

THE ESSEN LYNCHING CASE**TRIAL OF ERICH HEYER AND SIX OTHERS**

BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS,
ESSEN, 18TH-19TH AND 21ST-22ND DECEMBER, 1945

Liability of civilians for the killing of unarmed prisoners of war. Liability of the military for incitement to kill prisoners of war, and for inactivity while under a duty to protect them. Collective responsibility.

Heyer, a Captain in the German Army, gave instructions that a party of three Allied prisoners of war were to be taken to a Luftwaffe unit for interrogation. He ordered the escort not to interfere if civilians should molest the prisoners, while also saying that they ought to be shot, or would be shot. A German private was charged with having refrained from interfering with a crowd which murdered the prisoners, although entrusted with their custody. The remaining accused were German civilians who were alleged to have committed the killing. Heyer and one civilian were sentenced to death. The private and two further civilians were sentenced to terms of imprisonment. The remaining two civilians were acquitted.

A. OUTLINE OF THE PROCEEDINGS**1. THE COURT**

The Court was convened under the Royal Warrant of June, 1945, and consisted of the following : President : Lieut.-Colonel B. G. Melsom, E. Lincs. ; Members : Wing-Commander J. G. C. Barnes, 8501 Air Disarmament Wing, RAF ; Major L. E. Dickson, MC, 1 Glasgow Highlanders ; Major C. Freeman, MC, 107 Medium Regt. RA. ; Legal Member : Captain C. W. E. Shelley, ERE List, Legal Staff, Headquarters British Army of the Rhine. The Prosecutor was Major W. St. J. C. Tayleur, RA, Legal Staff, HQ Lines of Communication. The Defending Officer was Major J. W. Stone, 49 Recce Regiment, in civilian life a solicitor.

2. THE CHARGE

The seven accused were jointly charged with committing a war crime in that they, at Essen-West on the 13th December, 1944, in violation of the laws and usages of war, were, with other persons, concerned in the killing of three unidentified British airmen, prisoners of war.

At the material time, one of the accused, Erich Heyer, had been a Captain

in the German army; and the accused Peter Koenen had been a private in the German army.

The rest of the accused were German civilians, inhabitants of Essen.

3. THE CASE FOR THE PROSECUTION

The Prosecutor stated that the three captured British airmen had been handed by the German police into the custody of the military unit which was under the command of the accused Hauptmann Heyer. The three airmen were placed by Hauptmann Heyer under an escort consisting of an N.C.O., who was not before the Court, and the accused, Private Koenen.

The Prosecution alleged that Heyer had given to the escort instructions that they should take the prisoners to the nearest Luftwaffe unit for interrogation. It was submitted by the Prosecution that this order, though on the face of it correct, was given out to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. It was alleged that he had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners.

When the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.

The allegation of the Prosecution was that there were three stages in the killing, starting with the incitement at the entrance to the barracks, continuing with the beating and finally the throwing over the parapet and shooting. The accused Heyer "lit the match." Each person who struck a blow was "putting flame to the fuel," which was the enraged population, and finally "the explosion" came on the bridge. It was, therefore, the submission of the Prosecution that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen, was guilty in that he was concerned in the killing. It was impossible to separate any one of these acts from another; they all made up what is known as a lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.

Hauptmann Heyer admittedly never struck any physical blow against the airmen at all. His part in this affair was an entirely verbal one; in the submission of the Prosecution this was one of those cases of words that kill, and he was as responsible, if not more responsible, for the deaths of the three men as any one else concerned.

The Prosecutor expressly stated that he was not suggesting that the mere fact of passing on the secret order to the escort that they should not interfere to protect the prisoners against the crowd was sufficiently proximate to the killing, so that on that alone Heyer was concerned in the killing. The

Prosecutor advised the Court that, if it was not satisfied beyond reasonable doubt that he had incited the crowd to lynch these airmen, he was then entitled to acquittal, but if the Court was satisfied that he did in fact say these people were to be shot, and did in fact incite the crowd to kill the airmen, then, in the submission of the Prosecution, he was guilty.

The Prosecution referred to the rule of British law in which an instigator may be regarded as a principal. The same held good in this case if a man incited someone else to commit a crime and that crime was committed. Although the person who incited was not present when the crime was committed, he was triable and punishable as a principal and it made no difference in this respect whether the trial took place under British law or under the Regulations for the trial of war criminals.

Referring to the member of the escort, Private Koenen, the Prosecutor pointed out that his position was somewhat difficult because his military duty and his conscience must have conflicted. He was given an order not to interfere and he did not interfere. He stood by while these three airmen were murdered. Mere inaction on the part of a spectator is not in itself a crime. A man might stand by and see someone else drowning and let him go and do nothing. He has committed no crime. But in certain circumstances a person may be under a duty to do something. In the Prosecutor's submission this escort, as the representative of the Power which had taken the airmen prisoners, had the duty not only to prevent them from escaping but also of seeing that they were not molested. Therefore it was the duty of the escort, who was armed with a revolver, to protect the people in his custody. Koenen failed to do what his duty required him to do. In the Prosecutor's opinion, his guilt was, however, not as bad as the guilt of those who took an active part, but a person who was responsible for the safety of the prisoners and who deliberately stood by and merely held his rifle up to cover them while other people killed them, was "concerned in the killing."

