

29 December 1953

UNITED STATES)
)
 v.)
)
 KARL KANIA)

Case No. OOO-Mauthausen-12

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany during the period 31 March - 1 April 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

CHARGE I: Violation of the Laws and Usages of War.

Particulars: In that Karl KANIA did, at Mauthausen, Austria, in or about March 1945, wrongfully encourage, aid, abet and participate in the killing of one FLOCHNER, a Polish inmate of Gusen Concentration Camp, who was then in the custody of the then German Reich.

CHARGE II: Violation of the Laws and Usages of War.

Particulars: In that Karl KANIA did, at Mauthausen, Austria, in or about November 1944, wrongfully encourage, aid, abet and participate in the killing of one Arthur KAMPELNER, a Polish inmate of Gusen Concentration Camp, who was then in the custody of the then German Reich.

CHARGE III: Violation of the Laws and Usages of War.

Particulars: In that Karl KANIA did, at Mauthausen, Austria, in or about February 1945, wrongfully encourage, aid, abet and participate in the killing of an unknown Pole, an inmate of Gusen Concentration Camp, who was then in the custody of the then German Reich.

III. SYNOPSIS:

Karl KANIA

Nationality:	Polish
Age:	32
Civilian Status:	Truck Driver
Party Status:	None
Military Status:	Former Member of Polish Army
Flea:	All charges NO
Finding:	Charge I - G

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Charge II - 6 except the words "killing" substituting therefor "beating and mistreating" of the excepted words not guilty, of the substituted words guilty.

Charge III - 20

The accused was extradited to Poland on 13 Oct 1947. Unofficial information discloses that accused was tried and convicted of a war crime and sentenced to imprisonment for 15 years by a war crimes court of Poland. He is presently serving that sentence in Poland.

IV. SUMMARY OF THE EVIDENCE:

1. For the Prosecution

a. General. Offenses alleged under Charges I and II are hereinafter referred to as Incident No. 1 and Incident No. 2, respectively. Inasmuch as the accused was acquitted of Charge III, the evidence in support of that charge is not discussed herein.

Camp Gusen II was an outcamp of Mauthausen Concentration Camp and was located at Mauthausen, Austria, now in the Russian Zone of Occupation (N 2, 34).

The accused made a pretrial statement on 4 August 1948 at Lins, Austria, in which he stated in substance as follows:

He came to the Mauthausen Concentration Camp in December 1943. In May 1944 he was transferred to Block 5 of Camp Gusen II. In January 1945 all prisoners in Block 5 were transferred to Block 12. He was assigned as room orderly in Block 12. His duties were to get coffee for the prisoners' breakfast, to clean the rooms, and to "have loose-control" when the prisoners returned from work. He was ordered by the Block Sargent to slap the prisoners in the face if they did not obey. Once or twice in the morning or evening he beat with his hand prisoners who did not obey his orders. He carried a rubber stick 25 centimeters long to scare the prisoners. Once or twice in February 1945, the Block Sargent selected the weak and sick prisoners who were then brought to the bathroom to be killed. He saw two or three prisoners beat about 10 prisoners on the head with a "shopper or stick" until they fainted. They were then put in water for about ten minutes until they died. He was ordered by the Block Sargent to take the dead bodies back to Block 12 where they were laid near the barracks until a cart came and carried them away. He never used a "shopper or stick", as it was forbidden to have these instruments in the Block (N 106, 117; vos x 1 D).

Accused was a prisoner. He could not leave Camp Gusen. He did not wear a uniform. He was room orderly in Block 12. (N 22, 25, 33).

b. Incident No. 1.

