

ASB/daa

4 February 1948

Case No. 12-1866

REVIEW AND RECOMMENDATIONS

1. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 4-8 April 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Robert BUEHLER, Kurt KUHNERT and Helmut LIPPMANN, German nationals, did, at or in WOLFSBURG, Germany, on or about 29 June 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be 2nd Lt. Sidney A. BENSON, ASN O-818558, who was then and there a surrendered and unarmed prisoner of war in the custody of then German Reich.

(On motion made by prosecution, the particulars were amended to delete the name of Robert BUHLER, R. 3. Christian name of LIPPMANN actually spelled Helmut, P-Ex 6.)

III. SUMMARY OF EVIDENCE: Following a bombing attack upon Wolfsburg, Germany, 29 June 1944, an American flier, believed to be Second Lieutenant Sidney A. Benson, parachuted to earth from his disabled plane, landing near Wolfsburg. The flier came into the custody of accused LIPPMANN who shot him three times while marching him to Wolfsburg. After the shooting the flier continued to walk to Wolfsburg where LIPPMANN turned him over to a group of air raid wardens while he made a telephone call. A few minutes later the flier was beaten to death by the group of air raid wardens. Accused KUHMEERT was an air raid warden and was present at the scene of the beating.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Robert BUHLER

This accused was neither served nor tried (R 3).

2. Helmut LIPPMANN

Nationality:	German
Age:	35
Civilian Status:	Factory Engineer
Party Status:	Member of Nazi Party since 1941; Major, Hitler Youth since 1935
Military Status:	German Army, 1939-1940
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused, a Hitler Youth leader, arrived at the scene after an American flier, believed to be Second Lieutenant Sidney A. Benson, had landed near Wolfsburg, Germany, 29 June 1944, and had been taken into custody by two police officials and several German soldiers (R 56, 95, 101, 130; P-Ex 6A pp. 2, 3). After he was searched, the flier was turned over to the accused for the purpose of marching the ^{prisoner} / to Wolfsburg. Both proceeded along a road, the flier with his hands in the air in an attitude of surrender and the accused on his bicycle approximately three meters behind him. It was then between 1000 and 1100 hours (R 56, 65, 66, 71; P-Ex 6A pp. 2, 3, 4). The accused was riding his bicycle because he had a chip fracture of one of his toes (R 56, 104; P-Ex 6A p 13).

Reck testified that he observed the accused and the flier proceeding along the road and saw the accused fire several shots at the flier with a pistol (R 65, 66). Reck was about 300 meters from the accused when the shooting occurred (R 76, 87). The flier was approximately three meters ahead of the accused when the firing took place (R 67). Three of the bullets struck the flier in the region of his hip in a radius of 10 to 12 centimeters (R 56, 107; P-Ex 6A pp. 8, 14). The pistol used was a 6.5 mm owned by the accused who testified that he was not adept in its use (R 101). He also testified that after firing five rounds at the flier he was out of ammunition (R 109). The flier continued to walk to the town, a distance of 500 to 600 meters, where the accused put him in the custody of six to eight air raid wardens in front of the local hospital while he made a

telephone call (R 56; P-Ex 6A pp. 5, 8). The air raid wardens then beat the flier using their steel helmets as weapons (R 56, 129; P-Ex 6A pp. 6-8). The victim, who was badly beaten, bruised and shot, died at about 2200 or 2300 hours on the same day (R 33; P-Ex 2, p. 3). In the meantime Reck had gone to his home which was about 100 meters from the local hospital. He stood in front of his home and watched the accused and the flier pass by. Then Reck went into his house where he was for approximately five minutes. He then emerged and went to the local hospital where he saw the flier lying in the ditch, severely beaten, surrounded by a group of 50 to 60 people (R 68-70, 75, 85, 109, 110). Reck testified that immediately after the beating incident he saw the accused standing across the street from the ditch in which the flier had been lying. The witness approached the crowd and expressed his disapproval of what had been done. Someone in the crowd asked whether he had not heard Goebbels' speech and the witness replied that Goebbels was only referring to terror fliers who attacked women and children, but in this case a military installation was attacked. The accused, who was standing nearby, then said that "this was an order by Goebbels, and that they should do that" (evidently referring to the treatment given the flier) (R 72, 73, 92). The accused stated in his extrajudicial sworn statement that on the day after the incident he inquired at the local police station and was told that the hospital had notified the Red Cross that the flier had died of gun shot wounds in the left kidney and liver (R 56; P-Ex 6A, p.9). The German death certificate of the American flier identified him as Sidney A. Benson and gave as the cause of death a serious injury of the skull, a probable basal skull fracture (R 46, 130; P-Ex 5). The chief surgeon of the local hospital examined the flier shortly after his arrival at the hospital between 1000 and 1100 hours, and testified that the cause of death was a fracture of the skull (R 37, 44); that when death is caused by several wounds, it is very difficult to say which one of the wounds caused the death; that each wound could contribute a little bit to the final result; that the flier was beyond human help because of the skull injury; and that he was less inclined to believe

that the bullet wounds contributed to the flier's death (R 44, 53).

