

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

Indwigsburg, Detachment

26 April 1946

Case No. 12-2025

THE UNITED STATES

vs

Georg HITZER

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL

The accused, a German male civilian, was tried at Ludwigsburg, Germany, on 11 March 1946 by a General Military Government Court appointed by Paragraph 14, Special Orders No. 45, Headquarters Seventh United States Army, APO 758, 14 February 1946.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charge and Particulars	Plea	Finding
Charge: Violation of the Laws of War	NG	G
Particulars:	NG	G

In that Georg Hitzer, a German National, did, at Rauonheim, Germany, on or about January, 1945, wrongfully commit an assault upon 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 hitting them with his fist and a long handled scrub brush.

Sentence:

The Court, in closed session, at least two-thirds of the members present at the time the vote was taken concurring sentenced the accused to be imprisoned for a term of four years, commencing the 27th day of May 1945.

3. JURISDICTIONAL MATTERS:

a) It is settled law that civilian nationals of one belligerent nation may be tried and punished before the duly constituted tribunals of another belligerent nation for violations of international laws governing land warfare. When a civilian wrongfully commits an

assault and battery upon persons who have fallen into their hands as prisoners of war, it is an offense falling within the scope of this rule. (Par. 248, FM-10).

b). The letter referring this case to trial directs that this case should be referred to an Intermediate Military Government Court. However, at the time this case was referred to trial no Intermediate Military Court was available so to expedite the trial of this case it was referred to a General Military Government Court which was available. No prejudice could result to the accused for the reasons that the General Military Government Court which tried this court considered that it was bound by the maxim sentence which could be imposed by an Intermediate Military Government Court in the trial of this case (R 3).

c) This General Military Government Court, which tried this case, was duly and legally appointed by the Commanding General, Seventh United States Army. The Charges and Particulars were preferred by Howard F. Breese, Colonel, CMP, and referred to this Court by C. R. Bard, Colonel, JAGD. The required jurisdictional number of five members of the Court panel were present throughout the trial. The accused was properly represented by counsel and announced ready for trial (R 2). 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. SUMMARY OF THE EVIDENCE:

a) For the Prosecution: In January, 1945, four American fliers parachuted from their plane near Kaunheim, Germany (R 4, 5, 6, 8, 10 & 11). One of the fliers was wounded (R 8 & 10). HITZER took two of the fliers to get a stretcher for the wounded one. (R 8). On the way he beat one of the fliers with a long handled scrub brush causing the victim to bleed from the head (R 5, 7, 8). Then he returned with the stretcher he gave the flier who remained with his wounded comrade a severe blow across the mouth with his hand, causing the victim to bleed from the mouth (R 8 & 10). All of the Americans were then taken by members of the Wehrmacht, who had been summoned as protection for the victims, to the burgomaster's house (R 4 & 8)

b) For the Accused: Accused testified that he saw four fliers bale out of their disabled plane and land in the forest near the factory where he was working. He joined some other civilians and picking up a stick proceeded with them to capture the fliers (R 14). As he went into the forest he saw one flier hanging in a tree. This flier got himself free and came to the ground. Accused shouted "Haended hoch", whereupon the flier put his hands in front of the accused and accused grabbed his hands in order to help him raise them. Someone shouted "Attention, the flier is shooting", whereupon the accused turned around and hit the flier with his stick (R 15 & 16). He then escorted the flier to the factory. Accused noticed the flier was bleeding from the nose before he hit him with the stick (R 16). Accused then returned to the forest to look for the other three fliers. On his way he met two fliers with a stretcher, one of whom was a flier whom he had escorted to the factory. On proceeding a little further he saw a wounded flyer lying on the ground and another standing some five or six meters from him. The flier who was standing turned around apparently to hit the accused whereupon the accused hit him in the face. This blow did not cause the flier to bleed (R 17). Accused denies having gone with the fliers to get a stretcher. (R 18). He admitted the flier which had come down from the tree was unarmed (R 19).

5. DISCUSSION:

a) All of the elements of proof of the alleged offense necessary to establish the guilt of the accused was properly adduced in evidence. The prosecution proved that the accused, a German national, did at or near Raunheim, Germany, during the month of January 1945, wrongfully commit two separate assaults upon 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 hitting one of them with this fist and the other with his scrub brush. The identity of the victims as being American soldiers was properly established (R 7, 8 & 10).

b) The victims of the assaults perpetrated by the accused herein were American fliers who had been forced to leave their disabled plane by parachute and land in territory which was being held by the enemy. Under the principle hereinafter set out these fliers were definitely prisoners of war. "Enemy personnel descending in parachutes from aircraft which is disabled or out of control may not on general principle be shot if the descent is over ground held by forces hostile to the parachutist." (JAGD Text No. 7, page 34).

c) The acts of the accused herein were clearly acts of violence in violation of the rules of land warfare. Paragraph 73, EM 27-10 provides for the treatment of prisoners of war as follows: "They must at all times be treated with humanity; and protected, particularly against acts of violence, insults and public curiosity."

d) The status of the fliers herein as being prisoners of war and entitled to proper protection was born out by the fact that the soldiers of the Wehrmacht took them into custody and informed the populace that they would not tolerate further mistreatment of the fliers (R 8).

e) The evidence shows that the accused herein committed two separate acts of violence upon two different fliers. The first act according to the evidence of the prosecution was striking the first flier with a long handled scrub brush (R 5, 6 & 7). The accused denies that he hit the flier with the scrub brush but admits hitting him with a stick about two centimeters thick (16, 17 & 18). The second act of violence consisted of hitting the second flier in the mouth with his fist without provocation (R 3 & 10).

