CASE No. 31.

TRIAL OF WERNER ROHDE AND EIGHT OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY,
29TH MAY–1ST JUNE, 1946

A. OUTLINE OF THE PROCEEDINGS

Wolfgang Zeuss, Magnus Wochner, Emil Meier, Peter Straub, Fritz Hartjenstein, Franz Berg, Werner Rohde, Emil Bruttel, and Kurt Aus Dem Bruch, were charged with committing a war crime in that they at Stuthof/Natzweiler, France, in or about the months of July and August, 1944, in violation of the laws and usages of war, were concerned in the killing of four British women when prisoners in the hands of the Germans.

The accused were all officials attached to Stuthof/Natzweiler camp, except Berg, who was a prisoner there. It was shown that two members of the Womens Auxiliary Air Force (W.A.A.F.) and two of the First Aid Nursing Yeomanry (F.A.N.Y.), British Units, one of the four being of French nationality, had been sent to France in plain clothes to assist British liaison officers whose mission was to establish communications between London and the Resistance Movement in France. They were captured and eventually taken to Karlsruhe prison. After some weeks they were delivered to Natzweiler camp, where they were injected with a lethal drug and then cremated. It was alleged that the circumstances of their death constituted a war crime for which the accused were in different ways responsible. Counsel for Meier and Aus Dem Bruch were told by the Judge Advocate that they need not deal with these two accused in their final addresses, and the two were found not guilty.

Hartjenstein was Kommandant of the camp. There was no definite evidence that he was present at the killing, and he claimed that he was away from the camp at the time and that he did not know of the events alleged until after capture. It was established, however, that he was present at a party in the camp, the date of which was, according to some evidence, the same as that of the killings.

Wochner was the head of the political department at the camp, being independent of Hartjenstein and directly under the orders of the Security Police in Berlin. He claimed that someone from the criminal department at Karlsruhe brought the four women to his office, saying that they were to be executed and that he sent them away, saying that the matter did not concern him. He also denied having had any knowledge of the actual killings until after his capture. There was no evidence that he was present at the killings, but one witness said that Straub could not perform a cremation without Wochner's authority.

Rohde was a medical officer at the camp and admitted giving at least one injection, intending to kill. He claimed, however, that he only performed

this distasteful task because he had orders to do so from one Otto; the latter, however, was shown to be merely an officer under a course of instruction with no official authority in the camp.

Rohde admitted that Otto showed him no evidence of a sentence of death having been passed on the victims.

Straub was in charge of the camp crematorium, but claimed that he was in Berlin at the time of the offence; on this point, however, there was a conflict of evidence, and one witness stated that Straub had actually told him that he was present at the executions.

Against Zeuss, a staff sergeant at Natzweiler, the evidence consisted of an affidavit statement, that he, along with Straub, had been seen " taking prisoners backwards and forwards," and the evidence of Wochner, that Zeuss was usually present at executions. Zeuss claimed that he was on leave at the time of the killings, and in this he was to some extent supported by the other accused.

Berg was a prisoner whose task was to work the oven of the crematorium. He admitted that he lit the oven on the occasion but without knowing that there was anything unusual in the circumstances. No one claimed that he took part in the execution, and his own account was that he was locked in his room and that a fellow-prisoner watched and related the events to him as they happened.

Bruttel, a first aid N.C.O. at Natzweiler, admitted that he obeyed an order to bring the drug and that he heard, in conversations between the doctors and other officers in the camp, references to " the four women spies," " we cannot escape the order " and " execution." He claimed, however, that he had no clear idea that an execution was intended when he received his order. He was outside the room where the executions took place; he would have preferred to leave the crematorium altogether but could not do so without a lamp.

It was not shown that there existed any warrant for the execution of the victims. There was evidence that the papers relating to three of them during their stay in Karlsruhe prison provided no record of a trial or a sentence of death.

Zeuss, Meirer and Aus Dem Bruch were found not guilty. The remaining accused were found guilty; Rohde was sentenced to death by hanging, Hartjenstein to imprisonment for life, and Straub, Wochner, Berg and Bruttel to imprisonment for thirteen, ten, five and four years respectively.

The findings and sentences were confirmed, and put into execution.

