

CASE NO. 23

TRIAL OF MAJOR KARL RAUER AND SIX OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY,
18TH FEBRUARY, 1946

A. OUTLINE OF THE PROCEEDINGS

Karl Rauer (formerly Major), Wilhelm Scharschmidt (formerly Hauptmann), Otto Bopf (formerly Army Major), Bruno Bottcher (formerly Hauptmann), Hermann Lommes (formerly Oberfeldwebel), Ludwig Lang (formerly Feldwebel), Emil Gunther (formerly Unteroffizier), formerly attached to the aerodrome at Dreierwalde, Germany, were charged with committing war crimes in that they were "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on 22nd,⁽¹⁾ 24th and 25th March, 1945, respectively. The Prosecution argued that the accused had thereby violated Article 23 (c) of the Hague Convention No. IV of 1907.

It was shown that on 21st March the aerodrome was heavily bombed and five Allied airmen were captured by the Germans. Rauer, the commandant of the camp, claimed that he issued no specific orders regarding these prisoners, but expected that they would be sent to a prisoner-of-war camp in the usual way. Scharschmidt, his Adjutant, after questioning them, detailed Oberfeldwebel Karl Amberger to lead the escort, despite the warnings of Chief Clerk Lauter that Amberger was unsuitable for the task in view of his open hostility to Allied prisoners of war; the Adjutant did make some attempt to find a substitute. On the night of the 22nd four of the party of prisoners were shot dead on the way to the station.

Rauer admitted that he was primarily responsible for prisoners of war, but added that the administration of questions relating to them was a matter for Scharschmidt, the Adjutant. Both he and Scharschmidt accepted a report that the prisoners had been shot while trying to escape⁽²⁾ and Rauer passed this report on to higher authority. Rauer pleaded that he had no time to make a personal investigation, and Scharschmidt pleaded that he had no orders to do so.

On 24th March, a further party of prisoners, captured after a second serious air raid, were sent at night to help in filling in bomb-holes on the runways of the aerodrome. This was done under Rauer's orders, transmitted through Scharschmidt, though there was some evidence that the

⁽¹⁾ The first offence was that which led to the sentence of death passed on former Oberfeldwebel Amberger (See Vol. I of this series, pp. 81-87).

⁽²⁾ The fifth, whose affidavit alleging that the four had been shot in cold blood appeared as evidence both in this trial and in the trial of Amberger, escaped though wounded.

immediate order came from Bopf. In court, Gunther claimed that Lang had told him that Bopf had ordered the shooting of the prisoners. The latter were taken out by Gunther, Lommès, Lang (all of whom came under Bopf's orders) and one other, not before the Court. Seven or eight prisoners were shot, and there was evidence implicating Gunther, Lommès and Lang in the shooting. Bottcher, who was in charge of repairs, claimed to have reported the matter to Scharschmidt, but the latter denied this. Lommès claimed that Scharschmidt said to the N.C.O.s involved: "You must make a report that they were shot whilst trying to escape, so that I can pass it on." Lang told Bopf that the shooting had been committed, but Bopf took no action and jumped to the conclusion that Scharschmidt must have ordered it. Bottcher was also inactive, and Scharschmidt took no action because Rauer had intended to interrogate the escort. The commandant, however, could not find the time to do so. An unchecked report stating that the prisoners had been shot while trying to escape was thereupon sent to higher command. Lommès claimed in court that Bottcher said that the killing was justified in view of the German deaths caused by bombing.

Finally, on 25th March, a wounded prisoner was taken out of the aerodrome in a motor cycle side-car by Lang and Lommès and shot by Lang. Rauer and Scharschmidt stated in court that they knew nothing of this incident until long afterwards. Bottcher admitted lending his motor cycle to Lommès, and claimed that he had the impression that the victim was being taken to hospital. Lommès claimed that both Bottcher and Bopf had said that the remaining prisoner must disappear like the others; the two officers denied this.

There was evidence that both Rauer and Scharschmidt expressed hostile opinions towards captured enemy air crews, in the presence of N.C.O.s. Rauer, however, denied issuing any orders for the shooting of prisoners of war, and explained that he was prevented from making personal investigations into the shootings by his other duties; the Allied armies were near, air-raids were severe and necessitated extensive repairs by hundreds of prisoners of war, internees and civilians, which he had to supervise, and his task was made worse by ill-feeling among the officers on the aerodrome. No witness claimed that the killings were carried out on the specific orders of either Rauer or Scharschmidt.

Subject to confirmation by higher military authority, the following findings were pronounced.

Rauer and Scharschmidt were found not guilty of the first charge, which concerned the events of 22nd March, but guilty of the other two charges.

The remaining accused except Gunther, were found guilty of the second and third charges, not having been accused of the first charge. Gunther was found guilty of the second charge, concerning the events of 24th March, there being no other charge against him.

All of the accused were sentenced to death by being hanged. The sentence on Rauer was commuted to one of life imprisonment by higher military authority, and the other sentences confirmed.

