CASE No. 50

TRIAL OF ALOIS AND ANNA BOMMER AND THEIR DAUGHTERS

PERMANENT MILITARY TRIBUNAL AT METZ
JUDGMENT DELIVERED ON 19TH FEBRUARY, 1947

Theft and receiving stolen goods as war crimes—Civilians as war criminals—Responsibility of minors

A. OUTLINE OF THE PROCEEDINGS

The accused were a German family of five members, Alois and Anna Bommer and their three unmarried daughters, Elfriede, Maria and Hilde. They were charged with theft of, and receiving, stolen goods belonging to French citizens.

The accused pleaded not guilty. Alois and his wife declared that they had had an inventory made of the property and that they had purchased the furniture and the other objects concerned from the German custodian in charge of the deported Lorrainer's farm. They were, however, unable to prove the point by producing the inventory and the receipt; neither was such evidence found at Maxe. Alois and his wife were prosecuted and convicted for both theft and receiving stolen goods. They were sentenced to 18 months imprisonment each. Two daughters, Maria and Hilde, were prosecuted and convicted on the second Count only, and were sentenced to four months' imprisonment each. The third daughter, Elfriede, who was less than 16 years of age at the time of the offences, was acquitted of the charge of receiving stolen goods on the ground of having "acted without judgment" (sans discernement) on account of her age.

B. NOTES ON THE CASE

1. THE NATURE OF THE OFFENCES

The main point of interest in regard to the offences tried is that acts representing theft and receiving stolen goods under French municipal law were treated by the Court as amounting at the same time to war crimes.

The relevant provisions under which the two principal accused, Alois and Anna Bommer, were convicted, were Article 401 of the Penal Code relating to theft, and Article 460 of the same Code relating to receiving stolen goods.

Article 401 concerns any theft, as defined in Article 379 of the Penal Code, which does not fall within any of the specific cases provided in Articles 380–400 of the Code, such as theft at night or with violence. Theft is

defined in Article 379 as " fraudulent removal " (soustraction frauduleuse) of someone else's goods and, when not committed in the circumstances covered by Articles 380–400, is punishable with imprisonment of from 1–5 years and/or with a fine of from 200–6,000 francs.

Receiving stolen goods is defined in Article 460 as " knowingly receiving things taken, misappropriated or obtained by means of a crime or delict", and is punishable with the same penalties as theft under Article 401.

When passing sentence under these provisions, the Court also made reference to the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes. According to Article 2, paragraph 8 of this Ordinance, " the removal or export by any means from French territory of goods of any nature, including moveable property and money " is likened to pillage as provided in Article 221 *et seq* of the French Code of Military Justice. The latter deals with pillage by military personnel and, like Article 440 of the Penal Code covering pillage by any person, its definition of the offence is based on the element of the use of violence in taking away property. The description of violence in the Penal Code is couched in general terms and defined as " open force " (force ouverte), whereas in the Code of Military Justice it is elaborated in more detail and linked with and, at the same time, restricted to deeds of military personnel. The requisite element of violence consists either in the use of " arms or open force ", or in the " breaking of doors or external enclosures ", or in " violence against persons " by military personnel.

In the case of Alois and Anna Bommer there was no use of violence whatever, but, by virtue of the foregoing provision of the Ordinance of 28th August, 1944, the mere fact of their having removed French property from France to Germany was sufficient to fall within the notion of pillage as extended by the said Ordinance. It should be emphasised that, while likening such removal to pillage, the Ordinance did not restrict its definition to military personnel, but made it applicable to any perpetrator of the offence, including civilians.

In the judgment of the French Court, however, stress was laid on provisions of the Penal Code. It would appear that in face of the extension of the concept of pillage as effected by the above-mentioned Ordinance, there was, strictly speaking, no need for the Court to apply the general provisions of the Penal Code in addition to those of the Ordinance, specifically prescribed for war crimes. This was done apparently because of the deeply-rooted tradition of the French courts that they deal with war crimes on the basis of common penal law.

Another feature of the trial in respect of the offences committed, is that both Alois and Anna Bommer were convicted of having received stolen goods in addition to having committed theft. It is not clear why the Court proceeded on this Count, as the objects concerned were included in the property for which both had been found guilty as thieves. That is to say they were found guilty of receiving the same horses, furniture and linen as they themselves had stolen, with the exception of the silverware, jewellery and money. Neither is the reason for this distinction apparent from the judgment. It may have been that the evidence could not show

which of the various objects had been stolen by each of the two spouses, or that they had stolen *every* object as joint perpetrators or accomplices, in which case serious doubt remained that for some goods each of the two was guilty as a thief, and that both were thus mutually recipients of the goods stolen by the other.

Be this as it may, the main point in their trial is that relating to theft as a war crime, technically distinct from pillage but likened to it and emerging as one of its varieties in the laws and customs of war as understood by one nation. According to Article 47 of the Hague Regulations of 1907 " pillage is expressly forbidden ". Violations of this rule, at any rate since the findings of the 1919 Commission on Responsibilities, have been regarded as war crimes entailing procedure and punishment devised for war criminals. They are included in the list of war crimes drawn up by the Commission, under item XIII. The French law and jurisprudence are now evidence that to pillage in the traditional sense, that is as misappropriation committed with the use of violence, is added ordinary theft or " fraudulent removal " of property, where there is, or need be, no violence. It would appear that, in a sense, there is no extension of the hitherto recognised laws and customs of war. The latter, as contained particularly in the Hague Regulations of 1907, are not limited to the violations defined therein, and are therefore not restricted to pillage in the technical sense. Express reference to this was made in the preamble to the IVth Hague Convention, which includes the said Regulations, in the following terms:

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilised peoples, from the laws of humanity, and from the dictates of the public conscience."

