

23 January 1948

UNITED STATES )

v. )

Case No. 000-50-46-6

Ottokar TUMA, et al. )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 28 November - 12 December 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Ottokar TUMA, Alfons ROESCH, Heinrich KHAUSS, and Josef KOKOTT acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses and indignities, did, at or near the vicinity of Flossenburg Concentration Camp, near Flossenburg, Germany and at or near the vicinity of the Flossenburg out-camps, particularly Hersbruck, Wolkenburg, Ganacker and Leitmeritz, and with transports of prisoners evacuating said camps, all in German or German-controlled territory at various and sundry times, between the 1st of January 1942 and the 8th of May 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of Poles, Frenchmen, Yugoslavs, citizens of the Soviet Union, Norwegians, Danes, Belgians, citizens of the Netherlands, citizens of the Grand Duchy of Luxembourg, British subjects, stateless persons, Czechs, citizens of the United States of America and other non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich to killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such persons being unknown, but aggregating many thousands.

(Foregoing charge and particulars were subsequently amended on 19 November 1947 by inserting the name of Bernhard BANASIAK after the name of Josef KOKOTT wherever such name appeared therein)

III. SUMMARY OF EVIDENCE: Each of the convicted accused was connected either as an SS guard, capo, foreman, or block eldest in a subcamp of Flossenburg Concentration Camp for considerable periods of time between the dates alleged.



Accused ROESCH was an inmate of subcamp Obertraubling and held the position of kitchen capo. Accused KRAUSS was an SS sergeant and roll call leader in subcamp Ansbach. Accused KOKOTT was an inmate of subcamp Obertraubling and held the position of block eldest. Accused BANASTAK was an inmate of subcamp Plattling and held the position of a capo foreman.

Each of the convicted accused was shown to have committed individual acts of cruelty against inmates.

Prosecution's Exhibit P-Ax 13 is a certified copy of the charge, particulars, findings, and the sentences in the Parent Flossenburg Concentration Camp case (U. S. v. Becker, et al., 000-50-46, DJA 3, May 1947, hereinafter referred to as the "parent case", see Section V, post, R.57).

#### IV. EVIDENCE AND RECOMMENDATIONS:

##### 1. Ottokar TUMA

This accused was acquitted on motion following the close of prosecution's case (R 251).

##### 2. Alfons ROESCH

Nationality:	German
Age:	41
Civilian Status:	Unknown
Party Status:	None
Military Status:	None
Plea:	NG
Findings:	G
Sentence:	4 months, commencing 4 September 1947

Evidence for Prosecution: The accused was a kitchen capo in Obertraubling, a subcamp of Flossenburg Concentration Camp, during March and April 1945 (R 201, 202). On separate occasions he was seen beating a Russian inmate and a Czech inmate with an iron bar until they fell to the floor (R 185). He received gold from inmates to whom he distributed a few extra rations of soup (R 185, 202, 212, 234). With a kitchen fork, he stabbed in the upper thigh an inmate who worked under him (R 187)



218). He hit over the head, with the arm of a chair, a Polish inmate whom he caught nibbling at a potato or carrot (R 202, 203). Together with accused KOKOTT he participated in the killing of a Polish inmate (R 250-251).

The accused was feigning insanity at the time of the trial (R 24). A doctor with psychiatric training testified that he was sane (R 25, 35).

Evidence for Defense: The accused was selected as first cook of subcamp Obertraubling by the camp commander upon recommendation of the camp eldest (R 491). He supervised only a few inmates working in the kitchen (R 494). The cooks had no connection with potato peeling details, and they had nothing to do with the distribution of food to inmates (R 495, 496, 505, 506).

The camp commander testified that no report was ever made to him about food having been withheld from distribution to inmates nor about the accused having demanded gold in exchange for food. He further testified that he never heard of the accused having beaten inmates to death. No death certificate prepared in camp showed that inmates had been beaten to death (R 500-503).

The accused had been an inmate of Gross-Rosen (a subcamp of Mauthausen Concentration Camp) from 1941 until 1945 (R 515). While there, he bore a good reputation (R 517).

