CASE No. 27.

TRIAL OF
CAPTAIN EITARO SHINOHARA AND TWO OTHERS

AUSTRALIAN MILITARY COURT, RABAUL
30TH MARCH—1ST APRIL, 1946

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

The accused, Captains Eitaro Shinohara, Toyoji Nemeto and Takeyasu Shoji were charged with " violation of the Laws and Usages of War in that they in May, 1945, when members of a Military Court convened to try two natives of Kanbanguru failed to ensure that such natives were afforded a fair and proper trial."

The accused pleaded not guilty.

2. THE EVIDENCE

The village of Kanbanguru, which was under Japanese occupation, had failed to supply to the Japanese its quota of *sac sac* in April, 1945, and Sgt. Kenji Arai of the Japanese Military Police, who was in charge of the area sent inhabitants of the district to contact the villagers who had gone into hiding. The latter proved hostile and Arai reported accordingly to Captain Shinohara, who sent him five or six Japanese and instructed him to find out where the natives had gone. Two patrols were sent out and were also met with a hostile reception. Captain Shinohara then ordered Arai to bring the villagers into Branba, which he did without serious casualties, although there was some evidence that bows, arrows and spears were used by the villagers. Sgt. Arai interrogated the captives and reported that five native inhabitants were responsible for the resistance to the Japanese. Captain Shinohara then came to Banba and question the five, two of whom he considered principal offenders. He returned to Moim, and three days later again came to Branba with Captain Nemoto and Captain Shoji. These three officers interrogated the two native inhabitants selected by Captain Shinohara as the leaders.

The three officers then returned to Moim and a written order was received by Arai a few days later to execute the two villagers.

According to a statement by Sgt. Arai which was put in as evidence at the Australian trial, the two had been found guilty under Japanese military law of :

(i) Opposition to the Japanese Army.

(ii) Trying to influence other natives to oppose the Japanese Army.

Arai also claimed that several prosecution witnesses were heard and the natives accused admitted their guilt. The proceedings including the charges were interpreted and the examination of each accused lasted about one and a half hours. The trial was not public.

A statement by the accused, Captain Eitaro Shinohara, which was put in as evidence, stated, *inter alia*, that, after conducting an investigation at Branha, he reported to Headquarters 51 Div. Inf. Gp. that the two natives were guilty of rebellion. Captain Shoji arrived from headquarters with a convening order for a court martial at Branba naming Shinohara as President and Captain Shoji and Captain Nemoto as members. Shinohara showed the reports made by Arai and himself to Shoji and Nemoto. A court was then held ; Papaku and Maran were called in separately and were questioned by Nemoto and Shoji. The accused Shinohara's statement went on to say that, while the accused and Sgt. Arai remained in the room the three judges looked up the Rules for Court Martial Procedure and agreed that the accused were guilty, under Rule 25 thereof, of rebellion " by carrying weapons, resisting the Japanese and inciting others to take hostile actions against the Japanese." The death penalty was provided as the only penalty for the leaders of a rebellion. Major-General Kawakubo confirmed the sentence of death.

Shinohara stated that, because of his previous investigations, he knew before the trial started that the accused were both guilty, and he did not question them.

A statement by the accused Captain Toyoji Nemoto, which was put in as evidence stated, *inter alia :*

> " When the trial opened Captain Shinohara, Captain Shoji, Sergeant Arai, the two accused and myself were present. We all remained together until sentence had been pronounced. . . . The records of Sgt. Arai's and Captain Shinohara's previous investigations were before us. Captain Shoji and I began the trial by asking the natives questions . . . The natives told us that they had led the other villagers into failure to co-operate with the Japanese. The natives said that they realized that they had done wrong in doing so. Captain Shoji and I then decided that both accused were guilty of treason under Rules of Court Martial Procedure, Clause 24 or 25. We decided they should be sentenced to death.
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> " The offence of which we considered them guilty was treason in that they took up arms against the Japanese. The offence of failure to supply *sac sac* does not carry a death penalty and we did not convict them of that offence. We told Captain Shinohara of the charges of which we thought they were guilty and the sentence we thought appropriate. He thought for a moment and then said that he agreed with us and sentenced the accused to death. . . .
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> " The accused had no defending officer or advocate. No witnesses were called at the trial, but documentary evidence of the previous investigations by Captain Shinohara and Sergeant Arai was before

the Court. The trial took about four hours. After sentence was pronounced the accused were taken away in custody. A record of the trial was sent to Major General Kawakubo who later confirmed the sentence."

A statement by the accused Captain Takeyasu Shoji included the following words :

> " I was sent by Major General Kawakubo to be recorded and observer of a trial of two natives at Branba in May, 1945. . . .
>
> " Members of the court were Captain Shinohara, Captain Nemoto and Sergeant Arai. When the Court opened the two natives were asked questions by Captain Nemoto and Captain Shinohara. I asked no questions as I had no prior knowledge of the facts. . . . The three officers and Sergeant Arai then went into a room. Captain Nemoto and Sergeant Arai conferred and then told me that the accused were guilty of treason under Clause 26 of the Rules of Court Martial Procedure and deserved the death penalty.

