

Before a General Military Court

1. Summary of Charges, Pleas, Findings and Sentence.

Otto Brehm, Wilhelm Bausch, and Sebastian Schmidt, the accused German male civilians, were jointly charged with wrongfully assaulting an unknown American airman who was a prisoner of war of the then German Reich, on or about 19 September 1944, near Erbach, Germany. The accused Sebastian Schmidt was not present at the trial. Both accused, Brehm and Bausch, in person, and with advice of counsel, plead guilty to the charge and particulars. Each of these accused was found guilty and sentenced to imprisonment for a term of five (5) years commencing on 16 November 1945.

2. Jurisdictional Matters.

a. The accused, Sebastian Schmidt, was not present, was not represented by counsel at the trial and entered no plea to the charge and particulars. The prosecution (R 4) stated for the record that this accused was not present, not on trial, and no evidence would be presented against him. The court made no findings and imposed no sentence concerning this accused. It follows, therefore, that although this accused was joined in the particulars as co-perpetrator and some evidence was admitted in the record tending to implicate him in this offense, the court never acquired jurisdiction of this accused and these proceedings are a nullity as against him for the purpose of imposing any sentence or making any finding against him. The total effect of the proceedings is as though a motion had been made and granted to enter a nolle prosequi as to this accused. Conversely, since the court acquired no jurisdiction and assumed none against this accused for this offense, he cannot now plead the proceedings of this trial in bar to future trial against himself for this offense.

b. It is settled law that civilian nationals of one belligerent may be tried and punished before the duly constituted tribunals of another belligerent nation for violations of international law governing land warfare. When civilians wrongfully assault a person who has fallen into their custody as a prisoner of war, it is an offense falling within the scope of this rule.

c. This General Military Court was duly and legally appointed and the charge and particulars against these accused were properly referred to this court for trial by the Commanding General, Seventh United States Army Western Military District, Germany. The required jurisdictional number of five (5) members of the court panel were present throughout trial. This court was vested with full power to try these accused present for the offense alleged. The sentence was legally within the power of this court to impose.

3. Evidence Summary.

a. Prosecution - On or about 19 September 1944, near Erbach, Germany, an American airman parachuted safely from a disabled aircraft. (R 5, 11, 13, 17) He landed on Mariannenauer Island in the Rhine River. A group of German civilians, including Friedrich Lobert, Hermann Zimmerschitt, Georg Dornann, all witnesses in this trial; and Otto Brehm, Wilhelm Bausch, and Sebastian Schmidt, all co-perpetrators in this case, conducted search for this airman. The airman was found hiding, and when discovered,

came out with his arms up in token of surrender. (R 3, 6, 11, 13, 18) The surrender was voluntary and to all appearances the captive was at this time uninjured and unarmed. (R 5, 12) The searchers closed in and the accused, Brehm and Bausch, immediately started to beat the captive with clubs about three (3) feet long and an inch to an inch and a half (1 - 1½) in diameter. The captive was struck about thirteen (13) times around the head and shoulders. (R 6, 7, 11, 17) Each accused struck about six (6) or seven (7) blows. (R 8) The captive fled to the Rhine and waded into the water up to his hips or chest. The witness Dormann thereupon intervened, stopped the beating, and ordered the captive from the river. It was then first noticed the captive had a cut along the right side of his head above the ear from which some blood was running. (R 3, 4, 7, 8, 11, 14) The captive, after surrender, did any act to justify or provoke the assault upon himself. The plea of guilty entered by each accused is a judicial admission in open court of all the essential elements of the offense set forth in the charge and particulars.

b. Defense - Although the accused Brehm admits striking the captive, he stated it was only "several times on the buttocks." He also testified he helped the captive from the river and then helped him with the parachute. (R 3) Bausch testified that in the excitement he struck the flyer only once on the left arm. (R 4) The flyer received only one visible injury from the beating and was afterward walked into the village where he was seen talking normally with another captive airman. (R 14; 15) Each accused testified he struck the captive only on impulse caused by excitement due to the crowd and the air raids. (R 16, 18) It was shown that Bausch was married; had one child surviving of five (5); that he was Catholic; and that he had never been a member of the Nazi Party. Evidence was introduced to the effect that after the captive was brought to Erbach others suggested beating him to death, but that Brehm, then Ortsgruppenleiter, intervened to protect the captive, stating he had been beaten enough. (Def. Exs. A&B) Prior to trial, both accused had been imprisoned since 20 May 1945. (R 19)

