

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMED GROUP
UNITED STATES FORCES, EUROPEAN THEATER

17 September, 1946.

Case No. 12-2018

U N I T E D S T A T E S)

vs)

Hans TOELLE and Herbert
LANGNEI, German Nationals)

REVIEW AND RECOMMENDATIONS OF THE
DEPUTY THEATER JUDGE ADVOCATE FOR
WAR CRIMES

1. TRIAL: The accused were tried at Dachau, Germany, on the 12th July 1946, before a General Military Government Court appointed by paragraph 20, Special Orders No. 184, Headquarters United States Forces, European Theater, dated 3 July, 1946.

2. FINDINGS: The offense involved was: Pleas: Findings:
CHARGE: Violation of the Laws of War: as to Charge
and Particulars

Particulars: In that Hans TOELLE and Herbert LANGNER, German nationals, did, at or near THANNHAM, Germany, on or about 16 April 1945, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of Donald E. HOWIE, a member of the United States Army who was then unarmed and in the act of surrendering himself as a prisoner of the then German Reich.

As to Hans TOELLE

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As to Herbert LANGNER

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3. SENTENCE:

The Court by at least two thirds vote of the members present at the time the vote was taken concurring sentenced the accused Hans TOELLE to be imprisoned for a term of six years commencing the 29th day of May 1945, at such place as may be designated by competent military authority.

The Court by at least two thirds vote of the members present at the time the vote was taken concurring, found the accused Herbert LANGNER not guilty and acquitted him of the charge and particulars. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for

final action (paragraph 8d, Letter Headquarters, United States Forces, European Theater, File AG 000.5 JAG AGO, Subject: "Trial of War Crimes Cases," dated 14 October 1946).

4. DATA AS TO ACCUSED:

The accused Hans TOELLE is a German national, 39 years of age, and is unmarried. He stated that his parents were probably driven out of the Russian Zone of Occupation and he would have them to support. At the time of the offense for which he was found guilty he was a Corporal stationed at "Position Unit Pfau" and he had served at this position for a number of years prior to the 16th April 1945.

The accused Herbert LANGNER was acquitted of the charge and particulars. The record discloses that there was no evidence against the accused. Therefore the court was justified in its finding of not guilty and in acquitting the accused Herbert LANGNER of the offense charged. Therefore the remaining part of the review will deal with and refer only to Hans TOELLE.

5. RECOMMENDATION:

That the sentence as to the accused Hans TOELLE be approved and ordered executed.

6. EVIDENCE:

a. For the Prosecution: Briefly summarized, the evidence for the prosecution is as follows: On the 16th of April 1945 Second Lieutenant Donald E. HOWIE, an officer of the Air Corps of the United States Army, parachuted to earth near THANHAM, Germany (R 6). The flyer after landing walked across a field and into the woods (R 7). The weather was clear, and the hour was about three thirty in the afternoon (R 8.. 15). A guard from the prison camp at THANHAM had gone out to capture the flyer, had been within 500 meters from him and had shouted three times to the flyer to stop (R 15, 16). The flyer went into a small hole or depression in the ground. The witness KREILEDER testified that he was within eight meters from the flyer and that the flyer had a pistol in his hand; that the witness

rode on and met a soldier to whom he spoke (R 8). The soldier fired a warning shot to induce the flyer to come out and surrender (R 8). A group of three soldiers then came up, comprised of TOELLE, the accused, and MADL and ZOEHRER (R 9). MADL shouted to the flyer, "Hands up". The flyer then came out of the hole with his hands up over his head (R 9). TOELLE also shouted to the flyer, "Hands up", and immediately fired off four shots at the flyer from a machine pistol (R 9). The flyer had both hands raised over his head when the accused fired the shots, the accused shouting and firing about the same time (R 10). The flyer did not have anything in his hands when the shots were fired by the accused. He fell to the ground on his face in front of the hole (R 11). The flyer's pistol was found in the hole (R 7-12). The witness KREILEDER was four to five meters from the flyer and no effort on the victim's part to harm the witness was made (R 18).

