

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
WAR CRIMES BRANCH
UNITED STATES FORCES, EUROPEAN THEATER

UNITED STATES)

12 July 1946

v)

Case No. 12-485

Ernst Mueller, a German
National.)

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused was tried at Ludwigsburg, Germany, on 19 March 1946 by a General Military Government Court appointed by paragraph 17, Special Orders No. 77, Headquarters, Seventh US Army, APO 758, 18 March 1946.

2. FINDINGS: The offense involved was: Pleas Findings

CHARGE: Violation of the Laws of War NG G

Particulars: In that Ernst Mueller, a German National, did, at or near Altenburg, on or about 30 August 1944, willfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of Lt. DYKEMANN, a member of the United States Army, then an unarmed, surrendered prisoner of war in the custody of the then German Reich, by shooting him with a gun.

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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 to death by hanging. This case was tried by the Seventh US Army and was reviewed by the Staff Judge Advocate of the Third US Army. The record of trial has been forwarded to the Commanding General, USFET, for final action (paragraph 5c, Letter, Headquarters, United States Forces, European Theater AG 000.5-2, GAF 18 July 1945, subject: "Trial of War Crimes and Related Cases"; Military Government Regulations, Title 5, Section 5-312.1; and letter, Headquarters,

United States Forces, European Theater, AG 000.5, JLG-5 GO, 12 March 1946, subject: "Assumption of War Crimes Responsibilities previously exercised by Seventh US Army Area". (Letter, Headquarters, United States Forces, European Theater, AG 000.5, WCG-AGO, 11 July 1946 had not yet been promulgated when this case came to this office).

4. DATA AS TO ACCUSED:

a. Accused is 51 years old, a German civilian, male. He is married, has one child and one grandchild. For more than twenty years his occupation has been that of a policeman. From 1912 to 1920 he was a soldier. He was a member of the NSDAP from April, 1933, until its dissolution.

5. RECOMMENDATION:

That the sentence of the Military Government Court and the action of the Reviewing Authority be confirmed.

6. EVIDENCE:

a. For the prosecution: Accused was Meister of Gendarmerie in Altenburg in August, 1944. On the 27th of August 1944, there was a meeting of Gendarmerie in Weissenfeld, where a high ranking Gendarmerie officer instructed the meeting that all Allied fliers were to be turned over to civilians to be killed. This officer pointed out a case in which a member of the Gendarmerie who had not carried out such orders had "been taken care of". (R 8).

There was an air battle over Altenburg, August 30, 1944, (R 5, 8). In accordance with his orders for air attack, the accused reported to his post in Altenburg. He then went on his motorcycle to Nieder Moellern. There, around a curve in the road, he saw a civilian named Heideman coming from the ditch with a flier. Accused questioned the flier in German as to why he had come to Germany to bomb women and

children. The flier laughed, and accused then shot him, inflicting a flesh wound on the left side of the body. The flier stepped forward to stop him from firing again. Accused pushed him back and fired again, hitting him in the left chest (R 9). His intention with the second shot was to kill the flier (R 9, 22). At this point the German civilian told accused there was a second flier nearby, so accused went to capture him, telling the civilian to stay with the wounded flier. Accused went to a restaurant about one kilometer away, where more captured fliers were brought in (R 9, 10). Accused's Section Leader appeared on the scene and ordered accused to search the woods for more fliers. Finally accused returned to the place where he had shot the flier. The civilian there told him a soldier had come along and shot the flier through the head, killing him (R 10).

Accused checked the nationality and name of this flier from his papers and identified him as an American, Lt. Dykemann (R 10, 11). He procured the removal of the body from the field and it was buried a couple of days later in the cemetery at Altenburg (R 11).

b. For the Defense: When accused shot him the flier was still conscious (R 33). When accused returned to the scene of the shooting, Heidemann was no longer there, but a civilian whose name accused does not know was there. When accused first saw this flier he accused the flier of being a civilian in Army clothing. At the restaurant where there were more fliers brought in, accused searched these fliers to see whether they were wearing civilian clothes under their uniforms (R 22).