(1) Benjamin Lewis testified in substance as follows:

Camp Gusen II from Aug 1944 to May 1945. He lived first in Block 5 and then Block 12. He knew the accused when they were in Blocks 5 and 12 and identified him in court. They moved from Block 5 to Block 12 at the same time (R 12, 13). Lewite and the victim Flugelisen were friends. They lived and worked together. Flugelisen was a Pole about 30 to 33 years of age and a prisoner in Camp Gusen (R 14). Toward the end of winter 1945, the prisoners had returned to Camp Gusen after work, about 1900 hours, and were lined up for bread beside their beds in Block 12. Lewite heard Flugelisen scream and saw accused drag him from the side of the bed towards the door and beat him with the leg of a stool one half meter long for five or ten minutes. After one push Flugelisen collapsed on the ground and accused stepped on him and kicked him in the chest and neck (R 15, 16, 26). Accused had two prisoners strip the body of Flugelisen and throw it outside the Block. The next morning Lewite saw the body, with the death number written on the chest, lying by the side of the door of Block 12. The body was black and bruised all over and there were scars from the blows of the stick. About 0800 hours that morning, he saw three prisoners take the dead body on a cart to the crematory which was in Camp Gusen I. (R 17-19)

(8) Alexander Beer testified in substance as follows:

He was of Polish nationality, 30 years of age, a building engineer by profession, residing at Inns, Austria. He was a prisoner in Camp Gusen and lived in Block 11 from Aug 1944 to March 1945 (R 20). He knew the accused during this time. He also knew the prisoner Flugelisen who lived in Block 12 (R 20, 27). One evening about the end of February 1945, after the prisoners had returned from work, he was visiting in Block 12 and saw the accused beat Flugelisen with a stick about 60 centimeters long and 6 to 8 centimeters in diameter (R 27). Accused hit Flugelisen on the head with the stick until he was down on the ground, then accused kicked him all over and strangled him with his feet by jumping on his chest. Beer watched the beating for three or four minutes, then ran away to his own Block 11. After one-half hour he returned to Block 12 and was told that accused had killed Flugelisen. (R 28)

c. Incident No. 3.

The same Alexander Beer testified in substance as follows:

About the end of December 1944 or beginning of January 1945, after the prisoners in Block 11 had returned from work and gone to bed, a roll call was held and the prisoners were lined up outside of Blocks 12 and 13. Arthur Koefler, a prisoner inmate about 38 years of age of Polish nationality, who lived in Block 11 was missing. Beer knew he had gone to Block 5 to get some soup for himself, so Beer pointed him out to the Gaps. (R 29-30, 32). The accused then came along and beat Koefler with a stick for five or eight minutes until he collapsed. He then kicked him and jumped all over him until he was unconscious. Beer and the Gaps carried him to the roll call square where he lay on the ground. He was carried inside Block 11. Beer saw him that evening and to

answered very weakly that he would not go to work that evening. The next morning they carried him to the dispensary in Block 13 (P 31). That evening Beer went to the dispensary and saw the dead body of Arthur Loeffler with the death number across his chest. He was told that Loeffler died one-half hour before (P 31-33).

3. For the Defense.

The accused testified under oath in substance as follows:

