

IV. EVIDENCE AND RECOMMENDATIONS:

1. Ludwig WOLTER

Nationality:	German
Age:	53
Civilian Status:	Administrative Secretary with Criminal Police
Party Status:	Gestapo Agent
Military Status:	Unknown
Plea:	NG
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: In an unsworn pretrial statement, former police chief Knocheimann stated that on 7 July 1944 at about 1000 to 1030 hours, an American plane, which was on fire, crashed near Bad Harzburg, Germany; that several of the crew members parachuted safely and were picked up by the police and delivered to Goslar air field; and that two of the crew members fell into the hands of the Gestapo and were shot. He further stated that, according to his investigations, one member of the crew was first taken to the Gestapo headquarters in Bad Harzburg, interrogated and then taken into the woods and shot by Zellmann and the accused (R 6; P-Ex 2). Prosecution evidence tentatively identified the bodies of two American flyers, who had been killed near Bad Harzburg, 7 July 1944, to be Technical Sergeant L. A. Hambel, Army Serial Number 35424780 and Second Lieutenant Anthony J. Santomiary, Army Serial Number O-820070. These two were buried in the cemetery at Westerde, Germany (R 6, 8, 10, 13; P-Exs 3, 6, 10A, 15A p. 1).

In his unsworn pretrial statement, Heisacke stated that he assisted in the search for flyers after an American plane crashed in the summer of 1944 and, while he was in the woods near the crashed plane, he heard ten or twenty shots fired and then saw two Gestapo men near the body of a flyer. Two of the SA men and country guardman Gerken were present (R 8; P-Ex 7A).

In his Statement, police chief Knochelmann said that on 7 July 1944, at about 1100 hours, an American four motored plane crashed near Bad Harzburg, and six flyers bailed out. He "heard" that one flyer was killed by the accused. He further stated that, on the same day, he learned the accused had taken a flyer to the Gestapo headquarters and that, when he called Chief Gestapo Agent Kowitzke by telephone, the latter refused to turn the flyer over to the civil authorities. He again called about thirty minutes later and Kowitzke stated that the flyer had been taken to look for his pistol. He further stated that, about 1400 hours, while he was near the crashed plane, he met the accused and Zellmann. Zellmann said that the flyer had tried to escape and had been shot. The police chief then found the body of a dead flyer (R 11; P-Ex 12A).

In his Statement, Gerken stated that he visited the scene of a plane crash early in July 1944. Shortly after 1200 hours he heard a single shot fired followed by a burst of six or eight shots. He also stated that he saw the accused and Zellmann each with a pistol; that he saw the body of a dead flyer near them; and that he also saw six SA men were there.(R 12; P-Ex 14A).

Straube, a former secretary in the Gestapo office in Bad Harzburg, stated in her Statement that on 7 July 1944 she was instructed by Zellmann to arrange by telephone to have someone from the airport pick up American prisoners, but that after Zellmann went into Kowitzke's office he came back and said not to bother about calling. During this conversation the flyer was in the office. She further stated that "later on" she heard a discussion in the office to the effect that Kowitzke had ordered that the American flyer be taken away and shot, but she did not know who had made the remark (R 14; P-Ex 17).

In her Statement, Mrs. Dinkel, who was an employee in the Gestapo office at Bad Harzburg, stated that on 7 July 1944 Kowitzke was in his office and she overheard a conversation between him and some person or persons whom she could not identify by the voices. She heard Kowitzke

say that the Americans must be killed, according to orders from higher headquarters (R 16; P-Ex 23).

The accused admitted in his Statement that he shot at the flyer as he ran through the woods. He stated that, at the same time, Zellmann and some of the country guardsmen shot at the fleeing flyer, and that the flyer was hit (R 9; P-Ex 8A). In a second Statement the accused admitted that he fired three or four shots at the flyer as he ran into the woods. He also stated that several of the country guardsmen appeared before the shooting and joined in the pursuit (R 16; P-Ex 21 p. 2).