A. Discussion and Opinion.

a. It appears Brehm entered a plea of "guilty to a certain extent." (R 2) The defense counsel then stated both accused plead guilty. The court then explained the meaning and effect of a plea of guilty to both accused. The prosecution raised a question as to Brehm's plea and the defense counsel stated for the record it was a "plea of guilty without reservation." Brehm was then asked if he understood this and he stated he did. A plea of guilty with exceptions or reservations cannot be accepted by the court and it must be treated as a plea of not guilty, or a plea of not guilty must be entered for the accused by the court on its own motion. In this case, it affirmatively appears it was not the intention of the accused to enter a plea of guilty with exceptions or reservations, but that it was his intention to enter an unconditional plea of guilty. The record was properly corrected to reflect this intention of the accused. Further, the trial was conducted by the prosecution as though pleas of not guilty had been entered by both accused so that the findings and sentence of the court were not based on this accused's plea of guilty standing alone. It must be concluded, therefore, that no error prejudicial to this accused was committed with reference to his pleading.

b. A plea of guilty to an offense punishable by death may be accepted by a General Military Court if it appears from the nature of the offense the death penalty would clearly be excessive. (Sec. 305, par. 11 (3), Technical Manual for Legal and Prison Officers, 2nd Ed.) Although this case was referred to

a General Military Court for trial of an offense which could have been punished by death, such penalty would clearly have been excessive. This case falls within the scope of the stated rule and no error was committed by the court in this case in accepting the plea of guilty entered by these accused.

c. The pleas of guilty standing alone would sustain the findings and sentence in this case. Over and above the pleas, the evidence is amply sufficient to sustain the findings as to each accused. The trial was well and fairly conducted. Neither in the procedure nor in the admission of evidence do any errors appear so prejudicial to either accused as to offend against the rules of justice applicable in General Military Courts.

d. The sentence is legal and appropriate for the offense of unprovoked, unjustified assault upon a prisoner of war in violation of the international rules of land warfare. The offense is more reprehensible on the part of civilians. The court imposed a sentence of five (5) years and directed it to commence on 16 November 1945, the trial date. In view of the fact these accused were imprisoned on 20 May 1945, a period of about six (6) months prior to trial, it is believed the principles of fairness require consideration be given for this term. It is within the power of the reviewing authority to modify the sentence imposed by the court.

5. Recommendations.

It is recommended the findings and sentence as to each accused be approved, but that the sentence be modified by directing that the term of five (5) years imprisonment imposed by the court commence as to both accused on 20 May, 1945. The proper order for carrying out this recommendation has been appended for the signature of the reviewing authority.

/s/ Lt. Rae Smith, Jr.,
/t/ Lt. RAE SMITH, JR.,
Captain, Air Corps,
Reviewing Officer.

I CONCUR.

/s/ C. Robert Bard,
/t/ C. ROBERT BARD,
Colonel, JAGC,
Staff Judge Advocate.

HEADQUARTERS SEVENTH ARMY
WESTERN MILITARY DISTRICT
APO 758 US ARMY

GENERAL MILITARY COURT)

21 December 1945

ORDERS NUMBER 2)

Before a general military court appointed by the Commanding General, Seventh Army, Western District, which convened at Ludwigsburg, Germany, on 16 November 1945, pursuant to paragraph 5, Special Orders No. 311, this headquarters, 7 November 1945, were arraigned and tried:

Otto BREHM and Wilhelm BAUSCH

CHARGE: Violation of the Laws of War.

Specification: In that Otto BREHM, Wilhelm BAUSCH, and Sebastian SCHMIDT, German civilians, did, at or near Erbach, Germany, on or about 19 September 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in an assault upon an unknown member of the U.S. Army, who was then unarmed, surrendered prisoner of war in the custody of the the German Reich, by hitting him on the head and body with clubs.

PLEAS:

As to the accused Otto Brehm:

To the specification and the Charge: Guilty

As to the accused Wilhelm Bausch:

To the specification and the Charge: Guilty

FINDINGS:

As to each accused:

Of the specification and the Charge: Guilty

SENTENCE:

As to the accused Otto Brehm:

To be imprisoned for a term of five years, commencing 16 November 1945, at such place as higher authority may direct. (NO PREVIOUS CONVICTIONS CONSIDERED)

As to the accused Wilhelm Bausch:

To be imprisoned for a term of five years, commencing 16 November 1945, at such place as higher authority may direct. (NO PREVIOUS CONVICTIONS CONSIDERED)

The sentences were adjudged on 16 November 1945.

As to the accused Wilhelm Bausch:

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