The accused escaped from subcamp Obertraubling together with the camp eldest and prosecution witness Berek. They were together for several days (R 548, 549). Prosecution witness Berek was friendly with the accused (R 526). However, he appears responsible for having the accused arrested and prosecuted in a German Court at Regensburg wherein the accused was found guilty and sentenced to two and a half years imprisonment (R 559; D-Exs 7-7A) upon charges alleging that the accused committed the same individual acts of cruelty as those to which the prosecution evidence relates (R 519, 539, 551).

The accused was unable, by reason of his mental condition, to understand the nature of the charge and to participate in the trial (R 17



Sufficiency of evidence: The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: No Petition for Review was filed. A Petition for Clemency was filed 7 November 1947 by the Post Surgeon of W. P. Post Hospital, Dachau, Germany.

Recommendation: That the findings and sentence be approved.

3. Heinrich KRAUSS

Nationality:	German
Age:	52
Civilian Status:	Doorman
Party Status:	Nazi Party 1933-1940
Military Status:	Waffen SS, Master Sergeant
Plea:	NG
Findings:	G
Sentence:	5 years, commencing 24 June 1945

Evidence for Prosecution: The accused was an SS sergeant and was the roll call leader for three or four weeks, during March and April 1945, in Ansbach, a subcamp of Flossenburg Concentration Camp (R 58). He was seen beating two French inmates to death when they begged for food from passengers on an incoming train at the railroad station in Ansbach. He used an iron rod approximately one meter in length (R 58-60, 86-88, 99-100, 110-112). Upon order by the accused, a Russian who had been caught stealing was hanged by the hands all night and died the following morning (R 60, 71-72, 82-84, 100-101). The accused also beat inmates at roll calls with a stick (R 60-61, 110, 120-121).

Evidence for Defense: A witness who at the time was in charge of the construction of railroad tracks in Ansbach (R 352) never saw any mistreatment of inmates (R 358) and never heard that any inmates had been killed at their place of work (R 359). A post office employee, whose place of work was 120 to 150 meters away from the railroad station of Ansbach (R 364), never heard about any killings there (R 366) and never saw any bodies lying on the platform of the railroad station (R 368).



The accused testified that he permitted inmates to work for private parties from whom food was received and distributed to the inmates (R 377-378). The accused was placed under charges in 1944 while serving in Silesia for permitting male inmates to visit female relatives (R 379-380). He denied any knowledge of the instances relating to the two Frenchmen alleged to have been beaten to death at the railroad station and the Russian alleged to have been hanged by the hands (R 380). He stated that roll calls were handled by the camp eldest and head camp clerk and that he never took part in them (R 381).

Sufficiency of Evidence: The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

4. Josef KOKOTT

This accused was acquitted (R 573).

5. Bernhard BANASLEK

Nationality:	Polish
Age:	29
Civilian Status:	Baker
Party Status:	None
Military Status:	None
Flea:	NG
Findings:	c
Sentence:	3 years, commencing 9 October 1947

Evidence for Prosecution: The accused was an inmate capo foreman at Plattling, a subcamp of Flossenburg Concentration Camp, during March and April 1945 (R 126-127). A witness saw the accused severely beat a Polish inmate with a shovel until he collapsed. The witness was told that the victim had died (R 128-130, 139-141, 143-144, 151, 157-158). The accused also beat to death a Hungarian inmate (R 144-146, 151-152).

Evidence for Defense: Two former inmates of subcamp Plattling



testified that they never heard, while in camp, that the accused beat anyone to death (R 289, 299). The capo responsible for selecting the accused as foreman (R 305) testified that the detail over which he was capo and in which the accused acted as a foreman never brought back to camp a severely wounded inmate nor a dead one (R 305). He testified also that it would have been impossible for anyone to be beaten to death in his detail without his knowledge (R 306) and that only one inmate was shot to death in his detail by an SS man (R 307). He admitted that the accused beat inmates but stated that the accused did not beat anyone to death (R 307-308).

The accused specifically denied having beaten to death either a Polish inmate (R 335) or a Hungarian inmate (R 336). He stated that he beat sometimes under pressure from civilian foremen or SS men (R 334) and that he himself was beaten for not carrying out orders (R 334).

