

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

15 October 1946

U N I T E D S T A T E S )

v )

Case No. 12-1146

Anton ALBISHAUSEN, Josef  
BOULLET, and Fritz OHSIEK,  
all German nationals. )

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused were tried on 25 April 1946, at Ludwigsburg, Germany, by a General Military Government Court appointed by paragraph 3, Special Orders No. 100, Headquarters, Third United States Army, LPO 403, US Army, dated 20 April 1946.

2. FINDINGS: The offenses involved were:

FIRST CHARGE: Violation of the Laws of War.

Particulars: In that Anton ALBISHAUSEN and Josef BOULLET, German nationals, did, at Cologne-Bickendorf, Germany, in or about October 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of 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.

SECOND CHARGE:

Particulars: In that Josef BOULLET and Fritz OHSIEK, German nationals, did, at or near Cologne-Bickendorf, Germany, in or about October 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in an assault upon an unknown member of the United States Army who was then an unarmed, surrendered prisoner of war of the then German Reich.

FIRST CHARGE

	<u>Plots to charge and particulars</u>	<u>Findings to charge and particulars</u>
ALBISHAUSEN	PG	G
BOULLET	PG	G

SECOND CHARGE

	<u>Pleas to charge and particulars</u>	<u>Findings to charge and particulars</u>
BOULLET	NG	G
OSIEK	YC	NG

3. SENTENCE:

The court by at least a two thirds vote of the members present at the time the vote was taken concurring, sentenced the accused BOULLET to death by hanging, and the accused ALBISHAUSEN to life imprisonment. The accused OSIEK was acquitted of the second charge and specification. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (see paragraph 8d, Letter, Headquarters, United States Forces, European Theater, AG 000.5-WCD-100, subject: "Trial of War Crimes"), 11 July 1946.

4. DATA AS TO ACCUSED:

The accused ALBISHAUSEN is 47 years old, a German national and resident of Cologne-Bickendorf. He was a tailor by trade and a member of the local fire brigade. The record develops no further personal data.

The accused BOULLET is 43 years old, a German national and a resident of Cologne-Bickendorf. He held the office of Ortsgruppenleiter prior to the collapse of the Reich.

The accused OSIEK is 53 years old, a German national and resident of Cologne-Bickendorf. He is married, has three children and is a veteran of World War I, in which he was wounded four times.

5. RECOMMENDATIONS:

It is recommended that the sentence of the Military Government Court be approved as to accused ALBISHAUSEN and BOULLET, but that the sentence of accused BOULLET be commuted to imprisonment for life.

6. EVIDENCE:

a. For the Prosecution:

(1) The first witness for the prosecution was Ernst Paul KOLB (R 8). He was a medical student, 23 years of age, residing at Cologne in October 1944 (R 8). He described how, on a Sunday morning, in October 1944 he witnessed the descent of an American plane crew member from a crippled plane (R 13). As a Wehrmacht non-commissioned officer on leave he took the airman into custody. The flyer was unarmed (R 14); a crowd of people gathered, several in Party uniform. They attacked the flyer and this witness. The witness attempted to protect his prisoner, leading him across the market place to a place of safety. When they arrived in front of the Hitler Youth Building a shot was fired, striking the prisoner in the head and presumably killing him (R 15). There were several Party members with drawn pistols but the witness could not say which one had actually fired. He was unable to identify any of the accused (R 16). During the course of his testimony the witness identified a pencil sketch of the scene of the alleged crime (P-Ex. 1, R 12), and the same was admitted into evidence (P-Ex. 1, R 12). He admitted on cross-examination that the next day he heard that the accused ALBISHAUSEN had done the shooting (R 20).

(2) Karl ASMUS was the next prosecution witness (R 28). He was 17 years old, a merchant's apprentice, and lived with his father in Cologne-Bickendorf (R 28). His first sight of the flyer was when the witness KOLB was searching him for weapons (R 29). He followed the prisoner, KOLB, and an SDH man across the square to the Hitler Youth Building. A crowd was following, among which were accused ALBISHAUSEN, ORGIEK and BOULLET, and was attempting to kick and strike the victim (R 30).

The witness then testified he saw ALBISHAUSEN shoot the prisoner as he started to ascend the steps in front of the Hitler Youth Building (R 31). The pilot fell, shot in the back of the head (R 31). The witness then identified the three accused, saying he had known them for varying lengths of time before the incident (R 32).

(3) Gunther MUELLER was the next witness for the prosecution (R 31). He described the descent of the American plane crew member from the damaged plane between 10 and 11 o'clock on a Sunday morning of October 1944. He went to the scene of the landing with the former witness SMUS (R 42-44). He also described how ALBISHAUSEN fired his pistol at the prisoner, killing him in front of the Hitler Youth Building (R 44). In addition the witness testified that the accused OHSIEK kicked the prisoner (R 49-50).

