

CASE No. 26.

TRIAL OF
SERGEANT-MAJOR SHIGERU OHASHI AND SIX OTHERS

AUSTRALIAN MILITARY COURT, RABAUL
20TH-23RD MARCH, 1946

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

Sergeant-Majors Shigeru Ohashi and Yoshifumi Komoda, together with five other members of the Japanese Military Police, were accused of murdering a number of named victims, who were described in the charge as one half-caste and seventeen natives, on 18th September, 1944.

The accused pleaded not guilty.

2. THE EVIDENCE

The evidence showed that during September, 1944, the eighteen victims, who were civilian inhabitants of New Britain then in the occupation of Japan, were beheaded at Vunarima after a summary trial for acts of sabotage and other acts hostile to the Japanese Army and defined as war crimes in their military code. The accused claimed that all the deceased were guilty of a conspiracy against the armed forces of Japan in pursuance of which individual conspirators concealed weapons, stole grenades and rations, blew up a petrol dump and attacked, on one occasion, a Japanese soldier, and on another a Japanese civilian. These allegations were not denied.

Defence evidence, which was unrebutted, showed that the native victims had pleaded guilty to the charges against them after these had been read out to them. All accused were in court at once and were allowed to make their explanations. Two prosecution witnesses were produced to give evidence against them, and the proceedings were interpreted either by the interpreter or by Komoda. On the other hand, the evidence of the two witnesses was said to have occupied only about four minutes in all, the Court conferred for about ten minutes on the verdict, and ten minutes on the sentence, and the trial as a whole lasted only about fifty minutes. No defending officer was provided for the victims; according to Ohashi's evidence this was "in view of the time element," and the half-caste addressed the Court on behalf of all the accused. The executions began about an hour after the termination of the trial.

General Imamura, Commander-in-Chief of the Japanese Eighth Army Group, who commanded the Rabaul area at the relevant time, said that he declared Vunarima an emergency area in April, 1944, that where inhabitants of an occupied territory were charged with war treason or war rebellion they were under normal conditions sent for trial by court martial, but that "under pressing circumstances unit commanders would have the authority which had been provided by the Emperor to carry it out on their own for the protection of the army."

Later he referred to summary trials in the field, and to the wide discretion accorded to unit commanders not only as to the convening and constitution of the courts but also as to the penalty meted out. He further testified that confirmation of sentence would normally be required and that confirmation by the Provost Marshal should have been sufficient in the circumstances of the case.

In short, General Imamura's evidence was that the Japanese government had directed a summary trial in the field for war criminals under certain operational conditions, and that those conditions existed at Vunarima in September, 1944.

The Provost Marshal, Colonel Kikuchi, stated that he confirmed the finding of the Japanese Tribunal and authorized the execution and that he believed the trial to be a fair and just one.

The evidence of General Imamura and Colonel Kikuchi that in case of emergency a summary trial could be convened instead of a court martial for trial of war crimes as defined by Japanese law was supported by documentary evidence. It was claimed by the Defence witnesses that the emergency justifying such a summary trial was a threatened attack by other natives to rescue the deceased who were then held in custody for investigation of their alleged war crimes against the Japanese, that Lt. Yamada, who was not among the accused, decided to hold the summary trial, that the proper procedure was observed by the Court and that the sentences were confirmed by superior authority before being carried into execution.

The accused Ohashi and Komoda, with their superior officer Lt. Yamada, were members of the summary court which convicted the deceased. Ohashi and Komoda also took part in the execution.

A third accused acted as interpreter during the trial and also took part in the execution.

Four other accused were shown to have taken part in carrying out the orders for the execution of the victims, but not to have been present at their trial or to have had any knowledge of the nature of those proceedings.

3. THE FINDINGS AND SENTENCES

Ohashi and Komoda were found guilty and sentenced to life imprisonment. The other accused were found not guilty.

The two life sentences were commuted to sentences of imprisonment for two years by the Confirming Officer.

B. NOTES ON THE CASE

1. THE JURISDICTION OF THE AUSTRALIAN MILITARY COURT

During his summing up, the Judge Advocate serving with the Australian Military Court which tried the case pointed out that: "The charge is one covered by the War Crimes Act 1945 and the jurisdiction of the Court has

been established by the unchallenged evidence of the residence of the natives and the events occurring in an Australian Territory.”

The legal basis, jurisdiction, composition and procedure of the Australian Military Courts for the trial of war criminals are further examined in the Annex to this Volume.⁽¹⁾

2. THE LAW BINDING ON THE COURT

During his summing up, the Judge Advocate set out as follows the rules which the Court was to observe :

“ 1. The War Crimes Act, the Hague Conventions and the judgments of superior British and Australian courts are binding on you.

“ 2. Text books by learned jurist such as Oppenheim, and the Manual of Military Law in its explanatory passages are strongly persuasive and should be followed by this Court unless it is well satisfied to the contrary.

