

CASE No. 79

TRIAL OF SHIGEKI MOTOMURA AND 15 OTHERS

NETHERLANDS TEMPORARY COURT-MARTIAL AT MACASSAR

(JUDGMENT DELIVERED 18TH JULY, 1947)

Responsibility of Criminal Groups—Unlawful Mass Arrests—Systematic Terrorism.

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED

The defendants were members of the Tokkeитай, Special Japanese naval police, in Macassar, Netherlands East Indies, during the time of the Japanese occupation.

The first defendant, Shigeki Motomura, was, from November, 1943, until August, 1945, second-in-command of the Tokkeитай and held the rank of Sub-Lieutenant of the Japanese Navy. He was in charge of the Tokkeитай in South-West Celebes. The other 15 accused were non-commissioned officers and other ranks of the Japanese Navy, and also served in the Tokkeитай at Macassar, in various capacities. Their names are as follows: Chobei Sakai, Warrant officer; Toshimitsu Tomita, Petty-officer; Tooru Minami, Warrant officer; Shigeo Manabe, Warrant officer; Susumu Nakashima, Chief Petty-officer; Toshio Ono, Warrant officer; Toshihiro Shiba, Warrant officer; Tokyo Eguchi, Warrant officer; Isamu Shimitzu, Petty-officer; Tametsu Masuda, Chief Petty-officer; Masashige Oku, Chief Petty-officer; Shoichi Terayama, Chief Petty-officer; Noboru Doi, Interpreter; Fusso Nakata, Able seaman 1st class, chauffeur; Shigeichi Seno, Chief Petty-officer.

2. THE CHARGES

The defendants were prosecuted and tried as members of a criminal group which had committed offences as a single unit. The offences charged were unlawful mass arrests and systematic terrorism consisting in torture and ill-treatment of subjects of the Netherlands East Indies.

The relevant passage from the prosecutor's indictment reads as follows:

"In the period from March, 1942, to August, 1945, therefore in time of war, the Special Japanese Police Organisation in Macassar, called the Tokkeитай, of which the accused, subjects of the enemy power Japan, formed part as second-in-command and members respectively, the Tokkeитай being therefore a group in the sense of Art. 10 of the Statute Book 1946 No. 45, committed war crimes within the framework of its activities, the said unit having by means of its members, contrary to the laws and customs of war, carried out unlawful mass arrests and/or exercised systematic terrorism against persons suspected by the Japanese of punishable acts and, therefore, for that or other reasons, arrested, this systematic terrorism taking the form of repeated, regular and lengthy torture and/or ill-treatment, the seizing of men and women on the

grounds of wild rumours, repeatedly striking them with the hand and with sticks during their interrogation, kicking them with the shod foot, hanging them up by the arm or leg, burning them with glowing cigarettes and bicycle bells, wrenching their knee-joints apart, stripping women and exposing them in this condition to the public view, withholding food from arrestees, compelling them to put their thumb print on blank sheets of paper, or one or more of the aforesaid acts, or else ordered, encouraged or allowed them to be committed knowing that one or more of the said acts were being committed by those under them, the aforesaid acts having led or at least contributed to the death, severe physical and mental suffering of many and the condemning to death or imprisonment of several innocent persons."

The first defendant, Motomura, was held responsible on account of his position of commanding officer and was prosecuted for having "ordered, encouraged or allowed" the commission of some of the above crimes. So was the second accused, Sakai, who was the senior petty officer of the Tokkeitai and the first accused's deputy. Both were also charged with committing certain crimes personally. The other accused were prosecuted as perpetrators, some of them also as instigators of one or more of the crimes charged.

The prosecution asked the court to find the accused guilty of "carrying out unlawful mass arrests" and of "systematic terrorism" and requested penalties ranging from 1 year's imprisonment to the death penalty.

3. FACTS AND EVIDENCE

The particulars and evidence submitted by the prosecution were, after investigation before the court, admitted as establishing the cases against every defendant.

It was established that Motomura had ordered, encouraged or allowed the arrest, among others, of a large group of local inhabitants in November, 1944, and of two other large groups in January, 1945. It was also established that, in January, 1945, he had "seriously ill-treated" 3 American airmen, and had "ordered that all food be withheld for four days" from another prisoner.

His assistant, Sakai, was found to have taken part in the above crimes as an accomplice in "ordering, encouraging or allowing" their commission. It was also shown that in March and July, 1943, he seriously ill-treated several prisoners. For the other accused, it was shown that they all, at one time or another, seriously ill-treated persons detailed by the Tokkeitai. The defendant Minami was, in addition, found to have acted as head of a detachment of the Tokkeitai in a particular area, and to have, as such, also ordered, encouraged or allowed some of his subordinates to commit crimes. In addition, he raped a Dutch woman. Another accused, Ono, also headed a detachment and gave orders. The defendant Masuda repeatedly raped and ill-treated the same Dutch woman as Minami.

