

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

29 January 1948

UNITED STATES)

v.

Case No. 12-1146

Heinrich RIXEN

REVIEW AND RECOMMENDATION

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 3-4 December 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Heinrich RIXEN, a German National, did, at or near SPRINGE, Germany, on or about 26 November 1944, wrongfully kill a member of the Armed Forces of a nation then at war with the then German Reich, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On 26 November 1944, an unidentified unarmed Canadian flyer parachuted to the ground near Springe, Germany. The accused, a convalescent inmate of a military hospital at Springe, armed with a rifle, escorted the flyer toward the hospital. On the way to the hospital the accused shot and killed the flyer. The accused admitted killing the flyer, but claimed that the flyer attempted to attack him with a stick.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Heinrich RIXEN

Nationality:	German
Age:	36
Civilian Status:	Textile Tanner
Party Status:	None
Military Status:	Member of German Armed Forces
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: On 26 November 1944 an unidentified

and unarmed (R 30) Canadian flyer (R 17, 22) parachuted to the ground near Springe, Germany (R 15, 26). Ringelhan, a witness who was in the locality in which the flyer landed, testified that he observed the flyer coming down through high trees and saw him lie on the ground for a while and then crawl along the ground (R 16, 54). Schoenemeier, a police official, arrived in this locality and found Ringelhan and the accused there (R 16). The accused was wearing the blue-white uniform of a hospital inmate (R 15, 22, 26, 35). Schoenemeier saw the flyer sitting next to a tree and motioned to the flyer, indicating that the latter should come toward him (R 27). The flyer pointed to his legs (R 27). Schoenemeier gave the flyer two sticks with which to support himself (R 27). In a half-crawling manner and partially supporting himself with a tree branch, the flyer moved himself about 30 meters (R 17, 19). Schoenemeier told Ringelhan that he would have to go over to the plane and asked him to remain with the flyer. The accused volunteered to remain with the flyer (R 28). Schoenemeier told the accused to take the flyer to the hospital (R 54, 55) which was located nearby (R 35, 42). Ringelhan had with him a loaded Mannlicher hunting rifle, calibre 5.6, which used "dum-dum" (hohlmantel) bullets (R 17, 18). He testified that the effect of such bullets was to make an aperture of the same size as the bullet where it entered an object but to make an opening approximately the size of a man's hand where the bullet passed through the object (R 18). Ringelhan left his rifle with the accused (R 17, 22) who was unarmed (R 26) after the latter had requested that he leave the rifle with him for guarding purposes (R 17). Schoenemeier then left with Ringelhan and they drove to a hunting lodge (R 28).

Haselhorst, chief physician of the hospital located at Springe (R 42), was riding in a coach toward the hospital and saw the accused armed with a rifle going in the same direction on foot behind the flyer who was walking with the aid of two large sticks which he used in the manner of a skier. After Haselhorst had arrived at the hospital and had announced to a hospital sergeant that a prisoner would be there shortly, the accused

arrived alone. Haselhorst asked him: "Where is the prisoner?" The accused replied in a rather excited fashion that the prisoner had threatened him and that subsequently he had shot the prisoner. Haselhorst then said to the accused: "But one doesn't do such things -- one doesn't shoot right away". The accused replied to the effect that the flyer had threatened him and that where the accused came from such flyers were always shooting at women and children and would frequently be lynched (R 43, 44).

Schoenemeier, after arriving at the hunting lodge to which he had driven, heard a shot. He went back and found the flyer's dead body lying next to a ditch (R 28, 29, 32). There was a head wound, which in Schoenemeier's "opinion" was in the right side; the whole corner of the head, at a place indicated by the witness, but not recorded in the testimony, was gone. Schoenemeier did not pay any attention to whether or not there was a wound in the other side of the head. The accused was present and Schoenemeier asked him: "What do you think you are doing?" The accused answered: "He resisted". Schoenemeier asked the accused no further questions but took personal data from him. The body of the flyer was lying on its back and Schoenemeier turned it over. From observation of the wound, Schoenemeier concluded that a shot had entered from the right side of the flyer's head. Schoenemeier then left the accused and went over to the flyer's plane (R 29, 32, 40). The flyer, when he landed and Schoenemeier had reached him, was under Schoenemeier's protection, pursuant to orders which the latter had received to the effect that enemy flyers were to be captured and taken to his headquarters. Schoenemeier's automobile was too small for him to transport the flyer in and he did not take the flyer to his (Schoenemeier's) headquarters because he first had to go to the plane (R 35).