B. NOTES ON THE CASE

1. THE OFFENCE ALLEGED

The charge alleged a killing, contrary to the laws and usages of war, of British women when prisoners in German hands. Neither the Prosecutor

nor the Judge Advocate attempted to argue on the basis of the Geneva Prisoners of War Convention, however, and the only references to conventional International Law were made to Articles 29 and 30 of the Hague Convention.(1) The lack of greater clarity in the allegation would seem to have arisen out of the prevailing doubts as to the legal status of the victims (see under the next heading). In discussing the plea of superior orders, the Judge Advocate stated: " You begin, of course . . . from the point of view that *the laws of humanity* demand that no-one shall be put to death by a fellow human being . . ."

Regarding the meaning of the term, " concerned in the killing," contained in the charge, the Judge Advocate explained that to be concerned in a killing it was not necessary that any person should actually have been present. None of the accused was actually charged with killing any of the women concerned. If two or more men set out on a murder and one stood half a mile away from where the actual murder was committed, perhaps to keep guard, although he was not actually present when the murder was done, if he was taking part with the other man with the knowledge that that other man was going to put the killing into effect then he was just as guilty as the person who fired the shot or delivered the blow.

2. THE PLEA THAT THE KILLING WAS LEGAL UNDER ARTICLES 29 AND 30 OF THE HAGUE CONVENTION

Articles 29 and 30 of the Regulations annexed to the IVth Hague Convention of 1907 read as follows:

> " Art. 29. A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
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> " Accordingly soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army for the purpose of obtaining information are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians entrusted with the delivery of despatches intended either for their own army or for the enemy's army, and carrying out their mission openly. To this class likewise belong persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.
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> " Art. 30. A spy taken in the act shall not be punished without previous trial."

One of the Defence Counsel, acting on behalf of all the accused in this instance, argued that the evidence had shown that the four victims were spies and that Article 30 had been fulfilled. A spy was one who secretly or under false pretext received or attempted to receive messages in the country occupied by the enemy. The victims had landed in France without

(1) See below.

uniforms and had contacted the Resistance Movement. Article 30 simply stated that a sentence must have preceded the execution, but nowhere was it explained how such a sentence should have been arrived at. Counsel quoted the opinion of Professor Mosler, that: " Treatment according to usages of war does not require the lawful guarantee of a proper trial. It is sufficient to ascertain that a war criminal offence has been committed . . . Usages of war do not know of any regulations on who could pass the sentence. Normally the commanding officer of the troops who brought about the arrest would be the one to ascertain the guilt, the punishment, and the execution, and would order the execution." It must be remembered that the Nazi regime used unusual methods in some of its activities. Counsel for the Prosecution had alleged that the documents of the prison showed that no legal proceedings had taken place because nothing was mentioned in those documents concerning a sentence. The sentence was only entered on such documents, however, when the institutions concerned also carries out the execution, so that they could know how many days the party concerned was confined. In the case of political crimes where usually the Gestapo dealt with the matter the prison was given no such instruction. Counsel stated: " For us Germans the government in the last years have given us an enormous number of special courts amongst which I myself have found S.S. courts, S.D. courts, courts who everywhere decided the fate of a human being and normally passed sentences of death . . . Quite a number of the accused in as much as they are only small men cannot be expected to know that perhaps there was no sentence, and finally it is my point of view that the sentence by a full court was not required in this case but a sentence by a single person may have sufficed." (1)

International Law, it was argued, did not lay down the manner in which spies should be executed, and instantaneous painless death by injection could be considered a humane method. Counsel suggested that a soldier might have found difficulty in shooting or hanging women.

In reply to these arguments, the Prosecutor admitted that, while the victims' mission was not connected with espionage, they might nevertheless, on the least favourable interpretation, be possibly classified as spies. Had they had a trial by a competent court and subsequently been lawfully executed by shooting this case would never have been brought. The Defence, however, had not shown that there was any trial. No death sentence was ever communicated to these women nor did they ever, in the Prosecution's submission, appear before any court. Someone in authority issued orders for all inmates to be indoors between eight and nine during the evening. The victims were injected with secrecy and at the same time they

