

HEADQUARTERS THIRD ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
WAR CRIMES BRANCH
APO 403 US ARMY

Ludwigsburg Detachment

2 May 1946

THE UNITED STATES

vs

FRIEDRICH KATZ, EMIL GEISSER & KARL MERGE
Case No. 12-819
REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The three accused, all German civilians, were tried 1 to 4 February 1946 at Ludwigsburg, Germany, before an Intermediate Military Government Court appointed by Par. 4, Special Orders #30, Headquarters Seventh US Army, 30 January 1946.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charge and Particulars	Plea	Finding
Charge: Violation of the Laws of War	NG	G
Particulars:	NG	G

In that Friedrich Katz, Emil Geisser and Karl Mergé, German civilians, did, at Wiesbaden, Germany, on or about 2 February 1945 wrongfully commit an assault upon Second Lieutenant Paul C. Davenport, a member of the United States Army who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich, by hitting him about the head, face, and body with their fists and by kicking him.

Sentence:

The Court in closed session, at least two-thirds of the members present at the time the vote was taken concurring therein sentenced the accused as follows:

FRIEDRICH KATZ:

To be imprisoned for a term of ten years, commencing 26 September 1945, at such place as may be directed by competent military authority.

EMIL GEISSER:

To be imprisoned for a term of five years, commencing 10 August 1945, at such place as may be designated by competent military authority.

KARL NERGE:

To be imprisoned for a term of five years, commencing 14 August 1945 at such place as may be designated by competent military authority.

3. 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 wrongfully commits an assault and battery upon a person who has fallen into their hands as a prisoner of war, it is an offense falling within the scope of this rule. (Par 348 FM 27-10)

b) The Intermediate Military Government Court, which tried this case, was duly and legally appointed by the Commanding General, Seventh US Army, by Par. 4, Special Orders #30, Headquarters Seventh US Army, APO 758, dated 30 January 1946. The Charges and Particulars were preferred by Meade F. Griffin, Lt. Col., Inf., and referred to this Court by C. R. Bard, Colonel JAGD. The required jurisdictional number of three members of the Court panel were present throughout the trial. Each accused stated that he had been served with a copy of the Charges before trial. Each accused was properly represented by counsel, and each announced ready for trial. (R 3) This Court was vested with full power to try the accused for the offense alleged. The sentence was legally within the power of the Court to impose. (Art III MGO 2)

4. EVIDENCE:

a) For the Prosecution:

On February 2, 1945, Lt. Davenport, an American flier, was shot down west of the Rhine River. He was captured by the Wehrmacht and turned over to a guard. They boarded a train and arrived in Wiesbaden about 10 P.M. and Davenport was put in jail. (R 12, 29, 37 & 38) About 11 P.M. there was an air raid and the jail was hit. (R 13, 19, 37 & 38) The cell doors would not open and accused, Nerge, obtained a crow-bar and proceeded to open the cell door. (R 35 & 39) While Nerge and Geisser were trying to get the door open the accused, Katz, who was standing nearby, demanded that the flier be beaten. As the door was opened, accused Geisser took Davenport by the hand and proceeded to take him through a passageway to the cellar. As they passed him, Katz hit the flier. Nerge followed Geisser and the flier into the court yard carrying the crow-bar in his hand. Nerge kept hitting Davenport on the back of the head, causing the flier to move forward in an effort to escape the blows. (R 35, 36 & 38) As they got into the court yard Geisser saw Nerge with the crow-bar in his hand raised over his head threaten the flier. Geisser cried, "Man, Nerge are you crazy?" Whereupon Nerge refrained from hitting the flier. (R 36) While this was occurring Deudine, who had also been a prisoner and freed, came into the court yard where he saw accused, Geisser, strike the flier with an object

which appeared to be a stick (R 43 & 48) This was also seen by a Mrs. Andree Ames who was present at the time. (Prosecution's Exhibit "C") The flier, Davenport, was then seen being pushed into the air raid shelter by Nerge and Geisser with Katz following behind them. As he came into the collar the flier was taken to a corner and seated on a bench. As the flier entered he was seen guarding his face with his hands and when he was seated on the bench he dropped his hands, revealing his injured face. His eyes were swollen shut, his nose was bleeding and he was bleeding from the mouth. His jacket was covered with blood and dirt and he gave the appearance of being in great pain. (R 13, 30 & 31) When the flier was seated in the shelter people were still beating him. (R 13, 20 & 21) After the attacks had stopped, Hilga Krause wiped the flier's face and gave him some aspirin. (R 13 & 39) The next morning Davenport was taken to a hospital. (R 15 & 38) On 9 September 1945 the victim stated that blows he received were delivered by accused with their fists and that his injuries were as follows:

"My four front upper teeth were knocked out, I was cut right under the left eye and under my left cheekbone. There are still two bumps on my lower lip from cuts. The cartilage in my nose was loosened a bit and bled for a week off and on. My left eye was swollen shut for six or seven days and my face was numb for quite a while on the left side of my nose. It still feels a little funny; doesn't seem to be quite back to normal." (R 38)

b) For Accused Katz:

All of the witnesses who testified on behalf of the accused, Katz, described his condition during the air raid as being abnormal. They state that he was very excited, nervous and absent-minded. (R 70, 75, 82, 87, 92 and 98) Accused himself testified that as a result of the air raid his mind was blacked out and he did not remember anything that happened. (R 100)

c) For accused Geisser and Nerge:

Neither of these accused took the stand on their own behalf or presented any evidence. In the confession of Geisser which was introduced as Prosecution's Exhibit "A" it was shown that when Geisser seeing Nerge with a crow-bar raised over his head threatening the flier he called out, "Man, Nerge are you crazy?" Whereupon Nerge refrained from hitting the flier. (R 36)

d) For the Court:

Accused admitted on cross-examination by a member of the Court that he still could recall the date of the air raid as being on the third. (R 104)

5. DISCUSSION:

a) All of the elements of proof necessary to establish the guilt of each accused of the offense charged was adduced into evidence. The evidence establishes that each accused did at Wiesbaden, Germany, on 2 February 1945, commit an assault upon Second Lt. Paul C. Davenport (R 12, 20, 35, 36, 39, 43 & 46), a member of the United States Army, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich, (R 12, 29, 37 & 38) by hitting him about the face and body with their fists. (R 35, 36, 38, 43 &

48) The identity of the victim as an American flier was clearly established. (R 12, 29 & 37)

b) At the close of the Prosecution's case a motion was made on behalf of the defendants Nerge and Geisser for a directed verdict of an acquittal on behalf of each of these accused on the ground that the Prosecution had failed to establish that each of these accused participated in the particular assault as alleged in the Charge and Particulars. (R 62-67) The evidence as contained in the record shows that Nerge was threatening the flier with a crow-bar. (R 35 & 38) This is sufficient to establish an assault. An assault is defined as an apparent attempt by violence to do a corporal hurt to another. (Sec 799 Wharton's Criminal Law) An actual striking is not necessary to establish an assault. (Sec 802 Wharton's Criminal Law) The record also shows that the accused Geisser, struck the flier. (R 43, 48 & Prosecution's Exhibit "C") Where an assault is accompanied by a battery the assault is definitely established. (Page 178 MCM 1928) Where there is any substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tend to establish all of the essential elements of the offense as in this case the Court should as it did overrule the motion for an acquittal. (Par 71d MCM 1928)

c) Accused, Katz, takes the position that he cannot be found guilty of the offense charged by reason of the fact that at the time of the commission of the offense he was suffering from a mental condition which made him unaccountable for his acts. This defense is commonly known as the defense of temporary insanity under Anglo-American Law. It is based on the consideration that in certain offenses, such as murder and larceny, it becomes necessary for the Prosecution to establish an intent on the part of the accused in order to prove such accused guilty of the offense charged. In order to establish such a defense under Anglo-American Law it becomes the duty of the accused to prove that he was suffering from a mental condition which robbed him of his ability to know right from wrong. (Sec 52 Wharton's Criminal Law) If we consider the statements of the witnesses who were introduced by the accused we discover that during the air raid Katz had the presence of mind to take charge of things and began to direct the people about him by saying, "Take care, lie down, take care of the children." (R 63 & 82) Also following the air raid he had presence of mind to go to the police station in order to obtain further orders to carry out his duties. (R 87 & 98) This conduct upon the part of the accused, Katz, certainly negatives any contention that he was suffering under a mental state which robbed him of his ability to know right from wrong. Furthermore, it must be borne in mind that the accused is charged with an assault herein and no intent is necessary to establish the commission of such an offense. (Sec 805 Wharton's Criminal Law) Under the rules of procedure applicable to the Military Government Courts, it is one of the duties of the Court to determine whether accused was insane at the time he committed the offense charged. If the Court so finds it will make such finding of record and provide for the custody of the accused until such time as the reviewing authority can have the accused properly examined by a medical officer. (Rule 21, Rules of Procedure in MG Courts) The Court did not make such a finding in this case and in view of the evidence as heretofore discussed there is no ground for saying that the Court abused its discretion in not making such a finding.