Summarized in greater detail, the evidence of the prosecution is as follows: The first witness called by the prosecution was Georg KREILEDER who lived at KOESSLARN, THANNHAM. By occupation a farmer, 32 years of age, he lived near the scene of the murder. On the 16th of April 1945 he observed twelve planes in the air, and one of them "tail-smoked" (R 6). From his home he saw the pilot walking across the field. Later he saw the same man at a distance of approximately a hundred meters. Witness shouted to him in German but the flyer did not reply or come to him. The witness then returned to his home and learned from his mother that a guard from the prison was out looking for the flyer (R 7). He joined the guard, whose name was Franz BINDEL, and who at the time fired a shot into the air at a distance of about fifty meters. The flyer fell to the ground and rose and went into the forest (R 8). Later TOELLE, the accused, with two other soldiers whose names were MADL and ZOEHRER, came upon the scene, MADL saw the flyer and shouted at him "Hands up", at which time the flyer came out of the hole (R 9-22). At about the same time the accused TOELLE shouted "Hands up", crossed the triangle of the

machine gun pistol, and fired about four shots at the flyer, whose hands were raised at the time the shots were fired (R 9, 10, 22). On cross examination the witness did not vary or change his testimony (R 15, 17, 20, 22, 23).

The next witness called by the prosecution was Frau Annelies FINKE, whose occupation was a housewife. She was 30 years of age, and lived at DRIBURG. At the time of the murder she was working at the air force signal post as an operator. She testified that accused Lieutenant LANGNER was her superior in the work in the office (R 35), and that LANGNER, after receiving a report of the plane crash ordered the guard to hunt for the plane (R 35). Nowhere in the record does this witness testify that LANGNER ever gave any orders to shoot the flyer, and upon cross examination she admitted that LANGNER ordered the guard to hunt for the plane and not the flyer (R 37). LANGNER was talking to her and the other women present but at no time did he order anyone to hunt the flyer or shoot him down (R 37 and 39). There is no evidence anywhere in the record which connects the accused LANGNER with the murder or with giving an order to anyone to shoot the flyer.

Jakob RIENER, the next witness called by the prosecution, was 35 years of age, and lived at ROTHALLMUNSTEN. His present occupation is to install stoves and lay tiles. He testified that he was a former Lieutenant in the German Army, and that at the time of the offense alleged he was at home on leave. During the air raid he went out to look for his father-in-law, heard the shots, and went directly to the scene (R 51). He heard someone call "Hands up" (R 52), but did not see the actual shooting. He saw the body of the flyer later, and removed his personal effects and wrapped them in a white cloth which he took from around the deceased's neck (R 55). He talked with the witness KREIDLER, who explained to him how the deceased was shot by TOELLE the accused. TOELLE left the scene shortly after the shooting (R 57, 58).

The prosecution, with the consent of the defense, introduced Exhibit 3, which was a certificate of the investigating officer disclosing a document and a list of the personal belongings of the deceased flyer. It had been made by Captain FRIEDRICHS, who at the time of the murder was Company Commander of the German radio station (R 60). The prosecution and defense agreed that certain parts of the report of the medical officer of KOESSLAKN who examined the dead body on 20th September 1945, should be admitted. The report is found on pages 61 and 62 of the record. The report identified the deceased flyer as Donald E. HOWIE, the victim named in the Particulars (R 61, 62).

b. For the Defense:

The defense called as its first witness Franz BINDEK, who was a philosophy student, aged 26, and who lived in SALZBURG, Austria. This witness identified the two accused (R 69) and explained the duties of himself and the accused TOELLE (R 71). Lieutenant LANGNER ordered the witness to go look for the flyer (R 74). The order was go look for the flyer; but no order was given by the accused LANGNER to shoot the flyer (R 75). This witness talked with TOELLE a day or so after the shooting; TOELLE told him that he saw the flyer and that "if he had not fired the first shot he would have gotten away with his life" (R 76).

Walter BOEHM, the next witness called by the Defense, is 26 years of age, and a laborer living at GLISSRIENG (R 89, 90). This witness testified as to his duties at the radio station. He talked with Sergeant ZIDEK, who told him that a soldier was shot the day before (R 91). The witness also talked with MADL, who was the third member of the party. MADL told the witness that the flyer had thrown his pistol away, and that his hands were raised over his head (R 91), and that the accused TOELLE had been very excited when he fired at the deceased (R 92). This witness also testified as to the aircraft which had been flying low over that area (R 93). Most

soldier, but a business man, and was nervous and excitable (R 95).

The defense's next witness was Julius GABRIEL, 34 years of age, a business man, living at SCHWANENSTADT in Upper Austria (R 99). The testimony was hearsay evidence which other people had given him. He personally was not present, but was in the hospital at the time of the incident (R 100). He further testified as to the character and reputation of the accused TOELLE (R 101). The accused also had a bad heart (R 102).

