

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

THE UNITED STATES

vs

Otto Rasolph, a
German national,
Case No. 12-524

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused, a German civilian, was tried at Ludwigsburg, Germany, on 2 April, 1946, by an Intermediate Military Government Court appointed by par. 11, Special Orders 84, Headquarters Seventh United States Army, APO 758, 25 March, 1946.

2. CHARGES, PLEA, FINDINGS AND SENTENCE:

| Charges and particulars | Plea | Finding |
|--------------------------------------|------|---------|
| Charge: Violation of the Laws of War | NG | G |
| Particulars: | NG | G |

In that Otto Rasolph, a German national, did, at or near Sangerhausen, Germany, on or about 2 November, 1944, wrongfully commit an assault upon an unknown member of the United States Army, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich, by beating him on the head with a rock. (amended to include "and beating him with his fist.") (R 2)

Sentence: The court in closed session by at least two-thirds vote of the members present at the time the vote was taken concurring, sentenced the accused to be imprisoned for a term of seven (7) years commencing June 4, 1945, at such place as may be designated by competent military authority.

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 a person who has fallen into his hands as a prisoner of war it is an offense falling within the scope of this rule. (par. 348, FM 27-10).

b. The Intermediate Military Government Court which tried this case was duly and legally appointed by the Commanding General, 7th United States Army, by par. 11, Special Orders 84, Headquarters 7th United States Army, APO 758, dated 25 March, 1946. The charges were preferred by Howard F. Broscoe, Col., CEF, and referred to trial by C.A. Bard, Col., JAGD.

The required jurisdictional number of three members of the court panel were present throughout the trial. The accused stated that he had been served with the charges prior to trial and introduced counsel, who stated that he was prepared for trial. (R 1,3,5) 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 impose. (art,III,M.G.C. 2)

4. EVIDENCE:

a. For the prosecution: On or about 1 November, 1944, Franz Kaspik, a polish forced laborer, found an american pilot in a field near his home. He took the pilot and fed him for a day. He later hid the flier under a railroad bridge on the railroad line which ran between wallhausen and Sangerhausen, Germany. about three days later the accused Otto Rudolph found the flier under the bridge. On finding the flier he ordered him to come out and proceeded to take his pistol which he found upon his person. The flier made no attempt to fight back or escape. Rudolph proceeded to hit the flier in the head with a stone, knocking the latter to the ground, whereupon the accused and three other Germans jumped on the flier and proceeded to beat him until he was unconscious. Even after the flier was unconscious the Germans, including the accused, continued to hit the flier, who was still lying on the ground, with sticks and kicked him with their feet. The only act of resistance which the flier put up was to put his hands over his face to protect his face from the blows. The flier made no effort to escape. Several Germans then proceeded to pick up the flier and load him on a locomotive and took him to Sangerhausen, Germany. (R 12,13,21,22) The next day, in the town of Sangerhausen, this flier was seen with eight other fliers, all of whom were loaded on a truck and transported to some unknown destination. (R 21, 22). The prosecution's entire case was contained in four statements, three of which were made by Polish displaced persons in the presence of American officers immediately after the arrival of american troops in the area. (R 7, Exh. A,B,C).

b. For the accused: The accused admits that on 2 November, 1944, he found a flier under a railroad bridge near Sangerhausen, Germany. His story is that on finding the flier, whom he thought to be either English or American, he ordered him to come out from under the bridge, which the flier did. The accused then proceeded to walk with the flier some hundred meters towards the railroad track. Accused had seen a locomotive approaching some 600 meters away and intended to load the flier on the locomotive and take him to Sangerhausen, Germany. The locomotive stopped and two men whom accused recognized as Henschel and Myer got off the locomotive and came to meet the accused and the flier and upon receiving a negative answer proceeded to search the pilot and found a pistol on his person. Henschel then proceeded to open the pilot's blouse while accused and Myer held him by the arms. As Henschel proceeded to unbutton the top button of the flier's blouse, the flier lashed out with his hands and fist, hitting the accused in the face with his fist, and kicking him on the shins. Myer then proceeded to approach the flier from behind and grabbed him around the head and with the assistance of the accused and Henschel loaded the flier on the locomotive and took him to Sangerhausen. (R23,24) Accused denies having ever struck the flier at any time. (R 24). Accused takes to position that the statements of the Polish laborers, which were introduced as a part of the prosecutious case, which state that he beat the flier, are

he was a German. Accused further states that at one time he caught Franz Kempink stealing pickles and had turned him over to the police. (R29) On another occasion he had caught two Polish men, whom he knew lived in the same barracks with the women who made the statements against him herein, pilfering freight cars and he had turned them over to the police. (R 29, 30). Accused also states that he was first arrested and interrogated by a Polish man who, after interrogating him, took him down the cellar, threatened him with a pistol, struck him on the ear, and kicked him in the stomach leaving injuries which required medical treatment and from which the accused had not fully recovered at the time of trial. (R 33, 3,9).