4. DEFENCE OF THE ACCUSED

The chief defendant, Motomura, made a partial admission of guilt. He considered himself responsible for the deeds of his subordinates and also

for those of his deputy, the second accused, Sakai. He denied, however, responsibility for acts of his subordinates in those places to which they were detached. He explained that, according to regulations, a confession had to be secured before a case could be sent to a Japanese court-martial. During his time of office there never were denials, but all confessed of their own accord. He himself had never seen a beating being done by his subordinates, but believed that this took place. His duty was to select investigators and once appointed, these had independent power of arrest. His deputy, Sakai, had the same duties and performed them very often in his place. The accused admitted having carried out the mass arrests in January and July, 1945, but invoked the plea of superior orders. The arrests were made upon the orders of a senior staff officer, Toyama. He pleaded not guilty to the charges of ill-treating American airmen and withholding the food of prisoners.

The second accused, Sakai, took a similar line of defence, but made admissions which contradicted essential parts of Motomura's defence. He pleaded guilty to the charge of conducting and supervising mass arrests, but limited the plea to the time when Motomura was absent. He also admitted that confessions from arrestees were extorted by ill-treatment and torture. Confessions, he claimed, had to be forced, for otherwise they would have practically never taken place and cases could not be transmitted to courts-martial. Arrestees were also tortured to this end, but he, the defendant, had strongly disapproved of it. Physical ill-treatment was never instructed from above but was entirely the inventions of those conducting the interrogations. He pleaded not guilty to the other charges, namely that he had personally ill-treated arrestees.

The other accused pleaded not guilty to all charges, denying that they perpetrated any of the crimes for which they were prosecuted.

5. FINDINGS AND SENTENCES

One of the defendants, Toshio, died during the trial and the proceedings against him were declared terminated. As a consequence no findings as to his guilt were made and sentences imposed.

Another defendant, Terayama, was found not guilty and acquitted.

All the other accused were found guilty in different degrees of the "carrying out of unlawful mass arrests" and of "systematic terrorism practiced against civilians." They were convicted to various punishments. Motomura, Sakai and 7 other defendants were sentenced to death. Two accused were sentenced to 20 years' imprisonment each, one to 15 years, one to 5 years, and the last to 1 year's imprisonment.

B. NOTES ON THE CASE

1. CRIMINAL GROUPS

As previously stressed, the defendants were tried not as individuals, but as members of a group charged as a whole with the commission of specific crimes. This circumstance was stressed by the prosecution in the part of the indictment previously quoted under heading A. 2. and was confirmed by

the court in its Judgment. The latter acknowledged that the indictment was "not concerned with the accused as individuals but as a group," and based its verdict on the finding that "with regard to the Tokkeitai taken as a group, legal and convincing evidence has been produced at the sitting that it was guilty" of the crimes charged.

Penal responsibility of groups of persons is regulated by Art. 10 of the Netherlands East Indies (N.E.I.) Statute Book Decree No. 45 of 1946, known as the "War Crimes Penal Law Decree," to which the court made reference. This Article provides the following :

" 1. If a war crime is committed within the framework of the activities of a group of persons in such a way that the crime can be ascribed to that group as a whole, the crime shall be considered to have been committed by that group and criminal proceedings taken against and sentence passed on all members of that group.

" 2. No penalty shall be imposed on him of whom it is proved that he had taken no part in the war crime."

This provision covers ground similar to that regulated by Arts. 9 and 10 of the Charter of the International Military Tribunal at Nuremberg. According to these Articles the International Military Tribunal was empowered to declare criminal any given group of which any defendants appearing before it was a member. The effect of such a declaration was that any other member of the group was liable to prosecution before other courts for the crime of "membership", and that in such trials the criminal nature of the group so declared by the International Military Tribunal was considered proved and could not be questioned. This did not, however, prejudice the issue of the personal guilt of the members prosecuted, which was made subject to rules preventing the conviction of innocent members.⁽¹⁾