The written statement of the accused OHSIEK was admitted into evidence as Prosecution's Exhibit No. 2 (R 52).

The statement of the accused ALBISHAUSEN was admitted into evidence as Prosecution's Exhibit No. 3 (R 53).

The statement of the accused BULLETT was introduced into the record as Prosecution's Exhibit No. 4 (R 54).

The formal and official authorization for the investigation of the case was admitted into evidence as Prosecution's Exhibit No. 5 (R 56).

b. For the Defense:

(1) Anton ALBISHAUSEN first took the stand in his own defense (R 57). He introduced voluminous testimony to prove his heroism while a member of the fire brigade, and his good character (R 57-60). He belonged to the Volksturm since the summer of 1944 (R 60). After firing the shot which allegedly killed the American airman ALBISHAUSEN threw away his weapon and

protested vehemently against the order which required him to fire it (R 60). His food cards were subsequently suspended by BOULLET (R 60). He then testified as to how he had rescued other airmen and turned them safely over to various military units (R 60-61). A conflict of interest between the accused ALBISHAUSER and BOULLET developed on cross-examination of the former by the latter (R 62). The questions he propounded were not material to the issues (R 62-64). Upon cross-examination by the prosecution (R 65-67) he identified BOULLET as a Deputy Ortsgruppenleiter and stated that at the scene of the alleged crime he had shot the airmen because BOULLET twice had ordered him thus: "He has to be shot immediately, if not, I will report you." (R 67).

(2) George GEHARDTS was then produced as a witness for the defense (R 71). He was a German national, a resident of Cologne-Bickendorf and 23 years of age (R 71). Upon direct examination he stated he was present and described how ALBISHAUSER had shot the flyer in front of the Hitler Youth Building (R 74). He also described another occasion when ALBISHAUSER had taken a flyer into custody (R 71). He also said he did not see BOULLET point a pistol at ALBISHAUSER (R 76).

(3) The accused Fritz WISIEK took the stand on his own behalf (R 80). He was a German national 53 years old, and a resident of Cologne-Bickendorf (R 80). He testified that he was 60% permanently disabled due to wounds received in World War I (R 81). He testified further that he saw the captured flyer between 10 and 11 o'clock on a Sunday morning in October 1944 (R 81). He followed him across the market place and saw one STEINHAUSER strike him (R 82). In the excitement accused fell and, due to his physical condition, arose with difficulty (R 82). He heard a shot, but gave no details (R 83). On

cross-examination his prior written statement was produced, and he admitted having slapped the flyer twice (R 84).

(4) The accused Anton ALBISHAUSEN was recalled to the stand in his own defense (R 87). He denied the accusation that he had been a Gestapo agent (R 87). ALBISHAUSEN's Exhibits, A, B, C, and D, were introduced in evidence (R 90). "A" was a description of the events, which occurred on the day in question, signed by one BETTERMANN. "B" was a report of statements by one BARKOVSKI relative to what happened on the day in question. "C" is a statement by Frau ALBISHAUSEN, and "D" is a statement of the general good character of the accused by one Anna DUSDC. On cross-examination the accused stated how he considered the general order to shoot captured airmen. He said the order was probably promulgated by STEINHAUSEN or STODDEN.

(5) The next defense witness was Josef WALTERSCHEI. He was a resident of Kreis Aldanau, 57 years old, and a building contractor (R 94). He described the events leading up to the shooting and how the flyer was shot by ALBISHAUSEN (R 93). BOULLET pointed a pistol at ALBISHAUSEN threateningly (R 93).

(6) Josef BOULLET then took the stand in his own defense (R 97). He admitted being Amtleiter, but claimed this was not a position of authority (R 97). He described his strained relations with ALBISHAUSEN and the safe delivery of three flyers about three weeks subsequent to the events in question (R 99). He denied any knowledge of an order to shoot enemy flyers or having shot any himself (R 100). On cross-examination he described the events in detail leading up to the shooting of the flyer (R 100-109). He was confronted with his written statement in which he accused ALBISHAUSEN of the shooting (R 109).

(7) ALBISHAUSEN was recalled to the stand (R 109). He gave further details of the events leading up to the shooting.

(R 109-110)

(8) Josef WALTERSCHEID was recalled and gave further details relative to the shooting and the events leading up to the shooting (R 111-113).

OHSIEN's Exhibits "A" and "B" were introduced in evidence (R 115, 116). They were statements of bystanders to the effect that they did not see this accused mistreat the American flyer prisoner in any way. The defense rested. (R 116).

7. JURISDICTION:

The Military Government Court which heard this case was properly constituted and had jurisdiction over the subject matter and each of 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 Group and need not be repeated here (See US vs Clemens WIEGAND, Opinion, DTJWC, November 1945).