Before accused shot the flier the first time he thought the flier was going to attack him (R 22). Accused explained

why he shot the pilot by the example of one of his comrades, Schubart, who ended up in a concentration camp because he did not follow this order (R 34). Accused did not believe that Lt. Dykmann died as a result of accused's shooting him because examination of the body would certainly prove that he died because he was shot in the head (R 35).

Accused was told that the Geneva Convention no longer existed due to the fact that cities were being bombed by enemy aircraft. As a German he did not know who first violated the Geneva Convention because he had no access to "foreign senders" and did not know what was going on outside of the country (R 36). He knew nothing about the Rules of Land Warfare as outlined by the Gendarmerie. He knew that prisoners were to be treated in a humane manner, but said if he did not carry out his orders from superiors he himself was threatened with death penalty. When accused left the flier, he was still alive (R 37). After the incident accused put his pistol away immediately and never used it again (R 43).

7. JURISDICTION:

The Military Government Court which heard this case was properly constituted and had jurisdiction over the subject matter and the accused. When a civilian or enemy soldier wrongfully kills a prisoner of war who has fallen into his hands, it is an offense against the international laws governing land warfare and as such may be tried and punished by the duly constituted tribunals of an occupying belligerent nation. A general discussion of the jurisdiction of such military government courts, with appropriate citation of authorities, is contained in prior reviews of confirmation cases written by this branch and need not be repeated here (See U.S. vs. Clemens Wiegand, November, 1945).

8. DISCUSSION:

a. The significant fact in this case is that all the evidence introduced by the prosecution consisted of sworn statements. Two of these were transcripts of pre-trial, non-judicial statements by accused himself. The third was a sworn statement of one Erich Illgen, likewise made prior to trial. The prosecution offered no witnesses. The body of accused's alleged victim was not exhumed. It was stated by the prosecution and disclosed by the evidence that all witnesses to the events which constituted accused's offense are located in the Russian Zone of occupation, and it appears from the testimony that the body of the victim is also buried in that zone (R 5, 11, 13).

This constituted the prosecution's case in chief, and at the conclusion thereof the defense moved the court for a finding of not guilty. This motion was denied. The defense thereupon placed accused on the witness stand to testify on his own behalf. He testified not under oath (MGR 5-327.5) and was cross-examined on his own testimony, after which the Court found him guilty as charged and passed sentence upon him. The two arguments advanced by the defense in support of its motion, which we believe require some discussion, are (1) that no proof of a corpus delicti was made by the prosecution in its case (R 28), and (2) that the evidence fails to show that accused killed his victim.

b. On the first point the general rule as to what constitutes a corpus delicti and its necessity has been well stated by Wharton:

"The phrase corpus delicti means, literally, the body of the transgression charged, the essence of the crime or offense committed, the existence of the substantial fact that a crime or offense has been committed. When applied to any particular crime or offense, it means

that such crime or offense has actually been committed by someone. It is made up of two elements: (1) That a certain result has been produced, as that a man has died....., (2) that someone is criminally responsible for the result; e.g. on a charge of homicide it is necessary to prove that the person alleged in the indictment to have been killed is (1) actually dead, as by producing his dead body; (2) that his death was caused or accomplished by violence, or the direct criminal agency of some other human being." (See 347, Wharton's Criminal Law, 11th Ed.)

There is a further rule on corpus delicti which Wharton sets forth in the same treatise as to the sufficiency of statements of accused to constitute the corpus delicti:

"The general rule in this country is that the corpus delicti cannot be established by the confession of the accused, unsupported by corroborative evidence or proof aliunde, and a conviction had upon such uncorroborated evidence cannot be sustained. Without such corroborative proof of the corpus delicti, proof of the confession of the accused is inadmissible in evidence; but such corroborative proof need not be conclusive. It is the province of the court to decide in the first instance that the evidence of the corpus delicti is prima facie sufficient to allow a confession of the accused to go to the jury; when evidence of the corpus delicti has been admitted by the court, the jury must determine its sufficiency to establish the fact for which it is admitted, in the same manner as it will determine any other fact before the court". (Op. cit., Sec. 357).

