

Trial of YAMAMOTO CHUSABURO

BRITISH MILITARY COURT, KUALA LUMPUR, 30TH JANUARY-1ST FEBRUARY,
1946

A. OUTLINE OF THE PROCEEDINGS

The accused, a sergeant in the Imperial Japanese Army, was charged of having committed a war crime "in that he at or about 2300 hours on 12th September, 1945, at Kuala Lumpur contrary to the laws and usages of war killed one Omar a civilian resident of Kuala Lumpur." The accused admitted killing a Malaya civilian, Omar, who, he claimed, had stolen rice from the army stores, but pleaded, *inter alia*, that he acted in self-defence and under the influence of alcohol. The Court found him guilty and sentenced him to death by hanging, but with a recommendation for mercy. The sentence was, however, confirmed and put into effect.

B. NOTES ON THE CASE

I. THE NATURE OF THE CRIME ALLEGED

In his opening address, the Prosecutor said that action which resulted in death and which was not justified or accidental was, in English law, murder or manslaughter according to the circumstances. He submitted that whatever degree the killing might happen to be in this case, in reaching a decision as to whether the accused was guilty or not guilty, the court need not concern itself with the question of malice, the ingredient necessary to constitute murder. If the court thought Yamamoto had committed an unlawful act and that that act had resulted in death then the court might find him guilty on the charge. Nevertheless it might well be that the court would find evidence of malice sufficient to make the offence murder, and no doubt all such indications in the evidence would be taken into account if and when the court considered any question of punishment.

This submission that, on a charge of killing, it need not be proved that an alleged war criminal had committed murder as defined by English law is reminiscent of the advice rendered by the Legal Member in the *Essen Lynching Case*, to the effect that a charge of killing in a war crime trial was not one of murder, that is to say of a "killing of a person under the King's peace." (1)

The Prosecutor went on to state that the alleged offence took place at a time when, although open hostilities had ceased, the Japanese were still armed and in control of certain areas "pending the consummation by surrender of their capitulation." War did not end with the mere cessation of hostilities, and any violation of the Laws and Usages of War committed during the process of surrender and disarming was as much a war crime as one committed at the height of battle; all the more so if the act was a breach of the terms of the convention for capitulation.

(1) See Volume I of this series, p. 91.

It was stated in evidence that the body of Omar was exhumed on the 13th September, 1945, only one day after the killing, "on the orders of a British officer." It will be remembered that, in the *Scuttled U-boats Case*,⁽¹⁾ an accused was sentenced to a term of imprisonment for an offence committed even after the conclusion of an Instrument of Surrender, indeed for an act in breach thereof.

2. THE DEFENCES OF DRUNKENNESS, SELF DEFENCE, SUPERIOR ORDERS, PROVOCATION AND ALLEGED LOSS OF CIVILIAN STATUS BY THE VICTIM

The accused confessed to the killing of Omar, but pleaded that a number of circumstances should be considered as constituting defences. The evidence of the accused which is referred to in the following two paragraphs will be seen in effect to constitute the pleading of the five defences of drunkenness, self-defence, superior orders, provocation and loss of civilian status by the victim.

In pre-trial statements, he admitted that he had no instructions to kill or injure anyone stealing property. His proper duty would have been to take the offenders to his superior officers. He stated, however, that, finding himself attacked by eight or nine Chinese and Indians, he was compelled to retaliate in self-defence. He continued: "I borrowed the sentry's bayonet because I thought I was going to be killed. If I had not seized the bayonet I would have been helpless against the crowd. I wish to admit that I was under the influence of alcohol when I killed this man. I had strict orders from Colonel Imamura to guard the rice in the storehouse, which was due to be turned over to the British forces on their arrival in Kuala Lumpur."