4. THE EVIDENCE

The allegation of the Prosecution that Heyer had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners was proved in evidence, and was also admitted by Heyer himself. It was confirmed by some German witnesses, though not admitted by Heyer, that he made remarks to the effect that the airmen ought to be shot or that they would be shot.

One of the accused, Boddenberg, expressly admitted having hit the airmen with his belt. The part played by each of the others was described by one or more German witnesses.

5. THE VERDICT

Hauptmann Heyer and Private Koenen were found guilty. Two of the accused civilians were acquitted. The other civilians were found guilty.

6. THE SENTENCES

The Court sentenced Heyer to death by hanging, and Koenen to imprisonment for five years.

The sentences on the three civilians who were found guilty were as follows :

Johann Braschoss was sentenced to death by hanging,
Karl Kaufer to imprisonment for life, and
Hugo Boddenberg to imprisonment for ten years.

The executions were carried out on March 8th, 1946.

B. NOTES ON THE CASE

There was no Judge Advocate appointed in this case and consequently no summing up in open Court. The considerations as to the facts and as to the law which guided the Court cannot, therefore, be quoted from the transcript in so many words. It is only possible to attempt by inference to derive them from the verdict and from the sentences imposed, having regard to arguments brought forward by Counsel.

As has already been said, the Court found Hauptmann Heyer guilty, from which it follows that the Court accepted the arguments as to the criminal liability of Heyer, set out above.

From the fact that the Court sentenced Peter Koenen to imprisonment for five years, it can be seen that it accepted the Prosecutor's proposition both as to Koenen's guilt and as to the extenuating circumstances which were pointed out in his favour by the Prosecutor himself.

It may be stated in this connection that the Defence did not plead superior orders, either with regard to Heyer or with regard to Koenen, as a circumstance excluding criminal responsibility in a case where the order was illegal.

Two of the accused civilians were acquitted, the Court considering the allegations preferred against them by the witnesses not beyond reasonable doubt.

The other civilians were found guilty because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot or given the blows which caused the death.

The Prosecutor pointed out that the charge alleged that the accused were concerned in the killing of the three British airmen. That was the wording of the charge, but, the Prosecutor added, for the purpose of this trial he would invite the Court to take the view that this was a charge of murder and of nothing other than murder. The allegation would be that all these seven Germans in the dock were guilty either as an accessory before the fact or as principals in the murder of the three British airmen.

This proposition was not accepted by the Court. The legal member pointed out that this was not a trial under English Law. Murder was the killing of a person under the King's peace. The charge here was not murder and if Counsel spoke of murder he was not using the word in the strict legal sense but in the popular sense. As long as everyone realised what was meant by the word "murder" for the purposes of this trial, the legal member

did not think there was any difficulty. As to using words like "accessory before the fact" and so on, which are applicable to English law and to felonies, the legal member again saw no objection to that, as long as all concerned knew exactly what they were talking about. They were using the words almost in inverted commas as analogies to English law.⁽¹⁾

(1) It may be added that the mere passing of the order to the officer's subordinates to the effect that they should not protect the prisoners of war under their escort against mob violence, could even, standing alone, be considered a war crime, though not that war crime with which the accused in the present case were charged. The Prosecutor stated that the passing on of this order was not sufficiently proximate to the killing to say that on that alone Heyer could have been found guilty of having been concerned in the killing. But this behaviour of Heyer's can be considered a war crime under Art. 2, para. 2 of the Geneva Convention of 1929, which says that prisoners of war shall at all times be protected particularly against acts of violence, from insults and from public curiosity. Prisoners of War are, under Art. 3 of the Convention, entitled to respect for their persons and honour.

Heyer was actually found guilty of being concerned in the killing because of his positive utterances to this effect. The decision of the Military Court, in this case, could not, therefore, be considered a persuasive authority for the proposition that the passing of the secret order, standing by itself, does not constitute a war crime.

CASE No. 9

THE ZYKLON B CASE

TRIAL OF BRUNO TESCH AND TWO OTHERS

BRITISH MILITARY COURT, HAMBURG,
1ST-8TH MARCH, 1946

Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's first gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used. The Defence claimed that the accused did not know of the use to which the gas was to be put; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

A. OUTLINE OF THE PROCEEDINGS**1. THE COURT**

The Court consisted of Brigadier R. B. L. Persse, as President, and, as members, Lt. Col. Sir Geoffrey Palmer, Bart., Coldstream Gds., and Major S. M. Johnstone, Royal Tank Regt.

Capt. H. S. Marshall was Waiting Member.

C. L. Stirling, Esq., C.B.E., Barrister-at-Law, Deputy Judge Advocate General, was Judge Advocate.

Major G. I. D. Draper, Irish Guards, Judge Advocate General's Branch, HQ, B.A.O.R., was Prosecutor.

Three German Counsel appeared on behalf of the accused. Dr. O. Zippel, Dr. C. Stumme and Dr. A. Stegemann defended Tesch, Weinbacher and Drosihn respectively.

2. THE CHARGE

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they "at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." The accused pleaded not guilty.