Bause, chief physician for a military hospital to which the above-mentioned hospital at Springs was subordinate, stated in his extrajudicial sworn statement that on being informed that the accused, a hospital patient, had killed an enemy flyer, he instructed his adjutant, a Captain

Schultze, to investigate the killing; that the latter conducted an investigation; that Bause saw the accused, talked with him and questioned him at the time of the investigation and read the report of the investigation; that the report stated that the accused had pleaded self-defense and had said that he had to shoot the victim because the flyer attacked him with a club; that Bause had heard that the bullet wound inflicted was in the back of the victim's head, which made the self-defense plea not very plausible; and that when Bause questioned the accused, the latter said that the flyer had an injured leg and used a stick for support, that he ordered the flyer to walk toward the hospital, that after a short walk the flyer sat down on a stone to rest, that when he ordered the flyer to proceed the flyer refused to do so and "treated" him with his stick and that thereupon he shot the flyer. Bause did not believe this story of the accused. The report of investigation was forwarded to higher headquarters and when Bause did not receive any reply to the report after two weeks, he inquired by telephone concerning what steps had been taken regarding the report and was told in no uncertain terms to leave well enough alone (R 10, 11; P-Ex 8, pp. 1, 2).

Behrendt, a gamekeeper, stated in his extrajudicial sworn statement that on 26 November 1944, while he was riding in a hunting cart toward the hospital at Springs, he saw a flyer hobbling along with the aid of a stick, and a soldier was walking behind him with a rifle; that after arriving at the location of the hospital he heard two shots which seemed to be from the direction in which he had seen the flyer and the soldier; that sometime the next day he saw the flyer's body lying by the roadside covered with leaves, the head covered with blood; that he was told either by Haselhorst or a matron that the flyer, after resting, was ordered by the soldier to go on but adopted a threatening attitude with a stick and was shot by the soldier (R 11, 12; P-Ex 10, pp. 1-3).

Huiper, a cemetery warden at Springs, stated in his extrajudicial sworn statement that in connection with the crashing of an airplane on 26 November 1944, a single body was delivered to him on that day for

burial; that he placed the body in a coffin on the night of 26 November 1944 and the body was buried the next day; that there was a small hole like a bullet hole in the center of the back of the skull from which blood had been discharged and that he noticed no other injuries on the body (R 10, 11; P-Ex 9, pp. 12).

Evidence for Defense: The accused testified that Policeman Schoenemeier told him to take the flyer to the hospital, saying that he had to go over to the flyer's airplane to block it off, and either he or forester Ringelhan handed the accused a rifle. They left the accused alone with the flyer (R 54, 55). The accused walked along the road toward the hospital with the flyer ahead of him, walking with two sticks and then with one. After they had proceeded a short distance, the flyer asked for another stick and the accused gave him another (R 56). He walked with the aid of the sticks, as if skiing, and discarded one of them when he sat down (R 64). A little later the flyer made a motion like that of steering an automobile, indicating that he wanted an automobile to drive away with (R 56, 61). The accused shrugged his shoulders and the flyer said something which the accused could not understand (R 56).

On direct examination and in reply to questions by the Court, the accused gave the following account of the shooting of the flyer: After walking a while, the flyer pointed with a stick toward the grass and the accused said that he could sit down. The accused sat down three or four meters from him (R 56). Then the flyer put a stick under the nose of the accused and made a "mean" face. The accused pointed to his rifle and warned him not to do that (R 57, 66). At this time the accused moved about two meters further away from the flyer, thinking that the latter might attack him with the stick. Then a few deer crossed the road and the accused looked in their direction. Then the flyer jumped toward the accused and the latter jumped backward and then jumped into a small ditch which was behind him. The accused threw his rifle up into the air and fired. The accused was afraid that the flyer would hit the rifle out of his hands (R 57, 67). The flyer collapsed (R 58). The accused estimated that the flyer was about three yards distant from him when he fired

the rifle. In reference to the place at which the bullet struck the flyer, the accused testified that he recalled only that there was some blood on the flyer's head and neck (R 58). After the flyer fell down he did not move again (R 59). Before the flyer had said anything, the accused made a trial shot with the rifle by firing it into the air (R 61).

On cross-examination, the accused gave the following account of the shooting of the flyer: When the flyer stuck the stick under the nose of the accused, the flyer was still sitting down. Then he lay on his side. A little later, as the accused was watching some deer passing and was looking half aside, the flyer got up and, as the flyer "meant to strike" the accused, the latter jumped back and got hold of the rifle. The flyer came toward the accused with the stick. Then the accused lifted up the rifle and shot (R 64, 65).

