEW:

Subsequent to the drafting of this review a petition for Review in behalf of the accused has been brought to the attention of this reviewer. No errors in addition to those already discussed have been alleged.

#### 8. CLEMENCY:

No pleas for clemency have been received on behalf of the accused. He is 45 years old and a chemical laboratory technician by profession. The accused admits his guilt and his only explanation for his conduct is that he is highly nervous, caused by a polter disorder. There is no evidence of previous civilian convictions. He joined the NSDAP in 1940. The accused has been in prison since 25 April 1945. For reasons stated in the preceding paragraphs it is considered a more appropriate sentence would be a sentence of imprisonment for two years commencing 1 May, 1945.

#### 9. RECOMMENDATION:

It is recommended that the finding and so much of the sentence as provides for imprisonment for a term of two (2) years commencing the first of May, 1945, be approved. The proper order for carrying

out this recommendation has been appended for signature of the reviewing authority.

/s/ A. E. Ratzkorn  
/t/ A. C. SMITH  
Capt., INF  
Chief, Trial Section

I concur.

/s/ Charles E. Chaever  
/t/ CHARLES E. CHAEVER  
Colonel. JAGC  
Staff Judge Advocate



NAVY WARREN  
THIRD UNITED STATES ARMY  
-IC 403

INTERMEDIATE MILITARY GOVERNMENT )

COURT ORDER NUMBER

18 )

8 Jun. 1946

Before an intermediate military government court which convened at Ludwigsburg, Germany, on 2 April 1946, pursuant to paragraph 11, Special Orders No. 84, Headquarters, Seventh United States Army, 25 March 1946, was arraigned and tried:

Alfred Koller, German National

CHARGE: Violation of the laws of war

Specification: In that Alfred KOLLER, a German national, did, at or near BOLOVITZ, Germany, on or about 26 November 1944, wrongfully and with intent to do him bodily harm, commit an assault upon an unknown member of the United States Army, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich, by hitting him over the head with a stick.

VERDICT

To the Specification of the CHARGE: Not Guilty  
To the CHARGE: Not Guilty

Not Guilty  
Not Guilty

FINDINGS

Of the Specification of the CHARGE: Guilty  
Of the CHARGE: Guilty

Guilty  
Guilty

SENTENCE

To be imprisoned for a term of five years commencing the First of May, 1945, at such place as may be designated by competent military authority.

The sentence was adjudged 2 April 1946.

The findings and only so much of the sentence as provides for confinement for a term of two (2) years commencing 1 May, 1945 be approved and upheld. As thus modified the sentence will be duly executed. Prison #2, Schwaebisch Hall, is designated as the place of confinement.

BY COMMAND OF LIEUTENANT GENERAL RYERS:

MAJ. G. SCHLINT  
Major General, General Staff Corps  
Chief of Staff

/s/ W. C. Caldwell  
/t/ W. C. CALDWELL  
Colonel, Adjutant General's Department  
Acting Adjutant General

DO NOT  
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