5. DISCUSSION:

a. The evidence as adduced before the court by the prosecution proves that the accused Otto Rudolph on 2 November, 1944, found an American flier under a railroad bridge near Singerhausen, Germany. (R 12, 13, 21); that at this time the accused proceeded to disarm the flier and take him into custody. In the process of disarming the flier, accused hit the flier in the head with a rock, knocking the flier to the ground, whereupon the accused and three other Germans fell upon the flier and proceeded to beat him with sticks and kick him with their feet until the flier was unconscious. (R 12,13,21) The identity of the flier as an American soldier was properly established. (R 12,13,21) Thus the prosecution proved all the elements necessary for the court's finding the accused guilty of the offense charged.

b. There is a slight variance between the evidence and the particulars as contained in the charge sheet. The particulars state that the victim was an unarmed prisoner of war in the custody of the then German Reich. The evidence shows that the victim at the time of the assault was actually being apprehended as a prisoner of war and that the assault herein was committed in the process of taking him into custody and disarming him. The allegations in the charges and particulars in War Crimes cases need not be stated with the same precision as is necessary in the case of a common law indictment. So long as the variance does not exceed that standard which can be reasonably imposed under the circumstances it can not be said that the variance is one which prejudices the rights of the accused. (In re Yamashita, U.S. Supreme Court case Nos. 61, misc. and 672)

c. At the beginning of the trial, prosecutor with the consent of the court amended the particulars to include the words "and beating him with his fist." The rules of procedure in Military Government Courts permit the amending of charges and particulars at any time before the court makes its finding and gives the court the discretion to grant an adjournment whenever the court is convinced that the amendment of the charges and particulars prejudices the rights of the accused. (Rule 13, rules of procedure in MG courts) Inasmuch as defense counsel admitted that the objection to the amendment of the charge and particulars was merely a formal objection but stated that he was prepared to continue with the trial and it was not necessary for him to have an adjournment, it can not be said that the court abused its discretion in not granting an adjournment in this case. (R 2,3,).

d. The entire case, as presented by the record,

by the prosecution or by the accused. The court accepted the facts as presented by the prosecution and as long as there are facts in the record which sustain the court's finding it can not be said that the court abused its discretion herein.

e. The sentence as imposed by the court herein was within the authority of an Intermediate Military Government Court to impose. (art.III,M.G.C.2) However, considering the table of maximum punishments as contained in the Manual for Courts Martial as a guide, it is necessary, in order to justify the severe sentence imposed, for the facts as found by the court to be equivalent to the offense of an assault with the intent to do great bodily injury with a dangerous weapon. Whenever a court or a reviewing authority finds itself presented with a case on behalf of the prosecution which is contained entirely in statements made by Polish displaced persons who made such statements immediately following the arrival of American troops in the particular area in which such persons were living, great care must be used in weighing and evaluating such statements. It must be borne in mind that such statements were made at a time and by persons whose sole intent was to avenge themselves against the German population. To accept such statements blindly and without realizing the conditions under which they were made places the court and a reviewing authority in the position of enforcing a new tyranny over people who may be innocently accused of crimes. It is the policy of our government in handling War Crimes cases to consider each case upon its individual facts and to try, as far as humanly possible, to impose sentences which are adequate to punish the individual crimes committed. There is evidence in the record herein which is definitely corroborated and which shows that the accused, at the time he was first interrogated by a Polish man, was abused and mistreated. His account of the incident was that following the interrogation he was taken to a cellar where he was threatened with a gun and later beaten on the head and kicked in the stomach. At the time of trial the accused was hard of hearing in one ear and was still suffering from wounds in the stomach which had required medical treatment while he was being held as a prisoner. Realizing these facts, the only conclusion which we can properly draw in this case is that the statements introduced by the prosecution greatly exaggerate the facts, and it is believed by this reviewer that the only fair implication from the evidence presented herein requires us to consider that the offense committed herein was equivalent only to an assault with the intent to do great bodily injury and that a sentence of two (2) years imprisonment beginning 4 June, 1945, would be adequate to punish the accused for the offense of which he has been found guilty.

f. After a careful consideration of the entire record no error or irregularities have been found, other than the extreme sentence imposed by the court, which would substantially prejudice the rights of the accused.