The accused gave his Statements, hereinafter referred to as his first and second, on the same day. In his first Statement, the accused stated that, immediately preceding the flyer's attempt to escape, he, Zellmann and the flyer "stood by the side of the radiator, the flyer standing a little bit to the side." In his second Statement, he placed the flyer in "front of the radiator", but did not mention the precise location of himself and Zellmann (R 9, 16; P-Exs 8A, 21, p. 2).

During the trial he testified that the flyer "walked up to the radiator of the car and stood leaning his hand on the radiator" and that he and Zellmann were standing "right near to the doors of the car" (R 27, 28).

As to the position of the driver immediately preceding the attempt to escape, the accused stated in his first Statement, which was in his own language, that he could not "say with certainty" whether the driver got out or remained in the car. However, in his fourth succeeding sentence he stated the driver remained in the car. No mention was made in his second Statement as to the driver's location. However, he testified that the driver remained in the car (R 9, 16, 27, 28; P-Exs 8A, 21).

Relative to warning shots, the accused made no mention thereof in his first or second Statements, but he testified first on direct examination that Zellmann fired three warning shots, not mentioning that he did too, and considerably later on direct examination that he himself fired three warning shots into the air without mentioning that Zellmann

also fired warning shots (R 9, 16, 28, 34; P-Exs 8, 21).

Concerning commands to halt, the accused stated in his first Statement, "we called 'Halt' several times", in his second Statement "I" called halt, and asserted in his testimony that Zellmann called halt three or four times, but did not mention him self (R 9, 16, 28; P-Exs 8, 21).

Relative to shooting at the flyer, the accused stated in both Statements that he, Zellmann and some home guards shot at the flyer simultaneously. In his second Statement he said that he fired three or four shots. However, in his testimony, at first on direct examination he refers only to shooting by Zellmann, who in the running passed him and was six meters ahead, and does not mention shots by himself or the guards, but considerably later he testified that he had only three rounds of ammunition; and that he fired all three shots into the air and not at the flyer. Still later he testified that at the time of his shots he also heard other shots in "that area", about eight, and that they were fired by Zellmann. Still later in his direct examination he testified that he heard shots fired by persons other than him self and Zellmann.

In his second Statement, he stated that he shot the flyer in order to avoid being punished for allowing a prisoner to escape. During his trial he denied that he ever made a remark to anyone that he had shot or killed a flyer (R 9, 16, 28, 33, 34, 35; P-Exs 6, 21).

In his second Statement, the accused stated that he did not know whether or not other flyers were killed that day and that Zellmann did not tell him anything about another flyer having been killed that day. However, later in the same Statement he stated that he learned from Zellmann two days later that he, Zellmann, had shot another flyer on the same day as the incident in question. He testified that on the day following the incident in which he was involved he learned about the killing of the other flyer (R 16, 35; P-Ex 21).

The evidence definitely established that Zellmann, who was together with the accused and participated in killing the flyer with which this case is concerned, had earlier on the same day participated with another

Gestapo agent in the killing of another American flyer from the same plane crew, and under circumstances that unquestionably showed a willful killing (R 8, 9, 10, 14, 15; P-Exs 6, 7A, 9A, 10A, 18A, 19A).

Evidence for Defense: Heisecke stated in his Statement that he heard ten or twenty shots fired and was told by two Gestapo men who were then near the body, that the flyer had been killed while attempting to escape (R 8; P-Ex 7A).

In his Statement, police chief Knochelmann stated that, on the day of the killing, he called the Gestapo office to ask for the flyer and was told that the flyer had been taken out to search for his pistol. Later, near the scene of the killing, he was told by Zellmann that the flyer had been shot while trying to escape (R 11; P-Ex 12A).

Gerken stated in his Statement that from a distance of about 300 meters he heard "**** a single shot followed by 6-8 others****"; that he saw the accused and Zellmann about 100 meters west of a car that was parked on the road, each with a pistol in his hand. As he approached he saw the body of a flyer lying about 30 meters south of the road. The accused and Zellmann were walking toward the body. He also stated that six SA men were present (A 13; P-Ex 14A).

