

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

FCL/viam

6 November 1947

UNITED STATES)

v.)

Karl Heinz SCHERER)

Case No. 12-2694

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 21-24 July 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Karl Heinz SCHERER, a German national, did, in or about March 1945, at or near MAINZ, Germany, wrongfully kill an unknown member of the United States Army, who was then and there a wounded prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On or about 1 March 1945, an unarmed American flyer parachuted from his plane, landing at Mainz, Germany. There was evidence that while he was still in the air, accused SCHERER fired at him. The parachute of the flyer caught in a tree and he landed with considerable force, on the asphalt pavement. The evidence is conflicting as to whether the flyer may have been dead before landing; may have been killed by the impact of his landing; or may have been shot by the accused.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Karl Heinz SCHERER

Nationality:	German
Age:	25
Civilian Status:	Ranking apprentice
Party Status:	Hilter Youth Leader
Military Status:	Panzer First Lieutenant
Plea:	NG
Findings:	G
Sentence:	25 years, commencing 9 June 1947

Evidence for Prosecution: On or about 1 March 1945, an American flyer

parachuted from his plane over Mainz, Germany (R 6, 7, 18, 46, 52, 56, 57, 58, 61, 80, 105, 131, 168; P-Exs 3A, 6A, 7A, 8A). Two witnesses testified and two other witnesses stated in extrajudicial sworn statements that as the flyer neared the ground two shots were heard coming from the direction from which the accused was approaching (R 7, 9, 16, 18, 19, 23, 26, 52, 56, 57; P-Exs 3A, 6A, 8A). Apparently, the flyer was unconscious or dead when first sighted and before he landed (R 12, 16, 25, 131, 143-144). The flyer's parachute caught on a tree and he landed on asphalt pavement with considerable force (R 11, 14, 19, 22, 23, 24, 51, 63, 106). It was observed during the descent that the parachute was in a damaged condition, before it caught on the tree, which accelerated the speed of its descent (R 11, 81, 132). The accused ordered people to stay away from the flyer until he could approach him (R 7, 19). The accused was heard to say: "You s ine, you dog of a swine" (R 64). When the accused approached the flyer he was lying on the pavement (R 19, 23). The accused had a pistol with him at the scene (R 8, 19, 20, 64). The face of the flyer was covered with blood and he was dead (R 14, 15, 24, 56, 57, 65, 69, 72, 107, 118, 135; P-Exs 6A, 8A). In his extrajudicial sworn statement, Johann Jakob Horn stated that when the flyer hit the ground he groaned a few times and turned over on his right side, and that the accused then shot the flyer in his left temple with a pistol (R 45, 52; P-Ex 4A). However at the trial Horn testified that these statements were false (R 31, 32, 36, 37, 40, 41, 42, 45).

Evidence for Defense: The accused testified that he did not have a pistol at the scene of the incident (R 148). He testified that as he arrived near the scene he heard a loud noise like a body hitting the street. He admitted that he may have told people to stay back because the flyer might shoot. He further testified that when he arrived the flyer was lying with his head to one side. He placed the flyer on his back and felt of his pulse and found that he was dead. He took the flyer's wristwatch and found some empty cartridges in the flyer's pockets. He testified that he surrendered the body to an air corpsman and left the scene. He further

testified that the flyer had blood trickling from his face, nose, mouth and ears but he did not notice any other injuries (R 149, 150); that when the flyer was descending he was hanging completely lifeless between the parachute cords with his head on his chest; and that he did not hear any shots (R 151). He further testified that when he arrived on the scene there were 8 to 10 civilians present (R 156). Evidence was introduced to show that no shots were fired after the flyer landed (R 16, 23, 75, 107). Expert medical testimony, based upon hypothetical facts, accounted for the condition of the body of the flyer as the natural results to be expected from a fall (R 96-104). There were no apparent injuries to the flyer other than those that could have been caused by his fall (R 24, 107, 118, 127, 133). Anti-air craft guns had been firing, and several rifle shots were heard (R 113).

Sufficiency of Evidence: The prosecution witness Horn, in a sworn statement introduced at the trial, stated in substance that "when the flyer hit the ground he groaned a few times and turned over on his right side. The accused then shot the flyer in his left temple with a revolver"; however he repudiated his statement in Court and said it was false. On 5 August 1947, subsequent to the giving of his testimony in Court, Horn entered a plea of guilty in the Military Government Court at Dachau, Germany, to making the above mentioned false statement and was sentenced to nine months imprisonment. (See certificates attached to record.)

No eyewitness testified that the accused shot at the flyer, and the circumstantial evidence introduced, while tending to point to the accused, falls far short of satisfactorily establishing that he killed the flyer.

The findings of guilty are not warranted by the evidence.

Petitions: A Petition for Review was filed by defense counsel, Donald J. Ross, 12 August 1947. Petitions for Clemency were filed by the accused Karl Heinz SCHERER, 15 September 1947; accused's mother, Cecilie Schorer, 30 August 1947; Ernst Mettern, 1 September 1947; Heinrich Wienhold, 18 August 1947; Rolf Penselin, 19 August 1947; Ernst Valentin, 15 August 1947; Paula Opitz, 6 August 1947; Heinz Horsch, 6 August 1947; Ilse Reinhold, 5 August 1947; Anton Schick, undated.

Recommendations: That the findings and sentence be disapproved.

V. QUESTIONS OF LAW:

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

Motion for Findings of Not Guilty: At the close of the prosecution's case the defense made a motion for a finding of not guilty as to the accused for the reason that the prosecution had failed to prove his guilt beyond a reasonable doubt (R 76). This motion was denied (R 78). 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", published by Office of Military Government for Germany (US), 27 March 1947, 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 (Paragraph 71, d. "Manual for Courts-Martial, U.S. Army", 1928, as amended).

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

VI. CONCLUSIONS

1. It is recommended that the findings and the sentence be disapproved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

FLOYD M. LUNDEBERG
Major JAGD
Post Trial Branch

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

G. W. PHIFER
Lieutenant Colonel, USF
Acting Deputy Judge Advocate
for War Crimes