

Tried at Ludwigsburg, Germany, 9 and 10 November, 1945

Before a General Military Court

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

Erich Weiss and Wilhelm Mundo, the accused German male civilians, were jointly charged with wrongfully killing an unknown American airman who was a prisoner of war of the then German Reich, on or about 30 May 1944, near Aken, Germany. Both accused were present at the trial and in person, with advice of counsel, plead not guilty to the charge and particulars. Both accused were found not guilty.

2. 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, serving as a policeman, of a belligerent nation wrongfully kills enemy persons who have fallen into their custody as prisoners of war, or aids, abets, or participates in such killing, it is an offense falling within the scope of this rule.

b. 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 the trial. The charge and particulars were served on each accused prior to trial. Each accused was properly represented by counsel and announced ready for trial. This court was vested with full power to try these accused for the offense alleged. The court had power to acquit these accused.

3. Evidence Summary.

a. Prosecution - About 1100, one day in July, 1944, near Aken/Elbe, Germany, an unknown American Airman parachuted safely from a disabled aircraft. Wilhelm Weitch took the airman into custody as a surrendered prisoner of war, and thereafter turned the captive over to the custody of the accused Erich Weiss, auxiliary policeman. (R 4, 10, 11, 12, 22, Pros. Ex. 6). Weitch noticed the captive was wounded in the right arm. (Pros. Ex. 6) Although apparently unarmed, the captive was not searched. (R 4, 8, 12, 24) Weiss marched the captive toward town and on the edge of town met the accused Wilhelm Mundo, policeman. (R 5, 18, 39, Pros. Exs. 11, 12, 13, 14) A crowd gathered around the captive and made some show of force and demanded the captive be killed. An air raid was still going on. (R 6, 7, 18, 19, 24, Pros. Exs. 11, 12, 13) At this point, the captive suddenly put his right hand in his pocket and Weiss fired a shot. As the captive was falling Mundo fired a second shot. (R 6, 7, 8, 9, 13, 14, Pros. Exs. 11, 12, 13 14) The body was carted away and buried. The pathological report on the disinterred body shows the captive was wounded twice in the chest. Either shot could have been fatal. One shot pierced the heart and one shot pierced the body when it was at an angle, presumably falling. (R 13, Pros. Ex. 9) There is no evidence in the record that the captive attempted to escape.

b. Defense - Just before the shots were fired each accused was about two and a half meters from the captive and three meters from each other. Weiss was facing the captive and Mundo was facing the crowd with his back to Weiss and the captive. (R 19, 21, Def. Ex. A) At this moment, the captive suddenly put his right hand in his pocket and Weiss, believing he was reaching for a weapon, fired the first shot. (R 6, 9, 40) Mundo, hearing the shot behind him, felt threatened, turned, drew his pistol, and fired the second shot as the captive was falling to the ground. (R 8, 21, 26) It was stipulated the defense witness, Manley E. Cohen, Captain, Medical Corps, was a medical expert. (R 29) Based on Iros. Ex. 9, he stated it was his opinion that one shot was fired while the captive was erect and the second while the body was at an angle. (R 30) Further, it was his opinion that while either wound could have been fatal, the wound piercing the heart and fired while the body was erect could have produced instant death.

4. Discussion and Opinion.

a. Although the ultimate finding makes their consideration unnecessary, the defense motions are raised on review to assist in establishing the rule. At the conclusion of the prosecution's case and again during the case for the defense, the defense made a motion for a finding of not guilty as to the accused Mundo. Since both were made on the same ground they are considered together. The ground for the motion was that the prosecution did not prove that the second shot fired by Mundo was fired at a live man since there was proof that the first shot could have caused the captive's instantaneous death. Both defense motions were properly overruled by the court for the following reasons: (1) In considering and ruling on such a motion, the court must resolve all doubts in the evidence then before it in favor of the prosecution and having done so, if there is any evidence tending to establish the alleged offense the motion should be overruled. (2) The accused in this case were charged with deliberately aiding, abetting, encouraging and participating in a wrongful killing. This is not a charge of murder as defined under Anglo-American laws and does not have all the elements of that offense. It would follow that any degree of aid, encouragement or participation in the wrongful killing of a prisoner of war would constitute the offense alleged and would be sufficient to sustain a conviction.

b. Witnesses for the defense were unavailable and the case for the prosecution was, therefore, based entirely upon statements secured during the investigation of this case by a duly appointed War Crimes Investigating Team.

c. The defense of these accused was justifiable killing on the grounds of self-defense. The accused as guards of a prisoner of war are under a duty to accord the prisoner proper treatment, even protection if necessary. Conversely, as guards they would be authorized to use force, but only that force reasonably necessary under all the circumstances either to secure the custody of the prisoner or to protect themselves from an attack by their prisoner. Under these rules, and considering all the surrounding circumstances - the war, the air raid, the hostile crowd, the fact the prisoner was an enemy alien - the court must have concluded the sudden motion of the captive in reaching in his pocket did in fact constitute sufficient threat to justify the shooting; that the force used was not unreasonably excessive. This being so the acquittal of these accused was proper. Further, the only evidence establishing the facts surrounding the actual killing is contained in the numerous confessions of the accused and their testimony at the trial. Each such statement also contains all the evidence in justification of the killing on the grounds of self-defense. In the absence of any other evidence, if the court accorded

these statements that probative value necessary to convict these accused, the court would be bound to accord the balance of the statements with reference to self-defense that same weight. Under this basic rule of weighing evidence, even if a finding of guilty had been made it could not thereafter be sustained on review.

5. Recommendation.

It is recommended that the record of trial be affirmed and approved. The proper order for carrying out this recommendation has been appended for the signature of the reviewing authority.

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