Shoji and Shinohara agreed with them.

Finally, Major-General Kawakubo Shizuma, in a pre-trial statement, said that he had convened the Court and had decided upon its composition. The appointment of Defending Counsel was not provided for in the relevant Japanese Army Order, and in any case no such counsel was available.

3. THE FINDINGS AND SENTENCES

The accused were found guilty and each sentenced to imprisonment for five years. These findings and sentences were not, however, confirmed.

B. NOTES ON THE CASE

In the course of his argument addressed to the Court, the Prosecutor claimed that to prove that a fair trial had been held it must be shown :

(i) that there was an impartial tribunal ;

(ii) that the accused was notified of the charge before the producing of evidence ;

(iii) that some evidence was given in Court against the accused ;

(iv) that the accused was protected against incriminating himself before the Court ;

(v) that he was given the right to call witnesses and to speak in mitigation ; and

(vi) that he was " given defending counsel or the procedure " [*sic*] and his rights were explained to him.

The Prosecutor claimed that it was irrelevant whether or not the accused had regarded the trial as a fair one.

The Defending Officer's aim, in replying, was to emphasize the evidence which had been produced and which tended to show that the first, second and third requirements set out above had been fulfilled ; he did not attempt to deny that any of these was not in fact essential to a fair trial.

There was also proof, affirmed Defending Counsel, that the accused were allowed to speak in their own defence and that an interpreter was employed at the trial.

The Defence claimed that there was no proof that the victims were not allowed Counsel, and that in any case there was " no obligation on the prosecution to employ a counsel for defence."

The Defence further stated that it was quite legal to obtain statements from persons without their knowing the purpose of such action and claimed that this practice was followed by the Australian authorities in dealing with alleged Japanese war criminals. Further, he did not consider that it was essential to a fair trial that it should be held in public, and cited the trials of spies held during war-time as indicating that secret trials are not necessarily unfair. Counsel also emphasized the legality of exacting the death penalty for war crimes.

Defence Counsel claimed on behalf of the accused the defence of military necessity and quoted paragraph 366 of Chapter XIV of the Australian *Manual of Military Law* :

> " If demanded by the exigencies of war, it is within the power of the occupant to alter or suspend any of the existing laws, or to promulgate new ones, but important changes can seldom be necessary and should be avoided as far as possible."

The Judge Advocate acting with the Australian Military Court pointed out that it was " not in issue whether or not the accused were properly appointed to constitute a court for the trial of the two natives." Further, he pointed out, it was conceded by the prosecution that there was sufficient evidence before that court to justify its finding one of the natives guilty of war rebellion provided that he was first given a fair trial.(1) The Judge Advocate also affirmed that the victims were entitled to such a trial.

The Judge Advocate referred to paragraph 449 of Chapter XIV of the Australian *Manual of Military Law* which states that : " Charges of war crimes may be dealt with by military court or by such courts as the belligerent concerned may determine. In every case, however, there must be a trial before punishment, and the utmost care must be taken to confine the punishment to the actual offender."

A footnote to this paragraph, he pointed out, emphasized that " ' Previous trial is in every case indispensable.' (Hague Conference, 1899, p. 146)."

(1) See pp. 27-30.

He went on to state that international law did not appear to lay down any fixed form of procedure for Military Courts trying civilian inhabitants of occupied territories. That appeared to him to be at the discretion of the belligerent in occupation, subject to the fundamental principles of justice being observed.

The Judge Advocate then proceeded to set out the six fundamental principles which were essential to a fair trial, in the same words as those used by him in the trial of Shigeru Ohashi and Six Others.(1)

It will be noted that the victims of the offence proved in the case just reported were not furnished with the services of a Defence Counsel, or, apparently, any other aid in presenting their defence, and that Shinohara, the President of the Court, confessed to having been convinced of the guilt of the captives even before the opening of the trial. Further, the charge sheet was interpreted in Pidgin English and not in a language native to the accused ; (2) the same seems to have been true of the interpretation of the rest of the proceedings. On the other hand, some documentary evidence was produced (whether Prosecution witnesses were also called is uncertain), the accused confessed to having done wrong, and there was evidence of both having been interrogated for some time by the Court before sentence of death was passed. The three judges who imposed this sentence were held guilty of failing to insure a fair and proper trial, but the Australian Military Court which tried them decided that imprisonment for five years would be a sufficient penalty, and the confirming authority refused confirmation of the finding and sentences. This case provides an interesting illustration of the limits beyond which liability arising out of the denial of a fair trial will not extend.

(1) See pp. 30-1.

(2) Sergeant Arai was asked by the Australian Court to repeat in pidgin the charge against the two villagers. The result could not be said to convey with any accuracy the offence charged : " No. 1 Capt. belong Kumbumburu Name belong him Popaku. Boss boy belong Kambamburu. Name belong him Maran. You two fello you make him trouble along Japan soldier. Dis peela trouble now make court."