In a plea in mitigation of sentence, entered during the trial,⁽²⁾ the accused claimed that prior to the day of the incident in question several cases of looting by civilians of military stores were reported. He was particularly forewarned by his officer, Major Oba, to be extra vigilant against civilian looters. After the news of the Japanese surrender on 14th August, 1945, the looters became more daring and desperate. They raided with impunity places under Japanese control. On 12th September, 1945, at about 11 p.m., he heard a sentry raise an alarm. It was pitch dark then and the accused "rushed out almost half awake." He detected a group of Chinese and Indians wheeling away hand-carts loaded with sacks. He chased them and managed to arrest Omar, the deceased. At this time a collection of men had gathered around. A few of them started tugging at the accused in an endeavour to free Omar. A few others were hostile in their behaviour. Guided by a sudden impulse and obsessed by the thought of grave danger to life and property he momentarily lost control over himself and in a rage killed Omar with a bayonet. Pitch darkness around him aggravated his fears. He had an honest belief in the existence of grave danger to his own life though it might now seem that he had exceeded his powers by resorting to killing. The accused also pleaded that, having looted military stores Omar had forfeited his right of protection as a citizen under the Laws and Usages of War.

In his closing address, the Prosecutor replied to all of the arguments put forward by the accused with the exception of that concerning superior orders.

⁽¹⁾ See Volume I, pp. 55-70.

⁽²⁾ In fact contained in a document put in as evidence for the defence and agreed to by the accused. Since he had not then been found guilty, the use of the term "plea in mitigation of sentence" to describe this statement was, strictly speaking, incorrect.

It will have been noted that the accused did not claim that he had orders to kill persons attempting to raid the stores.

The Prosecutor said that he could find no foundation in law for the suggestion that Omar had lost his status as a civilian because he looted. His comment was that: "If in fact Omar did loot then no doubt Omar committed a war crime for which he could be tried and legally punished if the charge were proved. As the accused said in his first statement, 'My proper duty would have been to take the offenders to my superior officers.'"

On the defence of drunkenness, the Prosecutor said that drunkenness in itself was not an excuse for crime, but where intention was of the essence of the offence, drunkenness might justify a court in awarding a lesser punishment than the offence would otherwise have deserved or it might reduce the offence to one of a less serious character. In such a case the man must be in such a state of drunkenness as to make him incapable of formulating any intention to commit the offence, and such a state would clearly affect the degree of killing of which the Court would find the accused guilty.

The Prosecutor submitted that to affect intention provocation must be great. It must be such as might reasonably be expected to put an ordinary person not of an exceptionally passionate disposition into such a passion that he would lose his power of self-control, and that state must be sufficient to reduce a murder to manslaughter (1). It must be clearly established in all cases where provocation was put forward as an excuse that at the time when the crime was committed the offender was actually so completely under the influence of passion arising from the provocation that he was at that moment deprived of the power of self-control. It would be necessary to consider carefully all the circumstances showing the state of mind of the accused including the manner of the killing, the weapon used and the time between the provocation and the killing.

The Prosecutor further pointed out that there was evidence that the act was not committed in defence of property or person, while Omar was in the process of looting; it was committed after Omar had been taken from his house into custody.

The reasoning by which a British Military Court arrives at its verdict and sentence cannot be discovered, since its discussions are arrived at in private sitting and only the final decisions announced. The arguments of Counsel are of interest, however, in so far as they throw light on considerations which the Court may have had in mind during their deliberations. In strict law, even the summing up of a Judge Advocate, when one is appointed (as was not the case in the present trial), is not a final indication even of the law on which the Court acted. Two relevant provisions setting out some of the powers and duties of the Judge Advocate are made by Rule of Procedure 103 (e) and (f), which run as follows:

"(e) At the conclusion of the case he will, unless both he and the court consider it unnecessary, sum up the evidence and *advise* (2) the court upon the law relating to the case before the court proceed to deliberate upon their finding;

(1) As to the attempted division of killing as a war crime into murder and manslaughter, see p. 76.

(2) Italics inserted.

