

MILITARY COURTS FOR THE TRIAL OF WAR CRIMINALS

D.J.A.G's Case No. 16139/2

Name of Accused (including Rank, if any)	Arm or Former Arm of the Service	Age	Date and Place of Trial
Franz KOTULAN	German National		31 May 1946 : LEIBUITZ
			Convened by
			C-in-C, British Troops in Austria.

CHARGES

Charge. COMMITTING A WAR CRIME in that he at WEINBURG on or about 14 May 1942 in violation of the laws and usages of war did kill Corporal John Dermont TROY, New Zealand Expeditionary Force, a prisoner of war.

President and Members of the Court (except Legal Member)	Judge/Advocate/ Legal Member
Lt-col. J.P. FOWLER-ESSON, DSO, MC. Major T. MILLER Capt. D.W. MARCH	2 Hamps. 2 Loyals. 4 Devons. Major T.G. FIELD FISHER K.R.R.C.

Pleaded	Finding
Not Guilty	Guilty

Sentence and Minute of Confirmation

5 years imprisonment.

Confirmed, C-in-C, British Troops in Austria,
 on 30 June 1946.

When and where Promulgated:—

9 July 1946.

Date of Receipt	To whom sent	Date sent	Purport

R6/11/19/USA

16139/2/A.3.

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GENERAL REPORT OF THE PROCEEDINGS OF A MILITARY COURT
 held at Leibnitz, Austria, on 31 May - 1 June 46
 for the trial of
 Franz KOTULAN, German National
 charged with
 Committing a War Crime
 in that he
 at Weinburg, on or about 14 May 42, in violation of the laws and usages
 of war, did Kill Corporal John Dermont Troy, New Zealand Expeditionary
 Force, a prisoner of war.

Plea - Not Guilty.

The Prosecution

The evidence for the prosecution consisted of the following :-

- a. The affidavits of Charles Carroll and Kenneth Rubie, former Australian soldiers.
- b. The evidence of the Austrian farmers Alois Voit and Margarethe Schneider.
- c. The unsworn statement of the accused, taken under caution but before he had been formerly charged.
- d. The statement of Johann Scharrer, Bürgermeister of Weinburg, now dead.

The facts alleged by the prosecution were briefly as follows :-

In May 1942 a party of British prisoners of war were held at a small PW camp at Weinburg, the guard consisting of one gefreiter and one soldier, the accused Kotulan. Each morning at about 0600 hrs the prisoners were taken out by the guard to the neighbouring farms, where they were left to work for the day, being collected again by the guard at about 2000 hrs in the evening. The tendency had arisen for the prisoners to be put to work earlier and collected later, in return for which the guard Kotulan was alleged to have received eggs and other eatables from the farmers. This however was denied by Voit. It was also alleged that Voit and the accused were concerned in the pilfering of Red Cross parcels intended for the prisoners, but this again was denied by Voit, who stated that he had had no connection with Kotulan in the distribution of these parcels, merely having provided the transport to take them to the camp.

On the day in question the prisoners were being collected as usual from the farms in the evening by the accused Kotulan. On this occasion several of the prisoners had made their own way back to the camp, not waiting to be collected. Cpl Troy had waited, however, at the farm where he worked but threatened Kotulan that he would not wait in future if he continued to be so late in arriving. On the return to the camp, while collecting other prisoners, Troy and two other prisoners were intent on making their own way at their own speed and were only prevented from doing so by being threatened by Kotulan with his rifle.

On arrival back at the camp Kotulan found the prisoners who had made their own way waiting to be let into the dormitory. Kotulan asked them why they had not waited to be collected in the proper manner. Whereupon Troy turned round and advanced upon Kotulan, telling him that it was none of his business and that he would talk to the gefreiter about it in the morning. One affidavit alleged that Troy approached Kotulan 'shaking his finger' at him; the other affidavit stated that Troy approached Kotulan in a natural manner and not aggressively. Kotulan

loaded his rifle and shouted to Troy to halt, but he carried on until, seeing that the guard meant to shoot he made a movement as if to brush the rifle aside. Kotulan then fired, killing him instantly.

Troy was given a military funeral at which all prisoners at the camp were permitted to attend.

There was evidence to show that Troy had an excitable temperament and that at the time of the incident he was depressed on account of the fact that he had received no letters from his wife. He was a man of large physique.

Kotulan's version of the incident was that the shot was involuntary and due to his fear of being attacked, in spite of his repeated calls to halt. Voit alleged that Kotulan contemplated suicide after the shooting.

The Defence.