Heinrich LEIMBERGEL, 46 years of age, by occupation a construction engineer, lived at KOESSLARN. He had worked at the radio station and was acquainted with the accused LANGNER; they had worked together on the "No Resistance Movement" and discussed what they should do when the Americans came; they had agreed upon the positions that were not to be defended. Accused LANGNER told him about the death of the flyer, which was regretted by LANGNER. This witness personally had no information or knowledge concerning the shooting (R 104 and 105).

Otto HOFBAUER, by occupation a Chaplain, 34 years of age, living at KOESSLARN, was the next witness called by the defense. He stated that he was at the time stationed at the 43. Force Signal Unit (R 108); that he had learned from the population that an American flyer had been shot down (R 109); and that he made a personal investigation of the matter and obtained permission to give the flyer a partial military burial and his blessings (R 110, 111).

Eugene ZIDEK (R 114) made an affidavit concerning the death of the pilot, which was admitted in evidence for the defense upon agreement of the prosecution and the defense. In this affidavit he stated he had heard MADL shout, "Hands up", and saw the flyer stand up with one hand raised. About the same time he heard the shots and saw TOELLE stare at the flyer from above the machine pistol which TOELLE had discharged. TOELLE still had his finger on the trigger, and from the muzzle powder smoke could still be seen

Wilhelm KITZAU was the next witness called by the defense. He was a merchant by occupation and was 33 years of age. He lived at LAEGELN, near KOESSLAKN, and had been stationed with the German Army at the Army Area Unit called Position Pfau. Here he had been first sergeant and responsible for general company duties. He had returned to KOESSLAKN the last part of April 1945, and talked with soldiers concerning the shooting of an American flyer. He discussed this with MADL and TOELLE, the accused. MADL told him that TOELLE had shot the American flyer, that MADL had called "Hands up", and that TOELLE also called "Hands up" and immediately thereafter had shot the pilot, and that in his opinion TOELLE had fired because he was scared (R 141-142). Accused TOELLE did general company duties and was used for special jobs. During witness' tour of duty as first sergeant at this station the accused TOELLE had nothing to do with weapons, and had no training with machine pistols (R 122-123). TOELLE had the reputation of being a business man, not a soldier. He was excitable, and had physical disabilities consisting of a heart ailment, asthma, and a bad foot, due to a bone fracture. His eyesight was bad and he was forced to wear glasses. Accused TOELLE graduated from high school and had several semesters at the university. This witnesses's testimony was all from information he had received from other people, since he personally was not acquainted with the facts concerning the shooting of the flyer.

Lt. Jakob KIENER was called as a witness for the defense (R 126) and testified that he had six years of experience in combat and had an opportunity to observe reactions of Germans when they first encountered armed enemies (R 128). In his opinion a soldier untrained in the use of weapons, when first encountering armed enemies, might fire from pure excitement, and would be unable at the moment to concentrate. He knew the accused TOELLE only by sight (R 131).

Gerhard SCHLEIDER, 26 years of age, who lived at KOESSLARN was the next witness called by the defense (R 135). He identified the accused TOELLE, having been acquainted with him since the summer of 1944. TOELLE had been a guest in his home. TOELLE had considered the war as lost and they had tuned in on an English broadcasting station (R 136). TOELLE was not a Nazi, nor was this witness. TOELLE had said he wished the war was over so he could start life all over. Witness had discussed the shooting of the American soldier with TOELLE and with other people. The version of the shooting in the community was that the people were sorry about it, and were of the opinion that the deed was committed in excitement due to a first experience with the enemy (R 137). TOELLE had made the statement to other people that he was confronted with the decision either to shoot or to be shot at. The accused TOELLE was unhappy, and was regretful about it (R 138). On cross-examination the witness testified that the people thought that the American was not threatening TOELLE, and that therefore it had to be a deed committed in excitement (R 139).

Franz RUEDL was recalled by the Defense, and testified that an additional flyer to the one shot by TOELLE had landed in the vicinity of KOESSLARN; that this flyer was wounded; and that he was given medical attention and quarters (R 141).

Herbert LANGNER, one of the accused, took the stand and testified in his own behalf (R 143). He said he was 26 years of age, and that his profession was in a business firm. He lived at KOESSLARN and he had reported to the prison camp on 1 June, after proclamation of Military Government that all Germans who did not have discharge papers should report.