f) The fact that both assaults were followed by a battery definitely established that the two acts of violence constituted assaults. (Page 178 MCM 1928). The only question which the Court had to determine under the circumstances was the type of assault which had been committed. (Par. 149/MCM 1928). Whether the scrub brush or stick and the fist constituted dangerous weapons must be determined from the circumstances. Normally a scrub brush or stick two centimeters thick and the fist are not considered as instruments likely to produce harm (Par. 149 M, MCM 1928). However, the fact that the accused used a great deal of force and violence in the commission of the assaults herein clearly indicate that he intended to do great bodily harm (Par. 149 n, MCM 1928).

g) The accused rests his entire case on the question of self-defense. In the case of the first flier he states that someone cried: "Attention, the flier is shooting", and he struck the flier to prevent him from shooting (R 15, 16 & 17). In the case of the assault on the second flier he states that the flier turned around apparently to strike him and he struck him in the mouth (R 17). The question as to whether accused's acts herein were necessary to protect his person is one of the issues which the Court had to determine.

have considered whether the accused's impending danger was personal, imminent and immediate. The Court should also have determined whether the accused under the circumstances was the aggressor and if they determine that he was the aggressor the Court need not consider the question of self defense because by an act of aggression the accused barred his right of self defense (Section 846, Wharton's Criminal Law in view of the admission of the accused that he didn't see any arms on the first flier before he struck him (R 19) and in view of the fact that the accused merely thought the second flier might hit him but without provocation (R 18) it can not be said that the Court abused its discretion in not accepting accused's acts under the circumstances as acts of self defense.

h) A careful examination of the record reveals no errors or irregularities which prejudiced the rights of the accused.

i) The sentence imposed on accused herein was within the authority of the Military Government Court to impose (Art. I MGO 1). However, considering the table of maximum punishments, as contained in the Manual for Courts-Martial as a guide, it would appear that the sentence of confinement for a period of two years would be adequate to punish the accused for the offense of which the Court found him guilty.

7. DATA AS TO ACCUSED:

Accused is a 41-year old German civilian whose last address is Mainz-Ginsheim, Germany (R 2). He is married and has two children. He is a master worker in the Opel factory where he had been employed from 1930 to 1945 without interruption. He was a member of the SA since 1934 and a member of the NSDAP since 1937. He did not actually make application to join the party but was made a party-member automatically (R 12 & 13). Accused suffered injuries in an air-attack on 20 June 1944 which consisted of demolishing his left side and poisoning him with gas. These injuries caused the accused to have a heart ailment which made him very excitable (R 13 & 14). Accused has been in confinement since May 1945 (R 20).

8. PETITION FOR REVIEW:

A Petition for Review was filed on behalf of the accused in which he states that he has admitted the acts of assault. That such are of a minor nature and were committed in a state of excitement caused by the air-attack, which preceded the commission of the offense, without malice or ferocious intent. He also states that no dangerous weapons were used and no serious injuries resulted therefrom. Because of the foregoing fact accused believes that the sentence imposed by the Court was unduly harsh and severe and requests that such be modified by the Reviewing Authority.

9. CLEMENCY:

No Petition for Clemency other than that contained in the Petition for Review has been filed in this case.

10. RECOMMENDATION:

Considering the table of maximum punishments as contained in the Manual for Courts-Martial as a guide it is recommended that the period of confinement be reduced to a period of two years commencing May 27, 1945. Otherwise the record is legally sufficient and the

findings of the Court should be approved and upheld. The proper order for carrying out this recommendation has been appended for the signature of the Reviewing Authority.

M. C. SETZKORN
Capt. Inf.
Chief, Trial Section

I concur.

CHARLES E. CHEEVER, Colonel, JAGD,
Staff Judge Advocate

RESTRICTED

HEADQUARTERS
THIRD UNITED STATES ARMY
APO 403

GENERAL MILITARY GOVERNMENT)
:
COURT ORDER NUMBER)

8 June 1946

Before a general military government court which convened at Ludwigsburg, Germany, on 11 March 1946, pursuant to paragraph 14, Special Orders No. 45, Headquarters, Seventh United States Army, 14 February 1946, was arraigned and tried:

Georg Hitzer, German National

CHARGE: Violation of the Laws of War

Specification: In that Georg HITZER, a German national, did, at Rauenheim, Germany on or about January 1945, wrongfully commit an assault upon 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 hitting them with his fist and a long-handled scrub brush.

PLEAS

To the specification of the CHARGE:
To the CHARGE:

Not Guilty
Not Guilty

FINDINGS

Of the specification of the CHARGE:
Of the CHARGE:

Guilty
Guilty

SENTENCE

To be imprisoned for a term of four years commencing the 27th day of May 1945, at such place as may be designated by competent military authority.

The sentence was adjudged 11 March 1946.

The finding of the Court is approved and upheld but the sentence is reduced to imprisonment for a period of two (2) years commencing 27 May 1945. As thus modified the sentence will be duly executed. Bruchsal Central Prison, Bruchsal, Germany, is designated as the place of confinement.

BY COMMAND OF LIEUTENANT GENERAL KEYES:

W. G. CALDWELL
Colonel, Adjutant General's Department
Acting Adjutant General

Wm. R. SCHMIDT
Major General, General Staff Corps
Chief of Staff

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