Sufficiency of Evidence: The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

#### V. QUESTIONS OF LAW:

Jurisdiction: It is clear that the Court had jurisdiction of the persons of the accused and of the subject matter.

Application of Parent Case: The Court was required to take cognizance of the decision rendered in the Parent Case, including the findings of the Court therein, that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, subjected persons to killings, beatings, tortures, etc., and was warranted in inferring that those shown to have participated knew of the criminal nature thereof (Letter, Headquarters, United States Forces, European Theater, file AG 000.5 JAG-AGO, subject: "Trial of War Crimes Cases", 14 October 1946, and the Parent Case). All of the convicted accused were



shown to have participated in the mass atrocity and Court was warranted by the evidence adduced, either in the Parent Case or in this subsequent proceedings, in concluding as to them that they not only participated to a substantial degree but that the nature and extent of their participation was such as to warrant the sentences imposed.

Insanity: The defense in effect entered a plea of insanity at the time of the trial on behalf of accused ROSEN (R 12). Extensive evidence on this matter was adduced (R 12-56). The Court did not abuse its discretion in denying the plea of insanity (R 56, 57).

Double Jeopardy: After the admission of defense exhibits D-Exs 6 and 7 relating to the trial of accused ROSEN in a German district court at Regensburg for certain alleged criminal acts, the defense moved that the testimony of three witnesses in the instant case as to individual acts of atrocity on the part of the accused in the execution of the alleged common design be stricken for the reason that the illegal acts described in the testimony of those witnesses were the same criminal acts with regard to which they had testified in the German court and the same criminal acts for which the accused had been convicted in the German court and sentenced to two and one-half years imprisonment (R 560).

It appears that the defense visualized that the accused would be placed in double jeopardy, if the evidence were not stricken. In so far as American municipal criminal law is concerned, the rule as to double jeopardy is of common law origin and is expressed in the Fifth Amendment to the Constitution of the United States thusly:

" \* \* \* nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb \* \* \* ".

As applied by American municipal criminal law courts, the test of identity of offenses is whether the same evidence is required to sustain them (*Morgan v. Devine*, 237 U. S. 632). It is to be doubted that an accused war criminal may meritoriously claim, as a matter of right, benefits of the Constitution of the United States or the common law. However, it is not necessary to consider that question herein, as



necessary to decide whether war criminals in reliance upon any authority can meritoriously claim double jeopardy.

An examination of the charge in the instant case and the charges in the previous trial of the accused in the German district court reveals that they do not meet the test of identity of offenses. The offenses alleged in the two trials differ in two respects, viz., (1) those in the instant case allege a violation of the law of war whereas those in the previous trial alleged violations of the German penal code and (2) those in the instant case allege participation in the execution of a common design which involved the subjection of individuals to illegal acts as incident of the operation of the Flossenburg Concentration Camp while those in the German district court alleged the commission of certain illegal acts by the accused without any element of acting in concert with others. Thus, it is seen that there is no identity as to the nature of the alleged offenses. The charge in the instant case alleges participation in the execution of a common design contemplating the commission of certain illegal acts between the dates alleged, whereas those in the German district court alleged certain specific individual acts of violence. It is true that the same illegal acts of violence for which the accused was tried in the German district court are of significance in the instant case because they throw light upon the extent, nature and character of the accused's participation in the execution of the common design. However, proof of individual acts of violence is not essential to findings of guilty in the instant case.

It is obvious that there is substantial diversity as to facts, circumstances and illegal character of the offenses alleged.

Moreover, while the principle is not applicable as such to war crimes cases, it is well recognized that the same act may be an offense against two sovereigns, e.g., state and federal law in American municipal criminal jurisprudence and a trial, conviction and sentence by one sovereign does not bar a subsequent trial based upon the same act for a violation of the laws of the other sovereign (Wharton's "Criminal Law", Volume I, pa



564, 565). This principle can well be applied by analogy to the instant case where a sovereign state is exercising its jurisdiction to punish for a violation of the law of war, a body of law separate and distinct from German municipal law.

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentences be approved.

2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

CLAUDIO DELITOLA  
Attorney  
Post Trial Branch

Having examined the record of trial, I concur, this \_\_\_\_\_  
day of \_\_\_\_\_ 1948.

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