“ 3. You will use in your deliberations your common knowledge and your military knowledge but no other peculiar or expert knowledge any of you may possess. . . .”

The explanatory passages of the Australian *Manual of Military Law* were classified by the Judge Advocate as constituting a “ strongly persuasive ” authority. In so far as it describes the state of international law and does not simply reproduce the text of the Hague and Geneva Conventions, this *Manual* like the British *Manual of Military Law* and the United States Basic Field Manual F.M. 27-10 (*Rules of Land Warfare*), though not a source of law like a statute, prerogative order or decision of a court, is a very authoritative publication.⁽²⁾

3. THE STATUS OF THE VICTIMS

The Judge Advocate advised the Court that :

“ By the Laws and Usages of War inhabitants of occupied territories have not only certain rights but owe certain duties to the occupant, who may punish any violation of those duties.

“ Certain acts if committed by such inhabitants are punishable by the enemy as war crimes.

“ Amongst such acts are :

(a) Illegitimate hostilities in arms committed by individuals who are not members of the armed forces.

(b) Espionage and war treason.

“ The deceased would, being civilian inhabitants of an occupied territory, be guilty of the war crime known as War Rebellion if they rose in arms against the occupant.

⁽¹⁾ See p. 94.

⁽²⁾ See Vol. I of this series, pp. 19 and 32.

“ War treason includes such acts by private individuals as damage to war material or conspiracy against the armed forces or against members of them.”

After stating that the allegations of the accused that the deceased had been guilty of acts of hostility against the Japanese armed forces had not been rebutted and were entitled to be believed, the Judge Advocate continued :

“ Their actions rendered the deceased liable to punishment as war criminals.

“ Charges of war crimes may be dealt with by military courts or such courts as the belligerent concerned may direct.

“ In every case there must be a trial before punishment and the utmost care must be taken to confine the punishment to the actual offender.

“ All war crimes are liable to be punished by death.

“ So far as I have been able to ascertain . . . there is no provision in International Law relating to the composition of such courts or the procedure to be followed at the trials.

“ The type of trial to which the deceased were entitled was therefore subject to certain fundamental principles of justice, that were directed by Japan.”

The advice of the Judge Advocate regarding the rights of the deceased⁽¹⁾ and the decision of the Military Court must therefore be regarded as authorities more particularly on the rights under International Law of alleged war criminals.

Among the acts defined as war crimes in Oppenheim-Lauterpacht *International Law*, Vol. II, Sixth Edition revised, are the following : “ (2) All hostilities in arms committed by individuals who are not members of the enemy armed forces, (3) espionage and war treason.”⁽²⁾

It is later stated that : “ 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 organize themselves in a manner which, according to the Hague Convention, confers upon them the status of members of regular forces. Espionage and war treason . . . bear a two-fold character. International Law gives a right to belligerent to use them. On the other hand, it gives a right to belligerents to consider them, when committed by enemy soldiers or enemy private individuals within their lines, as acts of illegitimate warfare, and consequently punishable as war crimes. . . .

⁽¹⁾ See pp. 30-1.

⁽²⁾ See p. 451 of the work cited.

“ War treason consists of all such acts (except hostilities in arms on the part of the civilian population, spreading of seditious propaganda by aircraft, and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. War treason may be committed, not only in occupied enemy country, or in the zone of military operations, but anywhere within the lines of a belligerent.”⁽¹⁾

The provisions of the Hague Convention which define the limits of the category of persons which “ enjoy the privileges of armed forces ” (to use the same phrase as the authority just quoted) are those contained in Chapter I (The Status of Belligerent) :

“ Art. 1. The laws, rights, and duties of war apply not only to army, but also to militia and volunteer corps fulfilling all the following conditions :

- (1) They must be commanded by a person responsible for his subordinates ;
- (2) They must have a fixed distinctive sign recognizable at a distance ;
- (3) They must carry arms openly ; and
- (4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “ army ”.

“ Art. 2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war.

“ Art. 3. The armed forces of the belligerents may consist of combatants and non-combatants. In the case of capture by the enemy, both have the right to be treated as prisoners of war.”⁽²⁾

(1) *Loc. cit.*, p. 454. In an interesting footnote it is stated that : “ The following are the chief cases of war treason that may occur : (1) Information of any kind given to the enemy ; (2) Voluntary supply of money, provisions, ammunition, horses, clothing, and the like, to the enemy ; (3) Any voluntary assistance to military operations of the enemy, be it by serving as guide in the country, by opening the door of a defended habitation, by repairing a destroyed bridge, or otherwise ; (4) Attempting to induce soldiers to desert, to surrender, to serve as spies, and the like ; negotiating desertion, surrender, and espionage offered by soldiers ; (5) Attempting to bribe soldiers or officials in the interest of the enemy, and negotiating such bribe ; (6) Liberation of enemy prisoners of war. (As to the execution, during the first World War, of Miss Cavell, who was nursing in Brussels, on a charge of having assisted allied soldiers to escape, see Garner, ii, ss. 382-386) ; (7) Conspiracy against the armed forces, or against individual officers and members of them ; (8) Wrecking of military trains, destruction of the lines of communication or of telegraphs or telephones in the interest of the enemy, and destruction of any war material for the same purpose ; (9) Intentional false guidance of troops by a hired guide, or by one who offered his services voluntarily ; (10) Rendering courier, or similar, services to the enemy.”