The defence submitted that :-

- a. Kotulan was a soldier under orders and that,
- b. Troy was guilty of insubordination and intended violence on the accused.

The following evidence was produced for the defence :-

- a. a set of orders for British guards at the internec camp
- b. the evidence of the accused, of Raimund Olscher the accused's OC at the time of the incident, of Max Rebenik the tenant of the farm which constituted the PW camp, and of Frau Kotulan the accused's wife.

The orders referred to above stated that disobedience or mutiny would, if necessary, be suppressed by the use of arms and that any prisoner who failed to halt when ordered by a guard to do so did so at the risk of his life.

The accused alleged that the discontent amongst the prisoners on the day in question was due to the fact that the Red Cross parcels had not arrived on time, a matter which was beyond his control, and that, although it was a holiday they were compelled to do a full day's work; this again was a matter beyond his control.

The main facts of the shooting incident, as alleged by the prosecution, were not disputed by the defence. The accused, however, claimed that during the return to the camp on the evening in question Troy's actions were insubordinate and that he made obscene gestures at the accused. Kotulan was only able to retain control of the situation by threatening Troy and the other prisoners with his rifle. The general attitude of the prisoners was ugly and led Kotulan to believe that they were making some concerted plan. As to the shooting itself Kotulan claimed that he shouted "halt" three times, lifting the safety catch of his rifle after the second challenge. This however failed to stop Troy who made as if to snatch the rifle from the accused. Kotulan alleged that he fired partly because he knew it was his military duty to suppress disturbances and mutiny and partly because of his fear of Troy. Kotulan himself is a man of feeble physique and was 42 years of age at the time of the incident.

The orders for the guards laid down that fire-arms should be used in the event of a prisoner attempting to escape, in the event of disobedience to orders and in the event of an attack by a prisoner on a guard. In the case of disobedience to orders the use of firearms should be limited to prodding with the bayonet or otherwise using the weapon as a club. In the other cases firing was authorised. Kotulan had a general idea of the purport of these orders and stated that, in the case of disobedience he would only fire if the disobedience was of an aggressive kind.

After the incident a German court was held, at which P.W. gave evidence, but Kotulan was exonerated from blame.

It was shown that Kotulan was not a member of the Nazi Party and that he had done his best to avoid military service. He was acutely depressed after the shooting incident and threatened suicide. Kotulan was convinced that Troy's intentions were seriously hostile and, in fact, that his life was in danger. Prior to the incident Kotulan had been on the best of terms with the prisoners.

Closing Speech for the Defence.

The Defending Officer made the following points :-

- a. The evidence of the only eye-witnesses of the shooting, apart from the accused, was given by affidavits taken almost four years after the event and made by persons who were naturally prejudiced against the accused. There was therefore no opportunity for cross-examination by the defence of these most important witnesses.
- b. The attitude of Troy during the return to the camp on the evening in question was insubordinate and provocative in the extreme. It must have been obvious to the prisoners concerned, when Kotulan was compelled to threaten them with his rifle, that he meant business, and that, being a man of nervous temperament and weak physique, it was becoming dangerous to aggravate him too far.
- c. Kotulan was the only guard present in the compound at the time of the incident; had he not acted as he did the situation would have got out of hand. Disparity in physical strength ruled out the possibility of Kotulan using his rifle as a club.
- d. The evidence of the prosecution witnesses was at variance. 'Shaking a finger' was also an uncharacteristic gesture for a New Zealand soldier.
- e. Kotulan's military record was not such as would encourage his superiors to exonerate him from blame if in fact they considered his action unlawful and unnecessary.
- f. Kotulan acted in accordance with his orders which were the same in substance as those applying in a British internee camp in 1946.
- g. Had Kotulan not acted as he did he would not only have suffered physical harm himself but would have failed in the ordinary duty of a soldier.
- h. The evidence had shown that Kotulan was not the type of man to wilfully kill another, that circumstances forced the shooting upon him and that he had been bitterly remorseful afterwards.

Closing Speech for the Prosecution.

The question of the guilt of the accused rested on whether or not Troy offered violence to him or whether Troy's actions were such as to cause a reasonable man to believe that he was offering violence. The only eye-witnesses of the incident, other than the accused, had maintained that any violence offered was not of such a serious kind as would have justified the accused in using his weapon.

The Prosecutor pointed out that Kotulan had variously based his defence on 'accident', 'superior orders' and 'necessity'.

Court found the accused guilty and sentenced him to five years imprisonment.
On 30 June 46 Lieutenant General Steele, C in C BTA, confirmed the finding and sentence of the Court.

/dr.