

HEADQUARTERS

THIRD U.S. ARMY AND EASTERN MILITARY DISTRICT

Office of the Judge Advocate

(ATO 403)

14 November 1945.

SUBJECT: Review of Proceedings of Military Commission in the Case of the United States vs Georg Schultheiss. Case No: 12-1418.

TO: Commanding General, Third U.S. Army and Eastern Military District, ATO 403, U. S. Army.

1. THE TRIAL:

The accused, Georg Schultheiss, was tried before a Military Commission in Dachau, Germany, 21 September 1945 on the following Charge and Specification:

CHARGE: Violation of the Laws of War.

SPECIFICATION: In that GEORG SCHULTHEISS, a German National, did, at or near Renda, Germany, on or about 27 September 1944, willfully, deliberately and wrongfully kill DONALD E BRENT, a member of the United States Army who was then unarmed and a prisoner of war in the custody of the then German Reich, by shooting him.

2. FINDINGS AND SENTENCE:

The accused was found not guilty of the charge and specification.

3. EVIDENCE FOR THE PROSECUTION:

The accused Georg Schultheiss, a sergeant in the German army, was on detached service in the town of Renda, Germany, where he was in charge of a work detail of French prisoners of War (R 7, 9, 11, 14). On the night of 27 September 1944 Schultheiss went to the home of Karl Linhose, Deputy Burgomeister of Renda who was in charge of the home guard (R 7). Schultheiss told Linhose that he had a prisoner, an American flyer, who had to be delivered to the police station in the neighboring town of Netra which was about 5 kilometers away and requested that he be furnished a member of the home guard to accompany him (R 7, 20). Since it was night Linhose suggested that the prisoner be kept in Renda till the next morning, but Schultheiss said that he had strict orders to deliver the prisoner immediately to the nearest police station which was in Netra (R 7). Linhose supplied Schultheiss with a member of the home guard, Nicolaus Ellenberger (R 8, 27). Linhose and Schultheiss then went to the tavern of Mergental where the prisoner, who was dressed in an American uniform, was being held (R 8, 20).

Schultheiss and the prisoner started on their way to Netra and were met by Ellenberger at the edge of Renda (R 8, 20). Ellenberger did not have a weapon and had received no instructions as to what to do if the prisoner attempted to escape (R 20, 26, 30). It was between 8 and 8:30 P.M. when the three proceeded on their way (R 20). Ellenberger and the prisoner walked ahead together (R 20). Ellenberger was on the left side of the prisoner, approximately one meter separating them (R 20, 21). Schultheiss was about 3 to 4 meters behind (R 20). The sky was cloudy (R 20). Ellenberger, whose eyes were weak and wore glasses for reading, could distinguish objects from 6 to 10 meters away (R 20, 24, 25, 28). They had gone about one

kilometer when the flyer hollered at Ellenberger who did not understand him. Nothing happened and they continued walking (R 22, 31). It was about 9:30 P.M., after they had proceeded about another three kilometers, when the prisoner approached Ellenberger and hollered at him again (R 21, 31). Ellenberger in order to maintain his distance from the prisoner went off the road about 2 to 3 meters (R 21). He feared that the flyer might try to grab him although the flyer never did touch him (R 24, 25). As Ellenberger turned around a shot was fired (R 21).

Schultheiss was about 2 meters from the American who fell, face downward in the direction of Schultheiss, dead (R 21, 22, 23). Ellenberger explained that the shot had already been fired before he turned around because the sound of the shot had caused him to turn around (R 25). At that time Schultheiss was about 5 meters from him (R 21). Ellenberger stated that the flyer could possibly have lunged at Schultheiss during the interval when he was moving off the road as he, Ellenberger, had his back to both at the time (R 25). Ellenberger did not give and did not hear Schultheiss give any commands to the prisoner (R 30). After the shooting Ellenberger called Schultheiss to come to him (R 22). At that time Schultheiss had his hand on his holster (R 22). They carried the prisoner to the grassy edge of the road and covered him up (R 23). There was blood on the prisoner's head (R 23). Schultheiss and Ellenberger had had no conversation during the walk toward Netra and Schultheiss had in no way indicated that he had had any intention of killing the flyer (R 26, 30).