“(f) Upon any point of law or procedure which arises upon the trial which he attends, the court should be guided by his opinion, and not disregard it, except for very weighty reasons. *The court are responsible for the legality of their decisions,*⁽¹⁾ but they must consider the grave consequences which may result from their disregard of the advice of the judge-advocate on any legal point. The court, in following the opinion of the judge-advocate on a legal point, may record that they have decided in consequence of that opinion.”

From these clauses it follows that, strictly speaking, the Court is the final judge of the law as well as of the facts of a case, and that a Judge Advocate's summing up does not necessarily set out the law on which the Court acted, although in practice his words carry a very high authority.

The Court, in the trial under consideration, would appear to have considered that there were mitigating circumstances in the case, since they made a recommendation for mercy. The sentence of death was, however, confirmed by higher military authority, and therefore the defences raised must be regarded as having been rejected. Of these defences, only that of superior orders has commonly been raised in trials of alleged war criminals.

Art. 43 of Section III (*Military Authority over the Territory of the Hostile State*) of the Hague Convention No. IV provides that :

“The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country.”

Even had the laws of the territory in question, before its occupation, provided the death penalty for stealing from army stores, it would not have been within the competence of a sergeant to perform the function of judge as well as executioner. Further, it could hardly, on the facts of the case, be said that Omar had put himself into that category of war criminals which is referred to in Oppenheim-Lauterpacht, *International Law*, Sixth Edition Revised, Volume II, at p. 454 :

“Private individuals who take up arms and commit hostilities against the enemy do not enjoy the privileges of armed forces, and the enemy has, according to a customary rule of International Law, the right to treat such individuals as war criminals. But they cease to be private individuals if they organise themselves in a manner which, according to the Hague Convention, confers upon them the status of members of regular forces.”

The stealing of rice from a military store could not be regarded as taking up arms and committing hostilities.

The remaining defences, those of drunkenness, self-defence and provocation, are based essentially on the plea that the necessary guilty intention (*mens rea*) was not present in the mind of the accused when he committed the alleged offence. The references made to these defences constituted

(1) Italics inserted.

further examples of the introduction of Municipal (in this case English) Law concepts into a trial where breach of International Law is alleged.⁽¹⁾ It would not therefore be irrelevant to explain a little further the position in English law.

An authoritative declaration of the law as to intoxication was given in 1920 by the concurrence of eight law lords in *Director of Public Prosecutions v. Beard* [1920] A.C. 479, where the following rules were laid down :

- (a) Merely to establish that the man's mind was so affected by drink that he more readily gave way to some violent passion forms no excuse ;
- (b) If actual insanity supervenes as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity induced by any other cause. . . . Insanity, even though temporary, is an answer ;
- (c) Where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime.

Under the third rule, drunkenness, if incompatible with the indispensable mental element of the crime, "negatives the commission of that crime." Thus a drunken man's inability to form an intention to kill, or do grievous bodily harm may reduce his offence from murder to manslaughter (which requires no *specific* intent).

A defence witness, a lieutenant in the Japanese dental corps, in answer to questions by the Court, testified that the accused did drink liquor but was not a heavy drinker and did not get drunk easily. No further evidence was taken on the point.

It is clear that in English law a man is justified in using force against an assailant in defence of himself, provided the force is proportionate to the reasonable apprehension of danger, even if the death of the assailant results. It is also undisputed that gross provocation may reduce murder to manslaughter. As the Prosecutor pointed out, the provocation must be so great as to deprive a reasonable man of his self-control (*Rex v. Lesbini* [1914] 3 K.B. 1116). In point of fact, two Prosecution witnesses stated that there was only one other person accompanying the victim at the time of the alleged offence.

Even had the defences of drunkenness and provocation been taken into account by the Court, this fact would not necessarily have had any effect on the verdict and sentence, since the relevance of the distinction between murder and manslaughter in connection with war crimes is disputed.⁽²⁾

⁽¹⁾ See p. 60 ; and pp. 79-80 of Volume I of this series.¹

⁽²⁾ See p. 76.