d) During the trial of this case the Prosecutor found it necessary to refresh the memory of one witness as to the details of

the facts. (R 45) This is quite understandable in that over a year has elapsed since the occurrence of the offense and ordinary people cannot be expected to remember all of the small details and where the witness shows a clear lapse of memory on the stand Prosecution should be permitted to allow such witness to refresh his memory from a prior statement which he has made and then to continue with his testimony. (Sec 119b MCM 1928)

e) Prosecution sought to introduce a sworn statement into evidence which the Court refused to admit. (R 59 & 62) Under Rule 12 of Rules of Procedure in Military Government Courts, it is the duty of the Court to require the Prosecutor to produce the best evidence available. In the event that a Prosecutor is unable to have a witness appear in Court he should make this fact known to the Court and give the Court an opportunity to determine whether they are going to accept a prior statement made by such witness during the original investigation into evidence.

f) The sentences imposed by the Court herein were within the power of the Court to impose. (Art III MGC 2) However, it should be the policy in War Crimes cases to make the punishment fit the crime. In order to justify the sentences imposed herein the offense of which the accused were found guilty must be clearly equivalent to an assault with the intent to do great bodily injury with a dangerous weapon. There is evidence in the record which indicates that the accused Geisser and Nerge did use weapons but none in the case of Katz. On the other hand, the victim stated that the offense was committed with fists rather than dangerous weapons. (R 38) Normally the fist is not considered as a dangerous weapon so that the offenses of which the accused were found guilty compare more readily with the offense of an assault with intent to do great bodily injury. If we consider the Table of Maximum Punishments as set out in the manual for Courts Martial as a guide, it would seem that a punishment of five years imprisonment in the case of accused Katz, who was the ringleader, and two and a half years in the case of the accused Geisser and Nerge, would be sufficient to punish each for the offense of which they have been found guilty.

g) After a careful examination and consideration of the attached record no errors or irregularities have been found other than the excessive sentences which would prejudice the rights of the accused.

6. DATA AS TO ACCUSED:

a) As to accused Katz: Accused is a 56 year old, married German civilian, whose last address was No. 13 Schierstrasse, Wiesbaden, Germany. (R 2) Accused has been a police official in the city of Wiesbaden since 1919. He arose to the rank of Major and was retired in 1944 with that rank. Due to the shortage of personnel he remained on the force and was given the honorary rank of Lieutenant Colonel without salary. (R 100) He refused to join the S.S. (R 100) No party affiliations are shown in the record or allied papers. He has been in confinement since 26 September 1945. (R 106)

b) As to accused Geisser: Accused is a 25 year old, single German civilian, whose last residence was 15 Adolph Street, Wiesbaden, Germany. (R 2) No party affiliations are shown in the record or allied papers. He has been in confinement since 10 August 1945. (R 106)

c) As to Accused Nerge: Accused is a 52 year old, married German civilian, whose last residence was 5 Schierstrasse, Doltzheim.

Wiesbaden, Germany. (R 2) No party affiliations are shown in the record or allied papers. He has been in confinement since 14 August 1945. (R 106)

7. PETITION FOR REVIEW:

A petition for review has been filed upon behalf of accused Katz, stating that the accused should not have been held responsible for his acts on the night of 2 February 1945 because he was suffering a mental ailment as a result of the air attacks which robbed him of his ability to fully understand what he was doing. Since this matter has been fully discussed in paragraph c) of the Discussion, further discussion would add nothing to the consideration of this case.

8. CLEMENCY:

No petition for clemency was filed on behalf of any accused herein.

9. RECOMMENDATIONS:

It is recommended that the finding of the Court be approved and upheld but the sentences reduced as follows: In the case of accused Katz the sentence should be five years imprisonment commencing 26 September 1945; in the case of accused Geisser the sentence should be imprisonment for two and one-half years beginning 10 August 1945; and in the case of accused Nerge the sentence should be imprisonment for two and one-half years commencing 14 August 1945. The proper orders for carrying out these recommendations have been appended for the signature of the reviewing authority.

/s/ M. C. Setzekorn
M. C. SETZEKORN
Capt - Inf
Chief, Trial Section

I concur:

/s/ Charles E. Cheever
CHARLES E. CHEEVER
Col JAGD
Staff Judge Advocate