8. DISCUSSION:

The evidence in this case is quite conflicting. Also, it became evident early in the trial that the interests of ALBISHAUSEN and BOULLET were in conflict, and in order to present their defense both tried to capitalize on this fact. Under such circumstances it was incumbent upon the Court to judge the testimony presented before it and assess its weight and the credibility of the witnesses. The Court has done so and has shown by its findings whose story it considered worthy of belief.

There is sufficient evidence in the record from which the court could properly believe either that accused BOULLET and ALBISHAUSEN had entered upon a common plan to bring about the death of the victim, in which ALBISHAUSEN succeeded first because BOULLET twice dropped the magazine of his weapon, or that, ALBISHAUSEN carried out the deed at the instigation or order of BOULLET. Under either hypothesis the findings of the court as to these two accused may be justified. And if the second be adopted, it is clear that the orders of BOULLET constitute no defense to ALBISHAUSEN's act. They were admittedly illegal. There is some evidence in the record, mostly offered by ALBISHAUSEN himself, to the effect that BOULLET pointed a pistol at him and ordered him to shoot the flyer. The court was not required to believe this exculpatory part of ALBISHAUSEN's story, and, viewed in the light of testimony by other witnesses, it does not compel belief. The picture is more one of instigation of ALBISHAUSEN by a cowardly and yet bullying BOULLET. The difference between the sentences imposed on these two accused tends to reflect this aspect of the evidence.

The acquittal of the accused CHSIEK on the charge of assault on the flyer prior to the time of the latter's death, was warranted by the evidence, which showed him to be seriously incapacitated as a result of wounds received in the last war. The court chose to believe evidence which showed that CHSIEK could not have, and did not assault the flyer.

The record also discloses that the indorsement on the Charge Sheet, by which this case was referred to trial is defective in that it does not contain in the space provided therefor, the number and date of the Special Order by which the court was appointed. This omission was clearly the result of oversight, as is shown by the fact that the Charges and the indorse-



ment itself, were properly signed by officers qualified to do so. It has already been held in an analogous case (See United States v. Ernst (UELLET), opinion of this office, July 1946) that such an error is technical in nature and that it prejudicially affects no substantial right of accused. The Reviewing Authority may ratify the action of the court which tried the case by approval of its findings and sentence.

There are no errors or irregularities which affect any of the substantial rights of any of the accused. The trial was held with impartiality and adequate opportunity was given to each accused to present any matters in his defense that he might desire to. The petition for review raised no questions that were not decided by the Court upon the hearing of the evidence presented. Two thirds of the members of the Court concurred in the findings and sentence.

A General Military Court may impose any lawful sentence, including death or imprisonment for life, in proper cases. The maximum punishment for all war crimes is death, although a lesser punishment may be imposed. The Court in this case judged the various degrees of culpability of the two guilty accused and assessed their penalties accordingly. For reasons set forth hereinbelow, however, it is recommended that the sentence as to accused BOULLET be made the same as that of accused ALBISHAUSE, by approval thereof and commutation to imprisonment for life,

9. CLEMENCY:

The offense for which these two accused stand convicted is a war crime. All war crimes are subject to the death penalty although a lesser penalty may be imposed (per 337 of the 1949 Rules of Land Warfare). From the sentence imposed upon accused ALBISHAUSE it may be presumed that the court concluded that some of the elements of murder were not as strongly as against

BOULLET. A petition for clemency and review has been filed for ALBISHAUSEN by his lawyer, Dr. Wacker, dated 1 June 1946, to which are attached 14 annexes. These are certificates of character written by neighbors who have known him for various periods of time. Among them was one Krumpholmen, the pastor of his church. Some of these allege the culpability of BOULLET and excuse the action of ALBISHAUSEN as the result of duress. No new evidence is adduced. It is not believed this petition raises any questions of law or fact not disposed of in the previous sections of this opinion. There likewise accompanies the record a petition for clemency in behalf of accused BOULLET, filed by his wife, dated 25 June 1946. She alleges that her husband was not competent to and did not give accused ALBISHAUSEN the order to kill the pilot; she suggests that two witnesses not heard at the trial, the name of one of whom she does not even know, would give evidence to the same effect. The petition is accompanied by a letter from accused BOULLET to petitioner in which he alleges his innocence. It is believed that neither inclosure presents any new evidence or suggests any revision of accused's sentence. No extenuating circumstances are disclosed in the record. The difference in the sentences imposed upon accused ALBISHAUSEN, who received one of life imprisonment, and accused BOULLET, who received a sentence of death, is somewhat difficult to reconcile. There does not appear to be that great a divergence between the degrees of their guilt. It is believed that they should be equalized, and it is therefore recommended that BOULLET's be approved and commuted to one of imprisonment for life.

10. CONCLUSION:

It is accordingly believed that the sentences of the court should be approved, and that of accused BOULLET should be

commuted to imprisonment for life. Forms of action prepared to accomplish this result are attached hereto.

DAVID P. HERVEY  
Attorney  
Post Trial Section

Having examined the record of trial, I concur:

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

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