(1) Similarly in the Trial of Karl Buck and ten others (see p. 39), the Defence argued that, in order to do justice to the accused, the Court must " return to the conception of justice as it was prevalent at that time." In Germany there were in operation, not only courts-martial, but also " so-called S.S. and police courts for German persons and members of the S.S." He claimed that the evidence of Dr. Isselhorst had proved that the accused had not " shot the victims out of spite," but that a " security police trial " preceded the shooting; the same witness had shown that " the first basic fact of a trial was there; that means that the accused were given a hearing. The shot persons were questioned and their statements were taken down in writing." As a result of such examinations, Ernst had come to his decision.

were told they were being injected against typhus. They were then immediately cremated. Could the secrecy and the circumstances of their killing be reasonable inferred to be in the interests of humanity ? (1)

In his summing up, the Judge Advocate began by pointing out that a person who takes part in a judicial execution bears, of course, no criminal responsibility. There was no real definition of a spy, but Article 29 gave several examples of persons who could not be regarded as such. The Court might chose to interpret the reference to " persons sent in balloons for the purpose of carrying despatches and generally, of maintaining communications between the different parts of an army or a territory " as including within its scope persons sent by aircraft for the purpose of maintaining communications. If the victims had been obviously spies, their being such might have been a mitigating circumstance which the accused could possibly plead, but the doubt which existed on the point made it all the more clear that they should have been given a trial. The law on the point was set out in paragraph 37 (Duty of officers as regards legal status of combatants) of Chapter XIV of the *Manual of Military Law*.(2) The Judge Advocate, after reviewing the evidence on the point, concluded that he could see no proof that a trial in any real sense was held. A separate issue was whether or not the accused actually regarded the execution as being a judicial one ; the Judge Advocate thought it legally sound to plead that the accused did so, if it could be proved in fact.

3. THE PLEA OF SUPERIOR ORDERS

On behalf of the accused, it was pleaded that German Military Law demanded than an order had to be carried out unless the accused knew positively that the deed was unlawful. The Judge Advocate pointed out that, even if an order had been given, no one was obliged to obey an unlawful order. The Defence, he continued, had argued in effect that in Germany at the time an order to kill someone in the circumstances of this case would not be regarded as unlawful. He felt bound, however, to advise the Court that this did not provide a sufficient answer, if they were " satisfied that the order was one which could not have been tolerated in any place where a system of justice was used," and made the following comment : " If you were to go to a lunatic asylum to visit a field-marshal who was an inmate there and he said : ' Go and kill the head warder,' you would not, I imagine, go and do so and say : ' Well, I had to as the field-marshal said " do it." ' That would not be an answer. That is what you are up against in this particular trial ; a question of whether if anyone gives an order, emanating even from the highest authority, which *obviously cannot be permitted*, you are going to obey it or not." (3) (Italics inserted).

4. EVIDENCE BY ACCOMPLICES

In summing up, the Judge Advocate pointed out that, in this case, a great deal of the evidence was provided by accomplices " that is, persons

(1) Similarly, in the Trial of Karl Buck and ten others, the Prosecutor pointed out that the circumstances of the killings made it unlikely that the accused thought that they were performing lawful executions ; see p. 43.
(2) See p. 52.
(3) See p. 16.

who are also charged, or obviously could be charged, with having taken part in the same offence." He warned the Court " that the evidence of an accomplice must be regarded always with the greatest suspicion. Every accomplice is giving evidence which is of a tainted nature. He may have many reasons for not telling the truth himself. He may be trying to exculpate himself and throw the blame on somebody else, and there may be a hundred and one reasons why he should not be telling the truth . . . This does not mean that you cannot believe him or you cannot accept the evidence of an accomplice, but it means that before you do so you must first caution yourselves on those lines. If, having done so and in spite of having so warned yourselves, you believe that what he is saying is true, you are perfectly free to act upon his evidence." He added : " When you are looking for corroboration of an accomplice's evidence one accomplice cannot corroborate another."

In making these remarks the Judge Advocate was applying to the case the practice followed in English Criminal Law, according to which, " where a witness was himself an accomplice in the very crime to which an indictment relates, it is the duty of the judge to caution the jury strongly as to the invariable danger of convicting upon such evidence without corroboration. Moreover this corroboration must confirm not merely a material particular of the witness's story, but some particular which connects the prisoner himself with it . . . Corroboration by another accomplice, or even by several accomplices, does not suffice . . . But these common-law rules as to the necessity of corroborating accomplices amount only to a caution and not to a command." (1)

(1) Kenny, *Outlines of Criminal Law*, 15th Edition, pp. 459-461.