The elements of the corpus delicti of murder are first, the killing and second, the intention to kill. In the instant case the intention to kill is explicitly supplied by the statements of accused (R 9, 22). Accused never admitted the actual killing, exculpating himself by his story of a soldier who came along during the absence of the accused and shot dead the flier, who up to that time had only been wounded by the two shots of the accused. The trial court is of course the primary and most important judge of credibility and it was for the court if it believed this part of accused's testimony and statements to adopt this part of his story and reflect it in its finding. Sufficient material was before the court to enable it legally to find the elements of murder by the accused.

c. With regard to the second part of the corpus delicti doctrine, namely the insufficiency of the confession alone to establish it, we must examine the statement of Illgen. Illgen's statement is based on hearsay from his wife and from the owner of a tavern in Altenburg, whose name Illgen learned while he was in an American Detention Camp was Heideman. There is however, every probability that this Heideman was the same Heideman mentioned by the accused as being present at the shooting of the flier by the accused.

Hearsay evidence is of course admissible in a war crimes trial before a General Military Government Court, It has probative value and there is no question that it can supply the corroboration necessary to establish the corpus delicti.

On the subject of the actual guilt of accused it is only necessary to say, that once sufficient material of legally probative quality is before the court, the court is the best judge of weight and credibility of the testimony since it had the witness in front of it. In this case what the court believed, as reflected in its findings and sentence, is not lightly to be dismissed. The elements of the corpus delicti were in front of the court, corroborating evidence thereof was also present and the court was free to determine whether or not the accused's story of an intermediate killer was the truth.

d. In his interrogation by the president of the court at the conclusion of the trial, accused said that he did not believe that he could be punished very heavily because he only carried out his orders. This raised the defense of superior orders. The weight to be accorded to the plea of superior orders is one that varies with each case, and the sentence of the court in this case reflects its judicial discretion based

on observation of the witness, assessment of his character and the doing of justice in the case. The sentence was legal since all War Crimes are punishable by death, and from an examination of the record we cannot see that the punishment awarded is excessive.

Examination of the Charge Sheet discloses the fact that while the Charge and Particulars were properly signed by an officer qualified to prefer charges and the case referred for trial by another officer qualified to perform this function, the court which was to try accused was not designated on the Charge Sheet by number and date of the Special Order appointing it to sit. This omission was technical in its nature and did not prejudice any substantial right of the accused. Accused's counsel did not challenge the right of the court or of any member thereof to try the case. It is settled military law that the reviewing authority may ratify the action of a court which, although a case has not been correctly referred to it for trial, has nevertheless proceeded to trial of the case, when such court was in other respects qualified to try it. (CM 198108, Dig. Op. JAG 1912-40, Sec 397 (5) (AW 40), p. 243; Bull. JAC Vol III, No. 2, February 1944, p. 54, CM ETO 393 (1943)). This the Reviewing Authority has done in the present case by his action on the findings and sentence.

No other error or omission, technical or otherwise, occurred which is required to be set forth here.

9. CLEMENCY:

The record contains no clemency material except the oral plea of superior orders disclosed above. No petitions for clemency on behalf of the accused have been filed, except that the American civilian attorney for accused did incorpo-

rate in his petition for review of the case a paragraph embodying the defense of superior orders. It is not necessary in view of our discussion in paragraph 8 to repeat what is said there. Reading the record as a whole we do not believe that the finding or sentence of the trial court should be disturbed.

10. CONCLUSION:

It is accordingly believed that the sentence of the Military Government court and the action of the Reviewing Authority be confirmed. A form of action to accomplish this recommendation is attached hereto.

SAMUEL SOMERFIELD,
Attorney,
Chief, Post Trial Section

Having examined the record of trial, I concur.

O. B. STRAIGHT
Colonel, JAGD
Deputy Theater Judge Advocate for War Crimes