

17 June 1947

UNITED STATES)
))
 v.) Case No. 12-80
))
Josef STERN))

REVIEW AND RECOMMENDATIONS

1. TRIAL DATA: The accused was tried at Dachau, Germany, 28 April 1947, before a General Military Government Court.

2. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

PARTICULARS: In that Josef STERN, a German national, did, at or near LUDENHAUSEN, Germany, on or about 11 July 1944, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be 1st Lt. James E. DALE, ASN O-692767, who was then and there unarmed and in the act of surrendering himself to the then and there unarmed and in the act of surrendering himself to the then German Reich.

3. SUMMARY OF EVIDENCE:

a. For Prosecution: At or near Ludenhausen, Germany, on or about 11 July 1944, an American flyer, believed to be 1st Lieutenant James E. Dale, parachuted down into a mountain field, disengaged his parachute and ran toward a forest of young trees where it would have been possible to hide. Karl Stern, brother of accused, fired at the running flyer, who fell to the ground. Examination of the corpse shortly thereafter revealed that the flyer had been shot once through the back of the head and had been wounded in the back. Accused was with his brother and admitted firing a shot but denied aiming at the flyer. There was no evidence either that the flyer was "in the act of surrendering," or that he was "unarmed" at the time of the shooting. Karl Stern committed suicide on or about 4 January 1947.

b. For Defense: None (acquittal).

4. EVIDENCE, PETITIONS AND RECOMMENDATIONS AS TO ACCUSED:

a. Josef STERN

Nationality:

German

Age:

25

Plea to Charge and Particulars:

Not Guilty

Findings:

Not Guilty

Evidence for Prosecution: Prosecution's exhibit P-1 was received in evidence (R 6) and is a certificate to the effect that Karl Stern died of a self-inflicted bullet wound 4 January 1947.

Prosecution's exhibit P-2 was received in evidence (R 11) and is the sworn statement (questions and answers) of accused in English, with jurat dated 24 January 1947. It consists of five pages. Accused stated that his brother, Karl Stern, shot the flyer; that Karl shot twice, inflicting two wounds (page 2), one in the head, the other in the back (page 3); that he (accused) shot once not at the flyer but to "stop the crowd" (page 2); that he fired in the air (page 3); that he was on his honeymoon at the time, on German army furlough and was visiting his brother, Karl (page 3); that the flyer was running before Karl fired and that the flyer was dead when he (accused) saw him next (page 4).

Prosecution's exhibit P-3 was received in evidence (R 12) and is the affidavit (one page) of Russell Field Burbee to the effect that on 11 July 1944, he bailed out of the plane of which Lieutenant James E. Dale was pilot and saw a civilian shoot Dale while Dale was still in the air.

Prosecution's exhibit P-4 was received in evidence (R 14) and purports to be an extract copy of the "Missing Air Crew Report" appertaining to the plane of which 1st Lieutenant James E. Dale was pilot, 11 July 1944. At this juncture, on the proposal of defense, it was stipulated that "an American flyer, Lieutenant Dale, name and serial number as shown on this exhibit, was shot and killed near Ludenhausen, on 11 July 1944" (R 14).

Witness Weinberger identified accused (R 16) and testified that at the time and place in question (R 15) he saw the flyer lying dead in the mountain field near a small ditch (R 21), about 20 - 30 meters from a forest of trees one meter to five feet high, (R 22); that the flyer had a bullet wound in the back of the head, "came out through the eye" and a wound in the back, (R 22, 23); that the wound in the back was, he presumed, "a glancing shot," (R 31), but could not be identified, with certainty, as a bullet wound (R 31); that it would have been possible for a person to hide in the forest, (R 31); that the talk in the village was that Karl Stern shot the flyer (R 32); and that Karl and Josef Stern rode

to the locus in quo together (R 36). "It was said in our village that Josef STEIN also shot" (R 38).

Witness Buttner identified accused (R 43) and testified that at the time and place in question he saw the flyer land and heard two shots fired and that he saw Karl Stern fire the first shot (R 41, 42); that accused was with Karl Stern and had a rifle and that when he fired Karl was 3 - 5 meters in advance of accused (R 43); that the flyer was "running away" when he was shot (R 45, 46). As to who fired the second shot, he said, "I believe Josef STEIN" (R 47). He further testified that he went to the place where the dead flyer was lying and observed two wounds, (R 48); that he saw the flyer disengage his parachute and start to run "immediately" (R 50) "down the hill in the valley" (R 51); that he did not see accused fire the second shot and does not know that he did so (R 54, 55); that the flyer's back was to Karl Stern when the first shot was fired (R 55); that the flyer was running when the first shot was fired and fell to the ground (R 56), and was lying on the ground when the second shot was fired (R 67).

Evidence for Defense: After the prosecution rested (R 69) the defense moved "for a judgment of acquittal" (R 69). As the motion was sustained (R 72), no evidence was presented by the defense. However, during the cross-examination of witness Buttner, the defense offered in evidence Defense's exhibit D-1 (R 64), "for the purpose of impeaching the testimony of the witness, in view of the inconsistencies" (R 64) and the same was received by the Court (R 65).

Legal Sufficiency of Evidence: Inasmuch as the prosecution failed to offer any testimony to sustain the allegation that the flyer was "in the act of surrendering" and that the evidence is to the effect that he was "running away" at the time he was killed, it is the view of this reviewer that the Court was warranted in acquitting accused.

Petitions: None.

Recommendation: That the record of trial and other papers be filed in this office and that a copy of the Review and Recommendations be forwarded to the Judge Advocate, European Command, for his information.

5. QUESTIONS OF LAW: The Court was legally constituted and had jurisdiction of the person of the accused.

6. CONCLUSIONS: It is recommended that, as no action by any reviewing

authority is necessary, the record of trial and other papers be filed in this office, and that a copy of the Review and Recommendations be forwarded to the Judge Advocate, European Command, for his information.

/s/ Henry C. Chiles
HENRY C. CHILES
Attorney
Post Trial Branch

Having examined the record of trial, I concur

/s/ C. E. Straight
C. E. STRAIGHT
Colonel, JAGD
Deputy Judge Advocate
for War Crimes