He was born in 1915 in Poland. He was a truck driver. He was conscripted into the Polish Army in Sept 1939. He served with the 8th Artillery Regiment at Krakow (P 71, 72). He fought against the Germans at Jarosopol, Stanislawow, and Lwow. He served for two weeks in the Polish Army. He was wounded in the hand by a splinter from a German hand grenade (P 73). When the Polish Army was crushed by the Germans, the Polish soldiers returned to their homes. They sabotaged German food and ammunition trains. Accused was a member of the Polish Underground Resistance Organization (P 74). They were arrested by the Germans for smuggling horses for the Poles with which to cultivate their fields. Before they were tried he escaped to Lowenberg, Germany (P 75). In Germany he was tried and convicted of unlawfully using ration cards to obtain bread. He was sentenced to death, later commuted to 20 years imprisonment in a penal concentration camp (P 76). He was sent to Buchenwald Concentration Camp in 1942. He was in Camp Gusen I until August 1944 and then in outcamp Gusen II until May 1945. He worked on the Messerschmitt detail until Feb 1945 and thereafter as room orderly of Block 13 (P 75, 80, 82). He was a prisoner. He had no authority over other prisoners. He other prisoners worked for him. He had no authority over any other room orderlies. He had no part in the distribution of food. He received no special benefits as room orderly. He wore no uniform or insignia (P 83-87). He rarely struck or beat a prisoner and then only with his hand and only if the prisoner stole bread from another. He never kicked a prisoner and no prisoner suffered serious injury as a result of any beating by him. He could not remember ever seeing at Camp Gusen II the witnesses Benjamin Lewin or Alexander Beer who testified against him. He denied the incidents involving Flugisen and Loeffler (P 90, 91, 92, 100). When Camp Gusen II was liberated by the Americans on 9 May 1945, the 100 workers escaped except that those who had killed or beaten prisoners in the camp were killed by the prisoners that same evening. The accused remained in the outcamp. He was told by prisoners transferred to Camp Gusen from Auschwitz Concentration Camp, and he believes, that his mother, brother and sister were killed by gas in that concentration camp (P 93).

The accused requested six former inmates of Camp Gusen as witnesses in his behalf. However, they were then residents of Russian dominated Poland and no effort was therefore made by the prosecution to obtain them (P 8, 9, 24, 26).

V. DISCUSSION:

1. Charge I, Unlawful homicide. The competent evidence adduced established sufficiently that the accused unlawfully killed one Russian, a Polish inmate at the Gusen Concentration Camp. From

the circumstances, an intent to inflict death a grievous bodily harm may be inferred thus establishing murder.

It is to be noted that the particulars charged the accused with "wrongfully encourage, aid, abet and participate in the unlawful killing of one Flugman". This specification is intended to charge the accused as an aider and abettor. The evidence on the other hand shows that the accused acted as a sole principal and fails to establish that his acts were performed on behalf of another or others.

2. Charge II (Beating and mistreating Arthur Loefler). The evidence sufficiently establishes the beating and mistreatment found by the court, but, evidence similarly shows that the accused's acts were those of a sole principal, and they negate any joint or common design as alleged.

3. Jurisdiction. The accused was tried by the General Military Government Court appointed by Par 2, Special Order No. 1, Headquarters, European Command, dated 10 March 1947. This court was appointed under the provisions of letter HQ USMC, File AD 000.6 JAG-400, subject "Trial of War Crimes Cases", 14 Oct 1946, "for the trial of such war crimes cases as may be referred to that court for trial".

The letter referred to in the appointing order provides in part:

"4. Appointment of Military Government Courts

Hereafter Military Government Courts for the trial of war crimes cases involving American nationals as victims and mass atrocities committed in the American Zone of Occupation will be appointed by, and all further actions in connection with such cases will be taken by this headquarters. The principles hereinafter set forth will be adhered to in the appointing of such courts and in the taking of such actions." (Emphasis supplied)

"5. General

As a matter of policy, such cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof, commonly known as war crimes, committed prior to 8 May 1945, up to and including the time as determined by the Deputy Theater Judge Advocate for War Crimes, will be tried before specially appointed Military Government Courts, except where otherwise directed by the Theater Commander." (Emphasis supplied)

In view of the limited scope of the jurisdiction of the court before which the accused was tried, it is necessary to determine whether the offense alleged and found constitutes a war crime.

The following elements must be present for an act to constitute a war crime, viz:

a. The act must be a crime in violation of international law;

b. There must be a disparity of nationality between the perpetrator and the victim; and

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c. The criminal act must have been committed as an incident of war. (U. S. v Lehmann, et al, opinion *USAC* March 1948, Case No. OOD-50-5-26; Report of the Deputy Judge Advocate for War Crimes, European Command, June 1944 - July 1948, p 50.)

It is at once apparent that since both the accused and the named victims were Polish nationals there was no disparity of nationality between the perpetrator and the victim.