B. THE MEANING OF THE CHARGE OF BEING "CONCERNED IN" A KILLING

The names of two of the accused, ex-Major Rauer and ex-Hauptmann Wilhelm Scharschmidt, the commandant of the aerodrome and his adjutant, appeared on all three charges, these accused being thereby charged with being "concerned in the killing" of twelve Allied prisoners of war on three different dates in March 1945. It was agreed that there was no direct proof that either had given any specific orders for the offences to be committed. Yet both were found guilty on the second and third charges, and sentenced to death by hanging. They were found not guilty on the first charge, and the sentence on Rauer was commuted by higher military authority to one of life imprisonment.

Counsel for Rauer submitted that this accused "must be proved to have been a party to a crime or to have acted in consort with others in committing that crime or to have been guilty of criminal negligence of the highest order or to have been an accessory after the killings." He could not be convicted merely because he was the commander of people who were responsible for killings. In his closing address, Counsel claimed that Rauer should not be convicted of being concerned in a crime merely because he was the commander of the responsible parties. He must be proved to have participated in the crime, either by issuing orders in connection with the killing or by allowing the perpetrators to believe that they could kill airmen with impunity. Above all it must be proved that the accused Rauer had the necessary *mens rea* or guilty mind.

In his closing speech, Counsel for Scharschmidt submitted that utterances by the latter hostile to British pilots, made after heavy air raids, were not sufficient to prove him guilty of possessing that guilty mind which was an essential ingredient of the charges. Counsel's submission regarding the first charge was that there was no evidence that Scharschmidt instigated this crime or, realising that a crime had been committed, condoned it. If the Court considered that he was negligent in any of his duties, Counsel submitted that negligence was not enough on this charge. As to the charges as a whole he claimed that there was no evidence that Scharschmidt instigated any killing or condoned any killing. In every case he made an immediate report to his commandant, who must bear the responsibility for any neglect of duty that occurred. It was never Scharschmidt's duty to carry out any interrogations himself.

In closing his case, the Prosecutor pointed out that a man is deemed to intend the natural consequences of his acts. He contended that the murder in these charges came about if not on direct orders then because the Kommandatur in the form of Rauer and Scharschmidt let their hostile views towards prisoners of war be known to their subordinates, who thereupon took action against the prisoners. He considered that the offence of incitement to murder came properly within the scope of the words, "were concerned in the killing." In Section 4 of the Offences Against the Person Act (1861), incitement was defined as to solicit, encourage, persuade, endeavour to persuade, or propose to any person to murder any other person. The Court might well think that this wording included in its

scope exactly a situation where there existed a chain of command. If the Court were not satisfied that the evidence of the activities of any of the officers was enough to show that he was an accessory before the fact, then it was submitted there was evidence on which the Court might find that the accused officers were guilty of inciting to murder.

Scharschmidt, continued the Prosecutor, could have delayed sending the prisoners until a more reliable escort became available. After the killings, untested reports were accepted by Rauer or Scharschmidt from the escorts, to the effect that the prisoners were shot while trying to escape, and were automatically forwarded to higher command. Was it not strange that the prisoners involved in the second incident were not sent out by Rauer to mend the runways till midnight, whereas the work had been begun at 8 o'clock, and that Rauer claimed not to know that his action was wrong? Rauer ought to have anticipated further trouble in view of the deaths on the 22nd.

Summing up on a submission on behalf of Rauer of no case to answer, the Judge Advocate said: "In my view the charge does not envisage anything in the nature of negligence. The words: 'When concerned in the killing', to my mind, are a complete and direct allegation that Rauer was either instigating murder or condoning it. In my view that is the real basis of the charge which is before you, and I do not propose to embark upon any questions as to whether Rauer was negligent either at the time or afterwards in not making a proper investigation."

The Judge Advocate in his final summing up, dealing with the first charge, said that there seemed no direct evidence that Karl Rauer or Scharschmidt deliberately gave orders to Amberger and his companions to shoot the captives. Neither did he see any direct evidence upon which the Court could properly arrive at a finding that, though they were not giving direct orders they were passing on to these N.C.O.s the impression that the killing was what they wanted to happen, and that if the latter killed the prisoners nothing would be said about it and they would not be punished. He reminded the Court, however, that the Prosecution maintained that none of the killings alleged in the three charges could have occurred on the aerodrome without the connivance, without the direction and without the complicity of the Commanding Officer and the Adjutant of the station, and that as a corollary to the reliance which was placed on superior orders in trials of German war criminals the Prosecution was claiming that no German N.C.O.s would dare to take prisoners' lives unless they were satisfied that they had been told that such action would be approved by the Commanding Officer.

The Judge Advocate felt that the Court would be prepared to say without question that it was probably a sound view to take, in regard to the German Army, that the persons who did the killings did not commit these crimes without having some orders from their superiors, but the question was who did give these orders, who were the superiors involved? Apart from Rauer and Scharschmidt, Bottcher and Bopf were also officers. The finding of the Court was that all four officers were guilty of being concerned in the killing of the prisoners on the aerodrome and of the wounded prisoner.

The decision of the Court to find Rauer and Scharschmidt not guilty of the first charge, concerning the shootings on the way to the station, may have been influenced by the consideration, which was pointed out in the trial, that it was less reasonable for these officers to believe after the second incident that the prisoners involved were shot while trying to escape than it was after the first, and that measures should have been taken after the first shootings to prevent a repetition.