Schultheiss and Ellenberger then returned to Renda (R 24). Schultheiss told him that he had to report the incident to his company and to the air base at Eschwege (R 24).

The next morning Schultheiss reported to Linhose that the soldier had become belligerent and that he had shot him (R 9). On the same morning Schultheiss reported to the Burgomeister Reith that "I had to take a prisoner to the police station in Netra and I had to shoot him because he became aggressive" (R 13, 14). Reith understood that the flyer had exhibited that aggressiveness by grabbing Schultheiss with his hands (R 18). Reith remembered the name of the flyer was Donald Brent because Schultheiss had given him the name on a slip of paper (R 14, 15). On the following day, 29 September, 1944, Linhose, accompanied by Schultheiss, Nicolas Ebeling, Georg Gork and Karl Kunigs, went to fetch the body which was about 3 kilometers from Renda (R 9, 12). It was the same body that Linhose had seen in the Morgental Tavern on the night of 27 September 1944 (R 11, 12). The face was bloody and there was a hole on the side of the forehead (R 10). The body was carted away in a wagon to a nearby cemetery where it was buried (R 10, 17).

An investigation of the incident was conducted by the German Military authorities (R 17). A stipulation between the Trial Judge Advocate, Defense Counsel and accused was admitted into evidence as Prosecution's Exhibit 1. It reads in pertinent part as follows:

"1. That during the months of September and October 1944, there existed a state of war between the United States of America and the German Reich;

"2. That during the months of September and October 1944, the area of Renda and Netra, Germany, was in German held territory;

"3. That the road and/or highway between the towns of Netra and Renda is in Germany;

"4. That on or about 27 September 1944, Georg Schultheiss, age 54, a German national, was a Sergeant in the German Army of the German Reich stationed in Renda, Germany--having entered the army on 5 January 1944;

"5. That on or about 27 September 1944, Donald E. Brent, ASN 0747730, a member of the United States Armed Forces, was in custody of a member of the German Armed Forces;

"6. That on or about 27 September 1944, the deceased in this case, one Donald E. Brent, ASN 0747730, a member of the United States Armed Forces was shot to death on the road between Renda and Netra, Germany; that the cause of death was a gunshot wound in the head."

4. EVIDENCE FOR THE DEFENSE:

The accused Schultheiss, his rights having been explained to him by the Defense Counsel and the Commission, elected to make a sworn statement and testified as follows:

He was 54 years of age and had been a sergeant in the first World War for four years (R 36, 37, 49). During that time he had had his toe amputated, had been gassed twice, had been buried alive for a day and a half, and had gripe, rheumatism and arthritis (R 49). As a civilian he had prepared visiting cards at country fairs and had been a truck driver (R 37). He entered the army a second time on 5 July 1944 as a private and was assigned at Kassel to guard Russian Prisoners of War and while there he received instructions relative to the prevention of the escape of prisoners (R 37). If a prisoner escaped, Schultheiss would have been punished and degraded (R 37). He was next sent to Esch and then to Renda where he guarded 15 French Prisoners of War who worked on the surrounding farms. Schultheiss attained the grade of sergeant and was the only soldier stationed in Renda (R 33).

On 27 September 1944 considerable aerial activity occurred over Renda at noon (R 47). Dive bombers strafed the farmers in the fields (R 47). Four American and two German planes were shot down (R 38). Schultheiss took one enemy flyer, who had parachuted to safety and who had been captured, to Renda and then to the police station at Netra that afternoon. (R 39). About 8 P.M. a Frenchman informed Schultheiss that a second flyer, who was the victim in the instant case, was a prisoner at the tavern of Morgental (R 40). Schultheiss went there and found that the flyer was unharmed (R 40). He searched the flyer for a weapon but found none (R 40). The flyer was cooperative and in no way resisted (R 43). Schultheiss wanted to take the flyer to the police station at Netra since his superior was there (R 41).