He went to the Position Unit Pfau in September 1944 and remained there until May 1945. He was at the time the technical officer at the Unit (R 144). During air raids and heavy attacks he was also in the message center and on the morning of the 16th

subsided. He then went to the listening post where he remained during the afternoon (R 145). When he returned to the observation post he was told by the helpers that an airplane had crashed near THANHAM. The hour was about three thirty to four o'clock in the afternoon. He went to Captain FRIEDRICHS to advise him concerning this. FRIEDRICHS told accused LANGNER that he had already sent soldiers to search the plane. He requested that LANGNER also send soldiers to look so LANGNER sent Sergeants RUEDL and ZIDEK (R 151). He did not send TOELLE out to look for anyone, but he met TOELLE on his way to the administrative barracks. TOELLE advised that Captain FRIEDRICHS had ordered him to take part in the search and to go to the officers' barracks and get the machine pistol. Accused did not order TOELLE to get the machine pistol, but returned to the observation post and did not bother about TOELLE any more (R 152). The women working in the message center asked him about the crash and what would happen if the pilot would not give up. He said that "if the man resists it is a matter of course that our soldiers may make use of their weapons if necessary, he has got to be laid low". His remark was solely a statement of his opinion. He said it only to the girls who were there; soldiers were not present and it was not an order (R 153). He further testified that he at no time had given an order to the effect that enemy flyers would be "laid down" (R 160-161).

Accused LANGNER also testified on behalf of TOELLE and stated that TOELLE was not a soldier at all, but a civilian in uniform, who did not have the reputation of being blood thirsty (R 166). LANGNER was very much surprised when he heard that the American flyer had been shot. He felt sorry for the pilot because he was young and felt sorry for TOELLE because it had to happen to him and that this "had to happen almost at the end of the war". Neither on the 16th April nor before were orders given to shoot prisoners or to lay prisoners low or shoot pilots (R 167).

Accused LANGNER, upon being cross-examined, testified that he heard about the plane crash. He went to Captain FRIEDRICHS and advised him about the message. The Captain told him he knew already about the case, and that he had already sent out soldiers to search. He repeated his testimony as to meeting the accused TOELLE and denied having given any orders to him (R 110), or that he did not give TOELLE the machine pistol (R 141). When he first saw TOELLE the latter was on his way to get the machine pistol. LANGNER did not know what orders had been given to TOELLE, but he personally gave no orders (R 173).

Hans TOELLE took the witness stand and testified in his own behalf (R 180). He was 39 years of age, by occupation a merchant, and lived at ROHTENHL, MUENSTER. On 16 April 1946 he was a member of the Air Force stationed at Position Pfau. His rank between that of a corporal and private first class (R 180). His work was to keep records and operate the canteen, and particularly to keep the records on weapons. There was only one machine gun pistol and it was taken to the officers' quarters. He had never received any instructions in the use of this weapon (R 181). He finished high school and a few semesters in college, studying economics at KÖLN and at KÖNIGSBERG. He never had any training as a soldier (R 182). He was a limited service soldier and was not capable of combat duty (R 183). He was troubled with heart ailment and had a fracture of the foot; excitement bothered his heart and he would have headaches; he wore glasses and is unable to see without them (R 183). His only experience in air raids was the one in question. He learned of the plane's having crash-landed at about 1600 hours, through a civilian who came to the station (R 186). During the conversation with the civilian who reported the plane crash, his telephone rang and he received from Captain FRIEDRICHS an order to go out and hunt the pilot. The captain advised him that the pilot

accused to go to the barracks and obtain a machine gun pistol (R 191). He met KIELEDEI and Sergeant ZIDEK at the edge of the forest. They said that a guard from THANHAM had fired in the air, but that the flyer did not surrender. The flyer then ran into the forest. He was armed with a big pistol (R 191). The accused testified that he was excited because it was his first encounter with the enemy. The three of them spread out to look for the flyer (R 192). Accused saw the American flyer at about from fifty to a hundred meters, but did not see the other two soldiers who were with him (R 193). The flyer had a pistol in his hand and was sitting in a hole holding the pistol out towards the accused (R 195). Accused shouted "Hands up", and at the same time the pistol in his hand went off before he could fire a shot into the air as a warning (R 196, 219). When he shouted "Hands up" the pistol went off (R 197-219). Things happened so quickly that he could not see the pistol in the flyer's hands because he was surprised (R 198). After he had shot the flyer he ran to him and saw he was unconscious. Accused then ran to get a medical officer. He was very sorry, and he only had one thing in his mind, and that was to get medical aid to the flyer (R 198). He did not think it over, but just shouted "Hands up", and with the call the pistol went off (R 200, 221). He had no intentions to shoot the flyer (R 202-221). The others came up and talked, but he did not remember what was said, due to his excitement (R 204). On his way he met Captain FRIEDRICHS and told him he had shot the flyer, and was on his way for medical help. The Captain told him to go and make his report later. He returned with the medical man (R 205, 219).

