CASE NO. 71

TRIAL OF EBERHARD SCHOENGRATH AND SIX OTHERS

BRITISH MILITARY COURT, BURGSTEINFURT, GERMANY
FEBRUARY 7TH–11TH, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Eberhard Schoengrath, Erwin Knop, Wilhelm Hadler, Herbert Fritz Willi Gernoth, Erich Lebing, Fritz Boehm and Friedrich Beeck, all former Kriminal Sekretärs or members of the SS, were charged with " committing a war crime, in that they at Enschede, Holland, on 21st November, 1944, in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war." The offence alleged was the shooting of an Allied airman who had descended by parachute from his plane.

Subject to confirmation, all the accused were found guilty, five were sentenced to death by hanging, and two to imprisonment for fifteen and ten years. These sentences were confirmed by superior military authority.

B. NOTES ON THE CASE

1. STATEMENTS MAY BE PUT IN WITHOUT PROOF OF CAUTION ADMINISTERED

The present trial, like the Belsen Trial, gave rise to a discussion of the question whether a pre-trial statement made by an accused could be admitted as evidence if no caution had been administered to the accused prior to his making this statement.

The general outcome of the decision of the courts in the Belsen Trial, the Killinger Trial, the present trial and the Trial of Hans Renoth[1] is that the defence cannot prevent a statement being put in as evidence by denying its voluntary nature, but is free to attack the weight to be placed on it. In practice therefore the court will always ascertain whether or not a statement is made voluntarily in order to assess its evidential value. This position affords an illustration of the tendency, noticeable not only in British war crime trials, and due to the exceptional conditions under which war crime trials are held, to go some way towards ridding courts of the more technical rules of evidence and leaving them free to admit a wide range of evidence and then to decide what weight they will place on each item. The Prosecutor in the Belsen Trial claimed that the Regulations made under the Royal Warrant were drawn up with the intention of avoiding legal arguments in court as to whether evidence was admissible or not. They were drawn widely so as to admit any evidence whatsoever and to leave the court to attach what weight they thought fit to it when they had heard it.

(1) See Volume II, pp. 135–8, Volume III, pp. 71–2, and pp. 78 of the present Volume.

2. A SUBMISSION BY THE DEFENCE OF NO CASE TO ANSWER

A footnote to page 644 of the *Manual of Military Law* states that :

> " It is open to the accused, his counsel or defending officer, at the close of the case for the prosecution, to submit that the evidence given for the prosecution has not established a *prima facie* case against him and that he should not, therefore, be called upon for his defence. The court will consider this submission in closed court and, if they are satisfied that it is well founded, must acquit the accused. This submission may be made in respect of any one or more charges in a charge-sheet."(1)

Thus in the present trial, the Defence submitted that there was no case to answer because the Prosecution had brought no evidence to show that the shot airman was in fact an Allied airman, and the crime which the accused were charged with committing was that they at Enschede, Holland, on the 21st November, 1944, in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war. The shooting of a man by a German did not of necessity prove that he was an Allied airman. The Prosecutor replied in the following terms : " In 1944 most people, especially if they were in the Services, even though they might not be experienced in aircraft recognition were fairly familiar with the aircraft of the respective sides. The evidence in this case, and it has not been disputed at all by the Defence, is that a bomber which was flying west over Holland, which was a theatre of operations, was shot or brought down. All the people who were on the spot made to capture the airman. The airman, we know, when interrogated was unable to speak German, and there is evidence from at least one witness that he muttered something about " America " or " Canada " at some stage. It is very well known that most Continental people make relatively little distinction between British and Americans. All these accused, who were members of the Security Service, took it for granted that it was an Allied bomber and the airman accordingly an Allied airman." He submitted that it would be straining commonsense too far to suppose that this bomber was in some mysterious way a neutral bomber which was proceeding on a mission from Germany over Holland at that time and in those circumstances.

The Court over-ruled the submission of the Defence.

3. CROSS-EXAMINATION OF AN ACCUSED REGARDING OFFENCES NOT MENTIONED IN THE CHARGE

During the cross-examination of one of the accused, the Prosecutor began to question him regarding the shooting of six innocent men on a date and at a place other than those mentioned in the charge. He claimed that this course was legal in view of the cases *R. v. Geering*, *Makin v. Attorney-General for New South Wales*, and *R. v. Smith*, which were " referred to in Note 2 on page 76 of the Manual," and in view of Rule of Procedure 80 (D) (iii).

The following sentence appears in p. 76 of the *Manual of Military Law* : " Again, where women or children have been murdered, to rebut the defence of accident or to prove design, evidence has been admitted to prove that

(1) This is simply an adaptation of a similar rule of procedure followed in English Criminal Law. See Kenny, *Outlines of Criminal Law*, Fifteenth Edition, pp. 569–70.

other women or children living with the accused have died under similar suspicious circumstances, or have suffered from similar symptoms." To this sentence appears the following footnote : " *R. v. Geering* (1849) 18 L.J. (M.C.) 215, several cases of arsenic poisoning in a house. *Makin v. A.G. for New South Wales* L.R. (1894) A.C. 57 ; previous deaths of other nurse children. *R. v. Smith* (1915) 11 Cr. App. Rep. 229, three " wives " dying in succession in the same way." The Prosecutor in explaining his cross-examination said of the accused : " This man says more or less that he was a chance spectator of one murder. I am now going to put it to him that he in fact was one of the men detailed to be present when a very similar crime was committed on a previous occasion, to establish a systematic course of conduct in which he participated, so that he cannot be so innocent as he is trying to make the Court think today."

The Prosecutor claimed that, since all of the accused were incriminating one another, he was entitled to rely also on Rule of Procedure 80 (D), which provides that :

" 80 (D). The accused when giving evidence may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged, but shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless— . . . .

(iii) he has given evidence against any other person charged with the same offence."

He made a general submission. He pointed out that several of the accused, both personally and through their Counsel, had attacked two others of their number by suggesting that they were present and took some part in the mal-treatment of the airman by shackling him when he was going to be taken out in the car to be shot. The Prosecutor continued : " That entitles me, in my submission, to cross-examine them on their systematic course of conduct as members of this Kommando on occasions other than the present one ; otherwise they are surely in the position of saying : ' This crime was ordered by one superior officer and carried out under the supervision of his subordinate by other people in the Kommando, but I knew nothing of this sort of thing ; I was very shocked and I protested.' If you then find that these same men were constantly taking part in executions of hostages or civilians, whoever it may be, does not that throw some light on the question of their guilt or innocence on the occasion in question, even though one man's job was only to dig a hole or report that a hole had been dug ? "

The Court ruled that the Prosecutor could ask the questions which he desired to ask, but that he must be careful, in asking them, to avoid as far as possible causing the accused by his answers to implicate any other of the accused.(1) The Prosecutor thereupon requested the accused to describe his own role in the incident in question, while not mentioning the names of any others of the accused.

(1) The cross-examination of an accused by the Prosecutor in a joint trial before a British Military Court *follows* that by Counsel for the other accused.