

DEPUTY JUDGE ADVOCATE'S OFFICE  
7708 WAR CRIMES GROUP  
EUROPEAN COMMAND  
APO 407

29 December 1947

UNITED STATES )

v. )

Case No. 12-2129

Paul KANNERT )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, on 3 July 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Paul KANNERT, a German national, did, at or near BERLIN, Germany, on or about 10 or 14 February 1945, wrongfully kill an unknown member of the United States Army, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: During an air raid upon Berlin, Germany, in early February 1945 a flyer parachuted from a disabled plane. The flyer landed near an air raid shelter located in the cellar of the home of the accused. During the air raid the shelter was occupied by civilians, and the accused, who was a corporal in the Wehrmacht on leave. The flyer surrendered to the accused. Together with some party members, the accused took the flyer to a nearby school yard, fired a shot into the flyer's neck and then left, taking the flyer's jacket with him. About one-half hour later he returned to the school yard and fired a second shot at the flyer's head. The flyer was removed to a nearby hospital and died within a very short time from a severe head wound. The flyer was believed to be an American.

IV. EVIDENCE AND RECOMMENDATIONS:

Paul KANNERT

Nationality:

German

Age:

42

Civilian Status:	Locksmith
Party Status:	Unknown
Military Status:	Corporal, Wehrmacht from 1 May 1942 to April 1945
Plea:	NG
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: The prosecution's case was tried entirely upon documentary evidence. During an air raid on Berlin, Germany, sometime between 10-14 February 1945, a flyer parachuted to apparent safety from a disabled plane. He landed in the vicinity of an air raid shelter located in the cellar of the accused's home. At the time the accused was standing in the entrance thereof with one Bandt. The accused was home on leave from the army at this time. The flyer immediately surrendered to him. Bandt took the flyer's parachute (R 7, 8; P-Exs 2A, p. 2; 3A).

In his extrajudicial sworn statement the accused stated that together with Ortsgruppenleiter Jannesch he took the flyer to a bunker located in a nearby school yard. Jannesch gave his pistol to the accused and later said, "The flyer will be leveled." The accused stated that he thought he was to use the pistol to guard the flyer but admitted that when the flyer was taken to the school yard, Jannesch operated the air raid siren for the purpose of covering up the report of the pistol. In the school yard he fired a shot into the flyer's neck with Jannesch's pistol. The flyer fell to the ground. Jannesch reproached the accused for firing before the siren was sounded.

The accused returned to the air raid shelter and later went to Bandt's apartment, as previously agreed to, and procured part of the flyer's parachute from Bandt. About half an hour later he returned to the school yard. The flyer was still lying on the ground. Jannesch again gave his pistol to the accused who then fired a second shot at the flyer's head (R 7; P-Ex 2A, pp. 3-7).

A soldier who was in the school yard at the time of the incident stated in his extrajudicial sworn statement that he saw the accused shoot the flyer. He identified the accused from a photograph which was introduced into evidence. When the flyer fell to the ground wounded, the soldier sought the aid of the nurse on duty in the air raid shelter. While doing so, the soldier heard a second shot, and when he reached the flyer he noticed that he had been shot a second time. He and the nurse removed the flyer to a nearby hospital. The nurse corroborated the removal of the flyer to the hospital (R 9, 10, 11; P-Exs 4A, 5A, 8). The doctor and two nurses on duty in the hospital at the time the flyer was brought in stated, in their extrajudicial sworn statements, that he was suffering from a severe head wound. The flyer died from this wound within a short time after his arrival at the hospital. The body remained in the hospital morgue for a few days after which it was removed (R 10, 11, 12; P-Exs 6A, 7A, 9A).

Bandt and a woman who was in the air raid shelter at the time of the incident stated in their extrajudicial sworn statements that they saw the accused enter the shelter with the flyer's jacket.