Evidence for Defense: The accused stated in his extrajudicial sworn statement and testified that he fired five shots at the flier, three of the bullets taking effect when the flier attempted to escape while marching him to Wolfsburg (R 56, 96, 99, 107, 109; P-Ex 6A, pp. 4, 5). When his attention was distracted from his prisoner by overhead planes, the flier ran off the road towards a woods (R 56; P-Ex 6A, p. 5). The accused, with an injured foot, chased the flyer through a rye field, firing as he ran after the flier who was 10 to 12 meters ahead of him (106, 107, 108, 109). The accused testified that he set out to take the flier to the police station. However, upon passing the hospital he decided to leave the flier outside and to go in and call the police station for instructions. In response to a question as to why he did not take the flier into the hospital he testified, "I didn't know this man was hit at all, after all he kept running 15 meters with his hands raised." (R 99, 109, 110). It was during this telephone call that the flier was beaten and his skull fractured which resulted in his death (R 110).

Sufficiency of Evidence: It is clearly established that the accused shot the flier three times. The only evidence tending to prove that the flier was trying to escape was offered by the accused and, in the light of all the evidence and the circumstances, it is not persuasive. However, it is not established that the flier would have died from these wounds, alone. The assault by shooting, which is established by the evidence, is necessarily included in the offense charged.

Petitions: A Petition for Review was filed by defense counsel, George A. McDonough, 23 April 1947, Petitions for Clemency were filed by the accused's wife, Maria Lippmann, 25 May 1947 and 23 June 1947; the accused's father, Otto Lippmann, 23 May 1947; Erich Pestinger, 1 June 1947; Anneliese Busch, 9 June 1947; the accused's brother, Werner Lippmann, 25 June 1947; Dr. Georg Tyrolt, 8 June 1947; and the accused, 17 July 1947.

RECOMMENDATION: That only so much of the findings be approved as involves a finding of guilty of an assault by shooting with a gun; and that

3. Kurt KUPNERT

Nationality:	German
Age:	40
Civilian Status:	Mechanic
Party Status:	Member of Nazi Party and SA Sergeant since 1933
Military Status:	None
Plea:	NG
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: The accused was one of the air raid wardens with whom the captured and wounded American flier was left at Wolfsburg, Germany, 29 June 1944, by accused LIPPMA^{R 56;}NN at about 1100 hours while he made a telephone call in the hospital (P-Ex 6A pp. 5, 6). Some of the air raid wardens beat the flier using their steel helmets as striking instruments (R 56; P-Ex 6A pp. 6, 7). The victim, who was badly beaten, bruised and shot, died at about 2200 or 2300 hours on the same day (R 33; P-Ex 2). The accused admitted in his pretrial unsworn statement and in his testimony that on the day in question he boasted that he had killed the American flier but now he denied actual participation, having merely boasted of it in order to gain notoriety (R 57, 116, 119, 120, 122, 127; P-Ex 7A). One witness testified that on the day of the incident he heard the accused say that he (the accused) had beaten the American flier to death with a steel helmet (R 13, 14, 26).

Evidence for Defense: The accused testified that he was present when the flier was being attacked (R 117). He denied that he had beaten the flier, and also denied that he had had his steel helmet with him that day (R 119). He testified that the other air raid warder^s beat the flier, using only their fists and hands (R 120). The accused admitted that he had^{said} /that he had beaten and killed the American flier but explained this by saying he made the statement "out of foolishness" (R 57, 116, 122; P-Ex 7A).

Sufficiency of Evidence: The accused was present at the scene of the fatal beating and one witness heard him brag shortly thereafter that he had

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beaten the flier to death with a steel helmet. However, there is no evidence other than the accused/^{is} subsequent brag indicating that he was present in a capacity other than that of a spectator. The findings of guilty are not warranted by the evidence.

Petitions: A Petition for Review was filed by defense counsel, George A. McDonough, 23 April 1947. Petitions for Clemency were filed by the accused's finance, Hilde Gulden, 20 June 1947, 15 September 1947 and 9 January 1948; and Anton Zeiler, 10 January 1948.

Recommendation: That the findings and sentence be disapproved.

V. QUESTIONS OF LAW:

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

Motions: At the conclusion of the prosecution's evidence, defense counsel moved for a finding of not guilty as to each accused (R 93, 93). With reference to accused LIPPMANN, the motion was properly denied since a prima facie case against him had been made out by the prosecution. It is not error for a war crimes tribunal to overrule a motion for a finding of not guilty made at the close of the case for the prosecution if it believes there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-327.2, Title 5, and Penal Administration, "Legal of "Military Government Regulations," published by Office of Military Government for Germany (US), 27 March 1947; Section 501, page 409, "Manual for Trial of War Crimes and Related Cases," 15 July 1946). A similar practice is followed in Courts-Martial (Paragraph 71d., "Manual for Courts-Martial, U.S. Army," 1928).

As to accused KUHNERT, the motion for a finding of not guilty should have been granted. It was error for the Court to have denied defense counsel's motion since there was no proof adduced in the prosecution's case showing this accused guilty of a war crime.

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

VI. CONCLUSIONS:

1. It is recommended that only so much of the findings as to accused LIPPMANN be approved as involves a finding of guilty of an assault by shooting with a gun; that the sentence to death by hanging as to accused IPPMANN be approved, but commuted to imprisonment for life; and that the findings of guilty and the sentence as to accused KUEVERT be disapproved.

2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

A. S. BERNSTEIN
Attorney
Post Trial Branch

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

C. W. PHIFER
Lieutenant Colonel, USAF
Acting Deputy Judge Advocate
for War Crimes