Throughout the cross-examination by the prosecution and members of the court, the accused testified that he shot the flyer, that it was not his intention to do so, but that it was, on account of his excitement, accidental. The shooting was not as a result of orders from a superior officer (R 221).

7. JURISDICTION:

The charge and particulars alleged a violation of the laws of war committed on the 16th April 1945, by an enemy national against a member of the United States Army Forces, at a time when a state of war existed between Germany and the United States of America. Accordingly the court which was appointed to hear the case had jurisdiction of the persons and subject matter in accordance with previous decisions of this office in similar cases. See United States vs Richard BILAUZ (1946) and United States vs Clemens WIEGAND (1945).

8. SUFFICIENCY:

There is sufficient evidence to sustain the finding of guilty as to Hans TOELLE. Not only does the evidence presented by the prosecution establish the guilt of the accused but also the testimony of the accused Hans TOELLE himself establishes beyond any reasonable doubt, that he was guilty of the shooting of Donald E. HOWIE who was at the time in the act of surrendering himself. The evidence fully discloses that eye-witnesses did observe the victim rise from the small depression in the ground with his hands raised in the air over his head. The court did not, by its sentence apparently believe that the accused deliberately, with pre-meditation and malice aforethought shot the deceased, and must be concluded to have entered its findings based upon an act of manslaughter or second degree murder. There is sufficient evidence in the record of trial as to the identity of the alleged deceased and to show that he was a member of the United States Army at the time he was killed.

In the record of trial it is stated (R 1) that the General Military Government Court which tried the case was appointed by Paragraph 2, Special Orders No. 2, (Headquarters, United States Forces, European Theater) dated 3 July 1946. This is clearly erroneous, since there are no such numbered Special Orders of that

The case was actually tried by a General Military Government Court appointed by paragraph 20, Special Orders No. 184, this headquarters, and the error appears to have occurred as a result of a failure of the duplicating machine to print on all copies of the orders all the digits in the paragraph and order numbers. It is clear that no substantial right of either accused was prejudiced by the failure of the record correctly to recite the authority for the trial.

There are no errors or irregularities which affect any of the substantial rights of the accused. The trial was held without partiality, and adequate opportunity was given to the accused to present any matters in his defense that he might have desired. There have been no questions raised in the record that were not decided by the court upon hearing of the evidence presented. Two-thirds of the members of the court present at the time of the findings and sentence concurred in the same.

At the end of the Prosecution's case the Defense moved for a finding of not guilty as to the accused Herbert LANGNER (R 62, 63, 64). The court overruled the request and denied the motion for a finding of not guilty. Since the record discloses that the court found the accused LANGNER not guilty it becomes unnecessary to discuss the point raised by this motion and the exception taken thereto by the defense. The matter has become moot.

9. SENTENCE:

A general Military Court may impose any lawful sentence including death or imprisonment for life in proper cases. The maximum punishment for all war crimes is death, although the court in this case sentenced the accused to a lesser punishment. The court was presented with facts which might have been found to constitute murder. In the instant case the court, by its sentence evidently had some doubt as to elements of murder being present, and chose to consider the crime more in the light of manslaughter. The action of the court under the circumstances does not appear to be un-

10. CLEMENCY: Attached to the record of trial is a letter from accused TOELLE to his counsel, dated 28 August 1946, in which he professes his innocence. Other than that it adds nothing, which has not already been brought out in evidence and discussed in the foregoing Review and Recommendations.

11. RECOMMENDATIONS:

It is therefore recommended that the findings and sentence as to the accused Hans TOELLE be approved by the Theater Judge Advocate under the provisions of paragraph 8d, Letter, Headquarters, United States Forces European Theater, AG 000.5, JAG-AGO, subject: "Trial of War Crimes Cases," dated 14 October 1946. A form of action designed to carry the foregoing recommendation into effect should it meet with approval is submitted herewith.

s/ Samuel Sonenfield
t/ SAMUEL SONENFIELD,
Attorney,
Chief, Post Trial Section

Having examined the record of trial I concur:

s/ C E Straight
t/ C. E. STILIGHT,
Colonel, JAGD,
Deputy Theater Judge Advocate
for War Crimes