The N.E.I. provisions do not deal with declarations of criminality of a group which, under the terms of the Nuremberg Charter, were to precede trials of individual members ; neither do they restrict those trials to members of groups previously declared criminal. In the case of the Nuremberg Tribunal such a method was justified for several reasons. The individual defendants tried by it belonged to comparatively few and well defined organisations, so that there was no need to allow room for the subsequent prosecution of any other group or organisation. On the other hand, the evidence produced against the individual defendants who occupied the highest positions in the groups involved, threw at the same time light upon the question of whether or not these groups were criminal. The International Military Tribunal was, therefore, in the best position to answer the question one way or the other. In view, however, of the large number of individual members implicated, running into scores of thousands of persons, the Nuremberg Tribunal could not be expected to conduct all the trials which could take place as a result of its findings in this sphere. It was instituted only for the trial of major war criminals of the European Axis, and was, therefore, to deal solely with leading Axis criminals. For all these reasons, the method of splitting the proceedings into two different parts, one con-

(1) For details of these points, see pp. 42 *et seq.* above, and also *History of the U.N.W.C.C. and the Development of the Laws of War*, London, H.M.S.O., 1948, Chapter XI, in particular pp. 303-308 and 310-313.

sisting in declaring a group criminal and the other of entrusting other courts to conduct the trial of individual members on the basis of such declarations, was both the best indicated and the most expedient.

These reasons did not exist in the case of Dutch national courts and it was therefore unnecessary for the Dutch legislation to prescribe previous declarations of criminality or to circumscribe the effect of the latter to trials of members of any particular group. In this respect the N.E.I. legislation follows the same pattern as the war crimes laws of certain other countries, such as Great Britain, Canada, Australia or the United States.⁽¹⁾ Their common feature is that any member of a group of persons may be prosecuted as soon as it is established that one or more war crimes were committed as a result of concerted action on the part of the group. Once this essential element of collective criminality is established, the law of these countries provides that the evidence concerning a crime which is produced against one member of the group, may be received as *prima facie* evidence of the guilt of all other members. This could be implied in Art. 10 of the N.E.I. Decree No. 45 of 1946, as it prescribes that whenever a crime "can be ascribed to the group as a whole," the crime "is considered to have been committed by that group," which would appear or could be interpreted so as to mean any or all of its members. In the law of some countries there is even the rule according to which in such cases the burden of proof regarding the actual guilt of any member for the specific crimes charged, is reversed and a presumption of guilt created against the accused. The consequence is that, in order to escape punishment, it is up to the defendant to prove his innocence.⁽²⁾ This issue is not clearly answered in Art. 10 of Decree No. 45. It provides that the accused of whom "it is proved that he had taken no part in the crime" shall not be punished, and thus leaves open the question as to whether this has to be derived from the evidence to be submitted by the prosecution, or has to be established by the accused himself. The N.E.I. courts are therefore in a position to apply the rule which they find to be most appropriate, at their discretion.

It should be emphasised that in spite of the rule making possible convictions on the grounds of the evidence proving the crimes committed by the group as a whole and relating to the guilt of only one or a few more members, in this trial both the prosecution and the court were eager to establish the individual guilt of every member of the Tokkeitai. This would have provided a sufficient basis for their conviction irrespective of whether they were guilty as members of a criminal group. In the implementation of the above Art. 10, it was fully shown that none of the defendants convicted as members of the Tokkeitai were innocent.

2. NATURE OF THE OFFENCES

(a) *Unlawful mass arrests*

The first count upon which the defendants were found guilty as members of the Tokkeitai, was "unlawful mass arrests." This offence is provided

⁽¹⁾ For the law of these countries, see the respective Annexes published in Vol. I of this Series, pp. 108-9, Vol. III, pp. 103-20, in particular p. 111, Vol. IV, pp. 128-129, and Vol. V, p. 100.

⁽²⁾ On the issue of the burden of proof, see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M.S.O., 1948, pp. 307-308, 312-313, 322-332; also the trials reviewed in pp. 332-343.

against in Art. 1 of the N.E.I. Statute Book Decree No. 44 of 1946, which gives a definition of war crimes as punishable by the N.E.I. courts. Its relevant passages read as follows :

“ Under war crimes are understood acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy, such as :

34. Indiscriminate mass arrests for the purpose of terrorising the population, whether described as taking of hostages or not.”

This specific offence forms part of a comprehensive list of war crimes which were enumerated in the above Article according to the list drawn up in 1919 by the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. The original 1919 list consisted of 32 offences, but in 1944 it was amplified by the United Nations War Crimes Commission. The making of mass arrests was one of the two offences added on this occasion.⁽¹⁾

It should be noted that among war crimes comprised by the 1919 list and adopted in Art. 1 of the above Decree, figures “ systematic terrorism ” which, in the above description of “ indiscriminate mass arrests ” is indirectly referred to by the words “ for the purpose of terrorising the population.” In this connection “ indiscriminate mass arrests ” appear to constitute a particular form of systematic terrorism. However, when it was added to the 1919 list by the United Nations War Crimes Commission it was thought more advisable to specify the issue under a separate denominator than to leave it to uncertain and differing jurisprudence. By adopting it within the terms of its municipal law, the N.E.I. legislator has followed the same course, although the court as will now be seen took notice of the link.