(2) As to the legal position of inhabitants of occupied territory who take up arms against the enemy, see also pp. 37 and 51 of this volume, and also pp. 21-22 of Vol. III.

Elsewhere it is said that : “ War treason is a comprehensive term for a number of acts hostile to the belligerent within whose lines they are committed ; it must be distinguished from real treason, which can only be committed by persons owing allegiance, albeit temporary, to the injured State. War treason can be committed by a soldier or an ordinary subject of a belligerent, but it can also be committed by an inhabitant of occupied enemy territory, or even by a subject of a neutral State temporarily staying there, and it can take place after an arrangement. In any case, a belligerent making use of war treason acts lawfully, although the Hague Regulations do not mention the matter at all.”⁽¹⁾

Of espionage the same authority writes, *inter alia*, that : “ No regard is paid to the status, rank, position, or motive of a spy. He may be a soldier or a civilian, an officer or a private. He may be following instructions of superiors, or acting on his own initiative from patriotic motives.”⁽²⁾

4. DENIAL OF A FAIR TRIAL

The Judge Advocate further advised the Court that the accused would be entitled to an acquittal if it had been proved that “ the deceased had a fair and reasonable trial, that such trial was of the kind directed by Japan and that the accused were authorized to take part in such trial and execution.” It was “ for the belligerent to decide the form of trial subject to certain fundamental principles of justice.”

The Judge Advocate continued :

“ I consider these principles to be :

- “ (a) Consideration by a tribunal comprised of one or more men who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived belief in the guilt of accused or any prejudice against him.
- “ (b) The accused should know the exact nature of the charge preferred against him.
- “ (c) The accused should know what is alleged against him by way of evidence.
- “ (d) He should have full opportunity to give his own version of the case and produce evidence to support it.
- “ (e) The court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty.
- “ (f) The punishment should not be one which outrages the sentiments of humanity.

⁽¹⁾ Oppenheim-Lauterpacht, *loc. cit.*, pp. 331-332.

⁽²⁾ *Loc. cit.*, p. 331. And see also p. 56 of this volume.

“ Unless provision is made for observance of all of these principles I do not consider any other form of proceedings which a belligerent might direct would in law really amount to a trial.”

The Judge Advocate later added : “ Furthermore you should give close attention to the question of good faith in the accused as regards holding the proceedings at all as that has a direct bearing on deciding what was their attitude during the proceedings, keeping in mind of course their relationship towards Lt. Yamada. . . . You will consider whether at such proceedings the deceased did in fact plead guilty and the effect such a plea would have on the minds of the tribunal in arriving at a verdict and sentence.”

He also pointed out that the executioners would be entitled to the defence of justifiable homicide if it had been shown that each was a “ proper officer executing a criminal in conformity with his sentence.”

The Court found not guilty those accused who had taken part in the execution of the victims but had not acted as their judges, including the accused who had acted as interpreter. Those found guilty were the two accused who had acted as judges at a trial which, according to the evidence of the Defence themselves, lacked any representation of the accused by Counsel and occupied only about 50 minutes and was followed rapidly by execution of sentence, in which those found guilty by the Australian Military Court participated. It will be noted, however, that the accused were allowed to address the court and pleaded guilty, that the proceedings were interpreted, and, finally, that the sentence passed by the Australian Military Court, as commuted, was a relatively light one.

5. SUPERIOR ORDERS

The Judge Advocate stated that the Court should consider, *inter alia*, the question whether the proceedings against the deceased were “ conducted in accordance with the directions given by Japan.” He later added : “ You should bear in mind that the accused were soldiers, consider what orders were given them, and their duty to obey, also the limited protection afforded subordinates by superior orders as explained in the *Manual of Military Law*, Australian Edition, page 288, para. 443, as amended which I will read out to you.”

It seems therefore that the Judge Advocate was willing to concede that the plea of superior orders would afford some limited protection if the acts of the accused were actually conducted as laid down by those orders. The passage from the Australian *Manual of Military Law* to which the Judge Advocate referred is in the same terms as the passage from paragraph 443 of the British *Manual*, which has already been quoted.⁽¹⁾

⁽¹⁾ See p. 14.