Schultheiss went to Linhose who was then home guard chief and asked that a man be assigned to accompany him (R 40). Linhose said that Ellenberger would do that. Schultheiss's insistence that another individual should assist him was in accordance with an army rule that people were to proceed in two's at night although it was immaterial if they were armed or not (R 47). Schultheiss procured the flyer and met Ellenberger at the edge of town and the three proceeded toward Netra (R 40). The moon was shining (R 40). The prisoner was in front with Ellenberger on the prisoner's right (R 41). Schultheiss kept his hand in his overcoat pocket gripping his pistol (R 41). He had no holster (R 41). They had proceeded about one-quarter of the way when the flyer said something (R 41). After they had gone about 3/4 to 4 kilometers, the prisoner started toward Ellenberger, who was still walking to the right of the prisoner, suddenly hollered, turned around, grabbed Schultheiss by the right arm and kicked him in the leg (R 41).

Schultheiss said, "What is the matter," pushed the flyer away with his left hand, pulled out his pistol and shot (R 41). Schultheiss believed that the flyer was trying to get his weapon and as a matter of self-defense and in order to prevent an escape fired the fatal shot (R 42). He believed that he acted in accordance with his duty (R 42). At no prior time had he intended to shoot the prisoner (R 42). Schultheiss and Ellenberger carried the body to the side of the road and covered it with a piece of cloth (R 42).

They returned to Renda at about 11 P.M. (R 42). The reason that Schultheiss did not continue on to Netra was that everything was closed, that he was a stranger in that town, that it was a long walk uphill, and that he would have to return to Renda the same night (R 48, 49). On their return to Renda nothing was said except Schultheiss stated the flyer had grabbed him and he had to shoot. The next morning Schultheiss reported the incident to Burgomeister Reith and informed his company. He was later interrogated by a German Army captain (R 42).

An oral stipulation was entered into that Ellenberger was not under charges of any character (R 34).

5. PROCEEDINGS:

In letter Headquarters United States Forces European Theater, subject: "Trial of Suspected War Criminals by a Military Commission," 29 August 1945, trial by military commission of the accused Schultheiss was directed. The appointment of the commission and the proceedings thereof were in compliance with the provision of letter, Headquarters, United States Forces European Theater, subject: "Military Commissions", 25 August 1945, which sets forth military commission regulations. The accused was represented by a captain and first lieutenant who are both attorneys. A fair and impartial trial was had. An individual interpreter, who was sworn, was provided for the accused. Challenges for causes were permitted.

6. JURISDICTION:

Reference is made to the discussion of the jurisdiction of Military Commissions in the review of the proceedings of the military commission in the case of Albert Bury and Wilhelm Hafner, 15 August 1945, from which it is apparent that, in general, the jurisdiction of a military commission would extend to cases such as this one. Furthermore that jurisdiction was conferred upon military commissions such as this by letter, Headquarters United States Forces European Theater, subject: "Military Commissions" 25 August 1945.

7. MERITS AND DEFENSES:

The specification alleged that the accused, a German national, wilfully, deliberately and wrongfully killed an American prisoner of war. Such action clearly constituted a violation of the rules of land warfare and international law.