The accused admitted to Bandt and his own son and daughter, according to their extrajudicial sworn statements, that he killed the flyer (R 8, 13, 14, 15; P-Exs 3A, 10A, 12A, 13A). The accused admitted in his testimony that he gave his wife part of an Allied flyer's parachute and that he took an Allied flyer's jacket (R 31). A co-tenant of the accused stated in her extrajudicial sworn statement that the accused's wife gave her a part of the flyer's parachute and made the statement that the accused had shot the flyer. Part of the parachute was introduced into evidence (R 13, 17; P-Exs 11A, 12B). The flyer was believed to be an American (R 10; P-Ex 6A).

Evidence for Defense: The accused testified that he and Jannesch took the flyer to a bunker and Jannesch "forced" him to take a pistol by making a threatening remark which apparently referred to Jannesch's knowledge that the accused had been imprisoned; that he then fired the pistol; that some time later they both returned to the scene and Jannesch again "forced" him to take the pistol which he then fired ( R 25, 26). He further testified that he believed that the shots fired at the flyer did not cause his death. He based his belief on the fact that he is a poor pistol shot and that the flyer was surrounded by civilians at the time of the shooting (R 26). He denied the admissions of the killing attributed to him in the extrajudicial sworn statements of his son, daughter, and co-tenant. He stated that these persons were not in Berlin at the time of the incident (R 30, 31). In his testimony the accused claimed that people in the neighborhood said the flyer had been moved alive and was to have been delivered to a prisoner of war enclosure (R 26, 32).

Sufficiency of Evidence: The wrongful shooting of the flyer by the accused was adequately established by his own admissions, and was corroborated by the statement of an eyewitness. In addition there is credible evidence, consisting of statements by the nurses and a doctor, that the flyer did in fact die within a very short time from the wounds inflicted by the accused.

Regarding superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and 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.

Motions: After the prosecution rested, the accused moved to dismiss the charge upon the ground that there was no proof of a corpus delicti independent of the extrajudicial sworn statement of the accused (R 18, 19). The general rule in American municipal criminal law is that the corpus delicti cannot be established by the unsupported confession of the accused (Wharton's Criminal Law, 12th Ed., Sec. 357). Since there is sufficient proof independent of the accused's extrajudicial sworn statement of the corpus delicti, i.e., death and that it was caused by a criminal agency initiated by the accused, it is unnecessary in this case to decide as a general proposition that the evidentiary rule of corpus delicti applies in a war crimes trial. The Court properly denied the motion.

Testimony Against Parent: Although the question was not raised by counsel for the defense, the record indicates that extrajudicial sworn statements by the son and daughter of the accused were admitted in evidence. The statements recite that the accused admitted, after the incident, that he had shot an American flyer. The procedure relating to the trial of war crimes cases does not preclude the admission of such testimony, but provides that it is a privilege personal to the witness and except when claimed by the witness is not allowed (Section 270, "Manual for the Trial of War Crimes and Related Cases," 15 July 1946). In any event, there is ample direct evidence tending to prove that the accused illegally shot the flyer and such direct evidence is sufficient to support the findings of guilty.

Superior Orders: Accused KAHNERT sought to justify his actions by offering evidence to show that he was acting in compliance with "superior orders." Compliance with superior orders does not

constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJAWC, December 1945; and United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJAWC, February 1946, and French Republic v. Wagner, et al., Court of Appeals (France), July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U.S. Army", 1926, paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior in fact, directing that he commit the wrongful act, (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", supra, and the Llandovery Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53,

"Military Occupation and the Rules of the Law", by Ernst Fraenkel;  
United States v. Bury, et al., opinion DJAWC, September 1945,  
United States v. Thomas, supra; and United States v. Beck, et al.,  
opinion DJAWC, December 1946.)

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.

RONALD D. DAMICO  
2nd Lt., Inf  
Post Trial Branch

Having examined the record of trial, I concur, this \_\_\_\_\_ day  
of \_\_\_\_\_ 1948.

C. E. STRAIGHT  
Lieutenant Colonel, JAGD  
Deputy Judge Advocate  
for War Crimes