When considering the criminal nature of unlawful mass arrests the court defined it as follows :

“ Unlawful mass arrests are to be understood as arrests of groups of persons firstly on the ground of wild rumours and suppositions, and secondly without definite facts and indications being present with regard to each person which would justify his arrest.”

And it added the following :

“ The aforesaid mass arrests already contained the elements of systematic terrorism for nobody, even the most innocent, was any longer certain of his liberty, and a person once arrested, even if absolutely innocent, could no longer be sure of health and life.”

Other manifestations of systematic terrorism taken in itself were defined in connection with the second count.

(b) *Torture and Ill-treatment*

Physical ill-treatment of civilians is provided against in several items enumerated by Art. 1 of Decree No. 44. It appears as item 4 of the list

⁽¹⁾ The second offence added by the United Nations War Crimes Commission concerns “ acts violating family honour and rights, the lives of individuals, religious convictions and liberty of worship, as provided for in Art. 46 of The Hague Regulations ” of 1907. See on these additions, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M.S.O., 1948, pp. 170-172.

included in its definition of war crimes,⁽¹⁾ where it is described as "torture of civilians." It is also covered, in a wider sense, by item 9, "internment of civilians under inhuman conditions," as imprisonment may conveniently be regarded as a particular form of "internment." It is, however, specifically covered by item 35, which was added by the N.E.I. legislator himself, as "ill-treatment of interned civilians or prisoners." This covers any ill-treatment which does not constitute torture.

The court decided that the torture and ill-treatment to which the victims were subjected were only particular forms of "systematic terrorism" as covered by Art. 1 of Decree No. 44. It defined this issue in the following terms :

"Terrorism as reflected in the charge is to be considered as systematic, as the ill-treatment and tortures were not only similar as regards the various accused, but were also similar to those applied everywhere by the members of the Kempeitai,⁽²⁾ a single object being sought, namely the forcing of a confession. . . . In order to obtain this confession in the quickest and easiest manner the lines of least resistance were followed, namely . . . psychological and physical compulsion paralysing the resistance of the persons under interrogation . . . who were entirely innocent. . . ."

3. DEGREE OF GUILT OF THE ACCUSED

The court took into special consideration the degree of guilt of the chief defendant, Motomura. It admitted that, in regard to mass arrests, he acted under general instructions of his superior officers, but found at the same time that the accused was to be "considered responsible, not for carrying out the order, which as a subordinate he could not refuse to do, but for the fact that the execution of the order took the form of mass arrests . . . and that methods of interrogation such as mentioned above were used thereby." In this connection it was found that Motomura bore "the greatest measure of responsibility for everything standing to the debit of the Tokkeitai in the matter," as he "allocated the duties, gave orders for the duty tours, and detachments took place entirely according to his submission." In addition to this the defendant was found guilty as personal perpetrator of the acts of ill-treatment charged.

The Court's finding concerning the duty of the accused to follow his superiors' orders deserves special attention. It should be interpreted in context with the finding next to it, that, although "as a subordinate" the accused "could not refuse" to obey the orders, he was nevertheless guilty because, by executing them, he committed criminal offences. This finding reflects the principle governing the plea of superior orders and defining its boundaries in the legislation of most countries. According to it, no subordinate may be successful with this plea if the orders were clearly criminal in themselves.⁽³⁾ This implies that a subordinate is expected to refuse to obey orders which are of a clearly criminal nature. In Motomura's case, it seems that the above-mentioned finding concerning his duty to obey

(1) For full contents of this list see Annex to Vol. XI of this series, pp. 93-95.

(2) The Kempeitai was the Japanese Military Police Corps of which, in view of this reference, the Tokkeitai was presumably a branch.

(3) See Vol. V of these Reports, p. 14.

orders referred to general instructions to undertake police measures against suspects, which apparently did not carry with them the necessity for mass arrests and ill-treatment which actually took place under Motomura's personal command. It is probable that the Court's finding was limited to this particular situation, and did not imply a recognition of the duty to obey any orders under any circumstances.

The degree of guilt of the second accused, Sakai, was described to "follow directly" that of his superior, as he was Motomura's deputy, performed the same kind of duties and bore the same type of responsibility.

Both were convicted to death on the above-mentioned grounds.

The other accused convicted were sentenced according to the gravity of the crimes which they had respectively perpetrated, and according to the part they had taken in their mutual criminal relationship.