It is beyond question that the accused Schultheiss shot and killed an American prisoner of war then in his custody. The only issue which was before the commission was whether the accused's act was justifiable on the basis that it was to prevent an escape or hostile act by his victim. In a case involving the trial of an American soldier for the slaying of a prisoner of war, a finding of guilty was held legally insufficient where the evidence was considered to show that the killing resulted from the use of reasonable measures to prevent the prisoner's escape (Dig. Op. BOTJAG, ETO, Vol. II, Sec. 450 (1), (AN 92), CM ETO 4561, Ross (1945). It was stated in that opinion that, under the established principles of international law and the declarations

of the Geneva Convention, the guardian of the prisoner of war was authorized to use such force as was necessary to prevent escape and for this purpose violence resulting in the fugitive prisoner's death might be employed if less severe measures proved inadequate (See also JAGS Text No. 7, Law of Land Warfare, p. 104). It was also stated that, when it was shown that the accused killed the prisoner by use of a firearm, the presumption arose that the homicide was with malice aforethought and hence murder. However, this was a rebuttable presumption which could be overcome by proof that the prisoner was killed in the course of an attempt to escape or that the killing was, under the circumstances, reasonably deemed necessary by him in order to prevent escape. The burden was on the prosecution to establish that the prisoner did not attempt to escape or, failing in that proof, that the accused used more than necessary force to prevent the escape.

In the instant case the accused testified that the American prisoner turned around, grabbed his arm and kicked him. He believed that the prisoner was attempting to seize his weapon and effect an escape. Ellenberger who had been walking along-side the prisoner did not see these actions for, as he moved off to the side of the road, he had turned around so that he could not see either the accused or the American. Although the accused's testimony was at variance in certain details with Ellenberger's testimony, such as whether the accused had a holster or whether Ellenberger was on the prisoner's left or right, the trial judge advocate presented no evidence which in any way refuted the accused's claim that the prisoner attacked him. Thus, the presumption of homicide having been rebutted, the prosecution failed to meet its burden of proof to establish either that the prisoner did not attempt to escape or that more than necessary force was used to prevent the escape. Accordingly, the findings of the commission were warranted.

It should be noted that in two pretrial interrogations Ellenberger stated positively that the American prisoner did not attempt to attack the accused, whereas his testimony contained no such assertions. If Ellenberger's testimony had been in conformity with his pretrial statement, the commission would have been justified in finding Schultheiss guilty as charged since his testimony would have been uncorroborated and Ellenberger was apparently a totally disinterested party.

8. PROCEDURE:

The defense's motion for a finding of not guilty after the prosecution had rested was properly denied since at that time there was substantial evidence which, together with all reasonable inferences therefrom and all applicable presumptions, fairly tended to establish every element of the offense charged.

9. OPINION:

It is my opinion that the commission had jurisdiction of the person and offenses involved and that the acquittal of the accused is legal.

/s/ Charles E. Cheever
/t/ CHARLES E. CHEEVER
Colonel, J.A.C.D.,
Staff Judge Advocate

HEADQUARTERS
THIRD U S ARMY AND EASTERN MILITARY DISTRICT
AFO 403

Military Commission)

14 November 1945

Orders Number 8)

Before a military commission which convened at Dachau, Germany, pursuant to paragraph 4, Special Orders No. 251, this headquarters, 10 September 1945, as amended by paragraph 27, Special Orders No. 259, this headquarters, 16 September 1945, was arraigned and tried:

Georg Schultheiss, a German national.

CHARGE: Violation of the Laws of War.

Specification: In that Georg Schultheiss, a German national, did, at or near Renda, Germany, on or about 27 September 1944, wilfully, deliberately and wrongfully kill Donald E. Brent, a member of the United States Army who was then unarmed and a prisoner of war in the custody of the then German Reich, by shooting him.

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To the Specification of the Charge:	Not Guilty.
To the Charge:	Not Guilty.

FINDINGS

Of the Specification of the Charge:	Not Guilty.
Of the Charge:	Not Guilty.

The court therefore acquitted the accused on 21 September 1945.

BY COMMAND OF LIEUTENANT GENERAL TRUSCOTT:

DON E CARLETON,
Brigadier General, U. S. Army,
Chief of Staff.

/s/ Thomas Robinson
/t/ THOMAS ROBINSON
Colonel, Adjutant General's Department,
Adjutant General