In his Statement, the accused stated that he and another Gestapo agent first protected the flyer from an angry crowd of civilians who were mistreating him. They took the flyer away from the crowd and to the Gestapo headquarters. There the flyer was searched, but they found no weapon or papers. The flyer was given something to drink and smoke and the flyer then stated that he had hidden his pistol, some military papers, and some French and German money near where he had landed. The flyer agreed to assist in a search for these articles. Gestapo chief Kowitzke ordered the accused and Zellmann to take the flyer on the search. While driving along the road, two stops were made to search for the articles. At the second stop, the flyer ran into the underbrush of a pine nursery beside the road. The accused and Zellmann both called "Halt" and ran after the flyer. When they saw him he was 20 meters ahead of

then and gaining distance. Some members of the country guard were attracted by the pursuit and, along with the accused and Zellmann, fired at and killed the fleeing flyer (R 9; P-Ex 8A). In one of his statements, the accused repeated the story of the shooting and reaffirmed the fact that the flyer had attempted to escape. He denied that he ever, prior to the killing, received orders that enemy flyers were not to be taken alive and he denied that Kowitzke ordered him and Zellmann to take the flyer into the woods and kill him. He stated that he shot the flyer to avoid punishment for allowing a prisoner to escape (R 16; P-Ex 21 pp. 2, 4, 5).

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a letter
everyday*

The accused testified that he was first on duty with the Gestapo as a gatekeeper and later as a file clerk; and that he had never had any duty requiring him to make secret or field investigations relative to political activities (R 22). He denied that there were any orders to dispose of or to kill the flyer, or that there had been any conversation at the Gestapo office relative to killing the flyer (R 29). He testified that the only purpose for taking the flyer out was to search for the pistol and other articles which the flyer stated he had hidden (R 32). He testified that he fired all three of the rounds that he had in his pistol into the air and called "Halt" three times. He testified further that Zellmann must have fired eight shots (R 34). He heard additional shots and saw several other people there with firearms (R 35). The accused testified that he did not know any of these SA men (R 38).

Sufficiency of Evidence: The evidence falls short of establishing that the killing of the flyer was pursuant to the orders of any superior of the accused. However, taking into consideration all of the proven facts and circumstances, the Court might well have concluded that the accused, acting together with his accomplice Zellmann who had already that day participated in one unlawful killing, willfully killed the flyer as alleged.

The testimony of the accused himself is so filled with contradictions, variations, inconsistencies and improbabilities that the Court was justified

in placing little credence in any of his assertions. The evidence in support of the accused's affirmative defense that he shot the flyer to prevent an escape is not persuasive, and it is established that the killing was in no way justified.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by the accused, 5 August 1947. No Petitions for Clemency were filed.

Recommendations: That the findings and the sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: It is clear that the Court had jurisdiction of the person of the accused and of the subject matter.

Conflicting Evidence: It is fundamental that the Court is the exclusive judge of the credibility of the witnesses and the weight to be given their testimony; that where there is conflicting testimony it is the duty of the court to determine the true facts and circumstances relevant to the issues from the testimony which the Court in its discretion determines to be most worthy of belief; and that such findings of fact as reflected by the actions of the Court will not be disturbed on review.

Evidence Relevant to the Particulars: The defense moved "for a withdrawal" of the charge because the prosecution had introduced evidence attempting to show that the accused was a member of the Gestapo and that the Gestapo had been given orders concerning the treatment of captured enemy flyers (R 18-20). The Court properly overruled the motion (K 20). Any evidence tending to show that the accused may have unlawfully encouraged, aided, abetted or participated in the killing was clearly admissible under the Charge and Particulars, and is too well settled to require comment.

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentence be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

V. B. McClintock

V. B. McCLINTOCK
Attorney .
Post Trial Branch

Having examined the record of trial, I concur, this 9th
day of March 1948.

C. V. Phifer

C. V. PHIFER
Lieutenant Colonel, USAF
Acting Deputy Judge Advocate
for War Crimes