6. DATA AS TO ACCUSED:

Accused is 49 years old, a German civilian, married with a family consisting of four children. His last residence was in Hiesdett, district of Sam erhausen, Germany. (R 4,41) He has worked as a common laborer on a railroad from 16 March, 1933 to November, 1944. On the latter date

he became an official on the railroad, charged with the duty of guarding the tracks to prevent any person working along the railroad from being injured by passing trains. He was doing this particular task at the time of the incident presented in the record. (R 26,35) Accused states that he was never a member of the SS, SA, Gestapo, or Nazi Party. (R 26) Nor is there any showing in the record or Allied papers indicating any Party affiliations. He has been in confinement since 4 June, 1945. (R 41).

7. PETITION FOR REVIEW:

a. A petition for review has been filed on behalf of the accused herein setting forth the following grounds for review:

1. That the victim herein was not shown to be an unarmed, surrendered prisoner of war at the time of the incident, as was alleged in the charge and particulars.

2. That the sworn statements of the Polish displaced persons which were introduced into evidence by the prosecution are so inconsistent and biased that they leave a reasonable doubt as to the guilt of the accused.

3. That the offense herein occurred under such circumstances that the statements of the Polish displaced persons appear to be exaggerated and that the offense herein was nothing more than simple assault.

b. Accused takes the position, in his petition for review, that the victim of the alleged assault was not, at the time of the offense, an unarmed, surrendered prisoner of war. There is no dispute in the record that the victim was an American who had obviously been forced to leave his disabled plane and land in hostile territory and as such would be entitled to protection as a prisoner of war. (p.34, JAGD text #7). The mere fact that he carried a pistol can not be said to rob him of the privileges to which he would be entitled as a prisoner of war. It must be borne in mind that at the time of the incident in question the flier was being apprehended and disarmed. The evidence is clear that during his apprehension the flier made no attempt to escape and that the only resistance which he offered was that which he made when he found himself being manhandled by the accused, Myer and Henschel. Even then he made no effort to keep or retrieve his pistol. (R 29, 24). Even under the authority cited by the accused in his petition for review, the fact that as soon as the victim found himself overpowered he proceeded to voluntarily refrain from using the last means of defense which he had in his possession at the time of his capture and voluntarily placed himself in the custody of the accused and the other Germans as prisoner of war fully substantiates the contention of the prosecution that at the time of the alleged assault the victim herein was actually an unarmed, surrendered prisoner of war.

c. The proposition is advanced by the accused in his second ground of his petition for review has already been fully discussed in paragraph e of the discussion and any further discussion of the matter here would be undue repetition.

d. It is quite evident from the record that the facts as presented in the statements of the Polish displaced persons are highly exaggerated. However, to say that the offense herein was merely equivalent to a simple assault appears to go astray in the other direction. The only obvious conclusion which can be reached from the facts as set out in this record is that the offense committed by the accused herein was equivalent to the offense of an assault with the intent to do great bodily harm and, as heretofore been recommended, should be punished accordingly.

8. CLEMENCY:

a. A petition for clemency has been filed on behalf of the accused herein. Such petition sets forth as its grounds the statement that the facts do not warrant the severe sentence imposed by the court herein. This ground of clemency is supported by a letter signed by the prosecutor in this case who requests clemency on review on the basis that the prosecutor feels that the sentence imposed by the court herein is in excess of that necessary to punish the accused for the offense of which he has been found guilty.

b. The petition for clemency and the letter of clemency merely support this reviewer's prior conclusion as stated in paragraph "e" of the discussion to the effect that the sentence imposed by the court herein was excessive and not in keeping with the policy of imposing a sentence in such cases which fits the crime of which the accused has been found guilty.

9. RECOMMENDATION:

It is recommended that the findings of the court herein be approved and upheld but that the sentence be reduced to a period of confinement of two (2) years commencing 4 June, 1945. An order carrying out this recommendation is attached for the signature of the reviewing authority.

/s/ M.C. Setzern
/t/ M.C. SETZEREN
Capt., Inf
Chief, Trial Section.

I concur.

/s/ Charles E. Cheever
/t/ CHARLES E. CHEEVER
Colonel, JAGD
Staff Judge Advocate