It has not been disputed that the " principles of the laws of nations derived from the usages established among civilised peoples " include general principles of penal law, and there is no doubt that according to these principles theft committed in war-time conditions may be a war crime in the same manner as pillage.

The case against the daughters of the Bommer couple is an illustration of how receiving stolen goods may, under the same principles, equally constitute a war crime. In their case there was no evidence that they were accomplices to the theft committed by their parents, but it was shown that they accepted and kept for their own use some of the stolen goods knowing them to be stolen. This was a clear case of receiving stolen property, so that their being held penally responsible for it as a war crime in the circumstances of the theft was legally justifiable.

It would thus appear that, with regard to the state of the laws and customs of war as authoritatively described in the preamble of the IVth Hague Convention, the findings of the Court concerning theft and receiving stolen goods as war crimes were no legal innovation. They should rather be regarded as a recognition of the principle already admitted that the field of

war crimes is not limited to violations enumerated in the Hague Conventions, or in the itemised list of war crimes of the 1919 Commission on Responsibilities, or in any other existing document relating to the laws and customs of war. This has been expressly recognised in the most recent instruments of international law. Thus, the Nuremberg Charter defines war crimes as violations including but not limited to the offences which are enumerated in its relevant provision.(1)

Theft and receiving stolen goods have emerged as war crimes in many other trials held by French courts, which have thus created a firm jurisprudence on the subject. The following can serve as further illustrations:

In the case against August Bauer, a German gendarme, the accused was convicted for stealing a sewing machine and other objects, which he took to Germany during the retreat from France. He was also convicted for removing and using furniture, which his predecessor in the gendarmerie post had stolen from a French inhabitant and which the accused knew belonged to this Frenchman. The conviction on this latter case was for receiving stolen goods.(2)

In another case the accused, Willi Buch, a paymaster (Oberzahlmeister) during the occupation of France, was convicted of receiving stolen goods through purchase. The German Kommandantur at Saint-Die had siezed silverware which a French doctor had left behind in crates before leaving the locality. The goods were sold at an auction by the Kommandantur and part of it bought by the accused.(3)

In a case similar to that of the Bommers, a German couple named Benz had come during the war to settle in Metz. When going back to Germany at the end of the war they took with them various moveable properties belonging to French inhabitants, including that of the owner of the flat they occupied in Metz. The husband was convicted for theft and the wife for receiving stolen goods.(4)

Finally, in the trial of Elisabeth Neber,(5) another German settler in France (Lorraine), the accused was found guilty of receiving crockery stolen by her nephew from a French woman, which she took with her when returning to Germany towards the end of the war.

In all these trials conviction was imposed on the basis of the Penal Code and the Ordinance of 28th August, 1944.

2. CIVILIANS AS WAR CRIMINALS

The trial of the Bommer family is a confirmation of the principle that laws

(1) See Article 6(*b*) of the Nuremberg Charter.
(2) Judgment of the Permanent Military Tribunal at Metz, 10th June, 1947.
(3) Judgment of the Permanent Military Tribunal at Metz, 2nd December, 1947.
(4) Judgment of the Permanent Military Tribunal at Metz, 4th November, 1947.
(5) Judgment of the Permanent Military Tribunal at Metz, 6th April, 1948.

and customs of war are applicable not only to military personnel, combatant or acting as members of occupying authorities, or, generally speaking, to organs of the State and other public authorities, but also to any civilian who violates these laws and customs. As German settlers in occupied France the Bommers were under the obligation to respect the rights of inhabitants of the occupied territory, and by violating this obligation they had committed breaches punishable under rules of international law respecting the protection of the population placed under the authority of their own State as a consequence of war.

3. RESPONSIBILITY OF MINORS

Of the Bommer daughters, two were over 16 and under 18, and one, Elfriede, was under 16 at the time of the offence. Sentences in their respect were passed according to Articles 66 and 67 of the French Penal Code. These provide that, in the case of minors above 13 and under 18 the court has a choice between a reprimand or committal of the accused's person to his parent's care(1) and a penal conviction, having regard to the circumstances and the accused's personality. In the latter case, if the accused is under 16, the fact of being a minor is considered in itself as an extenuating circumstance and the punishment provided by the Code for the offence tried is reduced to a considerable extent. Capital punishment and hard labour are excluded and the only penalty is imprisonment, the maximum duration of which can in no case exceed 20 years. In the case of a minor above 16 and under 18, the court is at liberty to disregard minority as an extenuating circumstance, and penalties are then governed by the general provisions of the Penal Code. These also contain a rule concerning extenuating circumstances (Article 463) which are applicable to adults and which permit, in the case of unqualified or ordinary theft and of receiving stolen goods, a reduction of penalty to as little as one day's imprisonment.(2)

It is under Articles 66 and 67 of the Penal Code that the two daughters between the age of 16 and 18 were condemned to four months' imprisonment each. In both cases the Court passed sentence while admitting that there were extenuating circumstances. As to the third daughter under 16, the Court used its discretionary power to free her from responsibility on account of her age. It directed that she be given to her parents' care.

All three minors were prosecuted and tried as war criminals, and the two convicted were condemned on the same ground.(3)

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(1) Other alternatives, where there are no parents or the latter are not suitable, are committal to the minor's guardian or to an educational institution.

(2) Article 463 in conjunction with Article 40 of the Penal Code.

(3) In the Belsen Trial, which was conducted by a British Military Court, several of the accused were under age at the time of the offence, and were all convicted to various penalties. Such was, for instance, the case with accused Irma Grese, Heinrich Schrierer and Ilse Forster. See Vol. II of this series.