

DEPUTY JUDGE ADVOCATE'S OFFICE  
7708 WAR CRIMES GROUP  
EUROPEAN CASES AND  
APO 407

3 February 1948

UNITED STATES )

v.

Case No. 12-2162

Josef ELLERS

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 28-29 May 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

2c } Particulars: In that Josef ELLERS, a German national, did, at or near KEPPERN, Germany, on or about 18 September 1944, deliberately and wrongfully kill a member of the United States Army, believed to be 1st Sgt. Marion H. LAMM, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On 18 September 1944 a number of American airborne soldiers landed in the vicinity of Luisendorf, near Keppeln, Germany. That evening they were captured by German police in a farm house near Luisendorf without offering any resistance. While they were being searched and after they had been unarmed and were standing with their hands over their head, accused ELLERS shot one of the prisoners of war, now believed to be First Sergeant Marion H. Lamm. Shortly thereafter, Lamm died from the wound.

IV. EVIDENCE AND RECOMMENDATIONS:

Josef ELLERS

Nationality:	German
Age:	43
Civilian Status:	Member of SS Police and welder
Party Status:	Member of Nazi Party since 1943
Military Status:	None

Place:

SS

Sentence:

20 Years, commencing 18 September 1946

Evidence for Prosecution: The accused was a member of an SS police unit at Essen, Germany (R 18, 24, 47, 78; P-Ex 7A). On 18 September 1944 his unit went to surround a farm house near Luisendorf, Germany (R 18, 22, 24, 25, 45, 47, 80, 81; P-Exs 7A, 8, 9). They had been informed that some American soldiers had taken refuge there (R 24, 47, 71, 83; P-Ex 10). The Americans were ordered to come out of the house with their hands up (R 7, 13, 25; P-Exs 2, 4). The Americans offered no resistance. They came out of the house with their hands up and were immediately searched. The search continued after they were lined up in the yard (R 7, 13, 14, 18, 25, 26, 71, 82; P-Exs 2, 4, 5, 7A, 10). The accused, while searching one of the Americans stepped back, raised his rifle and without any provocation on the part of the American, shot him in the left side. Eye witnesses included Second Lieutenant Ellis in charge of the American soldiers and a Sergeant Buda standing next to the victim (R 7, 9, 13, 14, 18, 22; P-Exs 2, 3, 4, 5, 7A, 8). Medical aid was refused by the German police officer present (R 7, 9, 14; P-Exs 2, 3, 5). The Americans were then moved on foot to a schoolhouse near Keppeln, Germany, which was nearby. The wounded soldier was carried there by his comrades (R 7, 13, 14, 16, 18, 22, 26, 71, 84; P-Exs 2, 4, 5, 6, 7A, 8, 10). Shortly after they arrived at the schoolhouse the American soldier who had been shot by the accused died from his wound (R 7, 9, 13, 14, 16, 27, 28; P-Exs 2, 3, 4, 5, 6). He was buried in the cemetery at Udem, Germany (R 16; P-Ex 6). Two witnesses heard the accused admit that he had killed the American soldier (R 28, 29, 48, 52, 56, 63, 64). In his testimony in Court and in his extrajudicial sworn statements the accused admitted that he shot the American soldier (R 18, 22, 83; P-Exs 7A, 8). One witness testified that on 19 September 1944 while the accused and 10 to 12 other men were discussing the shooting incident which took place the night before, the accused said that he had killed an American out of revenge because his home had been destroyed (R 48, 52, 56, 63, 64).

rifle and that it was accidentally discharged (R 83). This is substantiated by his extrajudicial sworn statements (R 18, 22; P-Exs 7A, 8). He further testified that he was not familiar with the use of firearms; that he had never fired a gun before (R 91); that he had no intention of killing anyone (R 83); that he never told anyone that he had killed the soldier (R 84); nor that he shot him out of revenge (R 90); and that he never told anyone that the shooting was accidental (R 98).

Sufficiency of Evidence: The accused admitted shooting the American prisoner of war but claimed that it was accidental. However, he told other people that he shot the victim out of revenge and did not mention to any of them that the shooting was accidental. Moreover, his defense is overcome by the testimony of eyewitnesses which establish that the shooting was deliberate and intentional.

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

Petitions: A Petition for Review was filed by defense counsel, Captain Frank E. Morse, 2 June 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

#### V. QUESTIONS OF LAW:

Jurisdiction: The defense challenged the jurisdiction of the Court on the ground that the offense was committed in the British Zone of Occupation in Germany (R 3, 4). War criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violations of international law. Concerning this question, it is stated in "Wheaton's International Law," Volume I, Sixth Edition, at page 269, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed." Military Government Courts have jurisdiction over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e. g., military personnel, which

are not pertinent to the jurisdictional question here involved. Concerning jurisdiction over war crimes, no limitation is imposed. (See Sections 5-300.2 and 5-300.3, Title 5, "Legal and Penal Administration", of "Military Government Regulations," published by Office of Military Government for Germany (U.S.), 27 March 47). Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction over War Crimes," by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.

It may be the defense intended to attack the jurisdiction of the Court on the ground that the accused could not be tried in the United States Zone of Occupation unless certain administrative steps were taken as provided by Section 4, Article III, Control Council Law No. 10, which provides:

" 4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1 (b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned."

The defense failed to make a showing that the provisions in question were applicable to this accused even from an administrative point of view.

In any event, the provisions in question are merely administrative and not jurisdictional. Failure to strictly comply therewith would not have affected the jurisdiction of the Court. Section 2 of the same article of that law provides:

" 2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedures thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof or of the International Military Tribunal established by the London Agreement of 8 August 1945."

The motion by the defense was properly overruled (R 4). It is clear that the Court had jurisdiction of the person of the accused and of the subject matter.

Motions: At the close of the prosecution's case the defense made a motion for a finding of not guilty on the grounds that the prosecution had failed to prove beyond a reasonable doubt the charge against the accused (R 74). This motion was denied (R 76). The Court's action on this motion was proper. It is never error for a war crimes tribunal to overrule a motion for a finding of not guilty made at the close of the case for the prosecution if it believes there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-327.2, Title 5, "Legal and Penal Administration", of "Military Government Regulations", supra; and Section 501, page 409, "Manual for Trial of War Crimes and Related Cases", 15 July 1946). A similar practice is followed in Courts-Martial procedure (Paragraph 71 d., "Manual for Courts-Martial, U. S. Army", 20 April 1943).

Objections to Evidence: The defense objected to the introduction into evidence of several prosecution statements on the grounds that they were not the best evidence and that there was no showing that the authors of the statements were not available. The Court properly overruled this objection. The controlling factor as to the admissibility of evidence in war crimes cases is whether evidence is deemed by the Court to be of probative value, i.e., is helpful in arriving at a true finding. Moreover, statements of witnesses are always admissible regardless of the presence or absence of those who made them (Manual for Trial of War Crimes and Related cases, Sections 270 c (2) and 270 d).

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 sentence be approved.

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

FLOYD E. LINDBERG  
Major JAGD  
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