The simple test of nationality of the perpetrator and the victim is not, however, necessarily determinative of the issue whether the act amounts to a war crime. A person who is personally incapable of committing a crime may nevertheless be guilty of the crime if he aids, abets, counsels, commands or procures a person capable of committing a crime to do so. Thus a husband may be guilty of the rape of his wife if he aids another to have sexual intercourse with her by force and without her consent, although had he personally perpetrated the act no crime would have been committed.

In the *Belsen Concentration Camp cases* (Law Reports of Trials of War Criminals, Vol II, The Belsen Trial, 1947) several Poles were convicted of the murder and mistreatment of other Poles. In the Belsen cases, however, it was shown that the Polish accused had acted with Germans in pursuance of a common design to commit such atrocities in the operation of the concentration camp. It was their joint action, together with Germans and other nationals, that made it possible for Poles to be principals in war crimes committed against other Poles.

In the instant case the evidence is barren of any competent or persuasive proof that the accused had acted in conjunction with others in committing the crimes alleged. The accused was a room orderly and had no significant authority over other prisoners except with respect to "house control". For all that appears of record the crimes of which he was convicted were acts of his own, unconnected with the administration of the concentration camp of which he was an inmate. His acts are clearly a violation of the municipal law of all civilized countries but they are not war crimes, not only because the nationality of the parties in the case but also because the act is not an incident of war.

It is to be recognized that a general military government court or any other military commission has jurisdiction over offenses against the law of occupied territory as well as over war crimes (CG 302791 *KUHNHIT* et al, 59 BR 7; *Big Ops JAG* 1912, p 1067). Thus if there had been no limitation in the appointing order of the court which tried the accused, it might have had jurisdiction over the unlawful killings and batteries as violations of the law of the then German Reich. (See CG 302791 *KUHNHIT* et al, *supra*, wherein three German soldiers, charged with the murder of another German soldier, were held to be guilty of violation of the law of Italy where the crime occurred.)

In the instant case, however, the appointing order limited the jurisdiction of the commission to "war crime cases". It is true that the *UNWET* letter of 14 October 1946 mentioned in the appointing order refers to "cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof, committed as war crimes".

It is clear that the reference to the law of occupied territory in the HENRY letter pertained to those violations of local municipal law which embodied the indispensable elements of the definition of war crimes for ordinary violations of local municipal law would not be called war crimes.

It is concluded, therefore, that the charge does not allege, and the evidence does not show, that a war crime was committed by the accused. For that reason the court lacked jurisdiction in this case.

The accused was tried on 21 March 1947. On 22 April 1947 authority was granted the Polish War Crimes Liaison Detachment to extradite the accused to Poland. A copy of the record was furnished the Polish authorities on 2 May 1947. It is probable that the extradition and failure to complete the review within a reasonable time after the trial was motivated by a recognition of the jurisdictional infirmity inherent in the case. It is possible that the case is now moot and a formal action in the instant case may not be necessary. Nevertheless for record purposes an action declaring the proceedings, findings, and sentence invalid should be taken to close the case.

Under the provisions of paragraph 12d, confidential letter dated 21 July 1945, Headquarters European Command, subject: War Crimes, the Judge Advocate of this headquarters is authorized and directed to exercise all of the powers of the Commander-in-Chief as the reviewing authority in cases where no sentence of death has been pronounced. A search of the records of this headquarters fails to reveal a rescission of this authority. As successor to the Theatre Judge Advocate, you have the authority to take the action.

- VI. RECOMMENDATION: For the foregoing reasons it is recommended that the proceedings, findings and sentence in this case be declared invalid and the charges dismissed.

A form of action designed to accomplish the foregoing is attached.

Marvin O. Krieger
 MARVIN O. KRIEGER
 1st Col, JAEC
 Assistant Judge Advocate

I concur in the foregoing review and adopt it as my own.

WALTER A. GOLF
 1st Col, JAEC
 Assistant Judge Advocate