In an extrajudicial sworn statement, the accused stated that the flyer came toward him twice and put a stick under the accused's nose; that the flyer crawled toward him both times, hitting him under the nose; that the first time the flyer arose to a sitting position and the accused told the flyer not to do this and the second time the flyer arose to his feet (R 9; P-Ex 7A, pp. 1, 2).

In an extrajudicial sworn statement in his own handwriting, the accused stated that the flyer took a club and held it before the accused's face and the accused told him he should not do this; that the flyer then came toward the accused and the accused jumped aside and shot the flyer (R 7, 8; P-Ex 6A).

Sufficiency of Evidence: That the accused killed the flyer was admitted by the accused and was proved independently of his admission. His plea of self-defense was based solely on his own self-serving testimony and statements. The evidence that the bullet entered the back of the flyer's head definitely contradicted the claim of the accused that he shot the flyer in self-defense. The accused's accounts of the shooting differed in reference to the details of the actions of the flyer and

of the accused immediately before the shooting and no single account thereof by the accused was clear and definite. The evidence concerning the location and character of the flyer's wounds, instead of being inconsistent and contradictory, as defense counsel has asserted in a Petition for Review, is both consistent and convincing to the effect that the flyer was shot in the back of his head with a "dum-dum" bullet. The evidence, in the aggregate, on that subject describes the wounds received as of such character as would be thus produced. No ground is apparent for doubting the truth of the extrajudicial sworn statement of the cemetery warden who prepared the body for burial that there was a small bullet aperture in the center of the back of the flyer's head. With this statement, the testimony of Schoenemeier, the police official, that he observed a large wound at the front and side of the flyer's head, and the testimony of Ringelhan that the hunting rifle which he furnished to the accused used "dum-dum" bullets, are entirely consistent and, together with it, strongly tend to prove that the accused fired the rifle into the back of the head of the flyer. The Court having observed the accused and other witnesses was in the position to judge the credibility of each in the resolution of issues of fact presented by conflicts of testimony.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by defense counsel, Mr. Claudio Delitala, 16 December 1947. Petitions for Clemency were filed by Franz Esser, 12 December 1947; and by German defense counsel, Dr. Hans Fr. von Zwehl, 14 January 1948.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

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

The defense, by motion (R 48) and, also, in a Petition for Review, challenged the jurisdiction of the Court on the ground that the offense

was committed in the British Zone of Occupation in Germany. War criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violations of international law. Concerning this question, it is stated in "Wheaton's International Law," Volume I, Sixth Edition, at page 269, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed." Military Government Courts have jurisdiction over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e.g., military personnel, to none of which the jurisdictional question here presented pertains. Concerning jurisdiction over war crimes, no limitation is imposed. (See Sections 5-300.2 and 5-300.3, Change 1 to Title 5, "Legal and Penal Administration" of "Military Government Regulations," published by Office of Military Government for Germany (U.S.), 27 March 1947.) Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction Over War Crimes," by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.

It may be that the defense intended to attack the jurisdiction of the Court on the ground that the accused could not be tried in the United States Zone of Occupation unless certain administrative steps were taken as provided by Section 4, Article III, Control Council Law No. 10, which provides:

" 4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section I (b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned."

The defense failed to make a showing that the provisions in question were applicable to this accused even from an administrative point of view. In any event, the provisions in question are merely administrative and not jurisdictional. Failure to strictly comply therewith would

not have affected the jurisdiction of the Court. Section 2 of the same article of that law provides:

" 2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedures thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945."

Mental Capacity of Accused: Albert L. Eisner, Major, United States Army Medical Corps, in an unsworn report of "Psychiatric Findings" concerning the accused, stated: "This man is not psychotic. He can differentiate between right and wrong. His intellect is sufficiently preserved to be able to assist in his defense and follow the proceedings of his trial" (R 67; D-Ex 1, pp. 1, 2). It does not appear that the defense contended that the accused was insane at the time of the offense. That the Court concluded that the accused was sane at the time of the offense and at the time of the trial is inherent in its proceeding with the case and sentencing the accused. There is nothing to indicate that the Court improperly evaluated the evidence. It correctly exercised its judicial power and there is no requirement in the applicable procedure requiring a special finding as to sanity (United States v. Wegmann, opinion DJAWG, December 1946).

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

VI. CONCLUSIONS:

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

RAYMOND J. HEILMAN
Major Inf
Post Trial Branch

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

C. E. STRAIGHT
Lieutenant Colonel, JAGD
Deputy Judge Advocate
for War Crimes