CASE No. 66

TRIAL OF FRANZ SCHONFELD AND NINE OTHERS

BRITISH MILITARY COURT, ESSEN,

JUNE 11TH-26TH, 1946

A. OUTLINE OF THE PROCEEDINGS

Franz Schonfeld, Albert Roesener, Karl Paul Schwanz, Karl Otto Klingbeil, Michael Rotschopf, Karl Brendle, Hans Harders, Eugen Rafflenbeul, Werner Koeny and Karl Cremer were charged with committing a war crime in that they, " at Tilburg, on the 9th July, 1944, in violation of the laws and usages of war, were concerned in the killing of " a member of the Royal Air Force, a member of the Royal Canadian Air Force and a member of the Royal Australian Air Force. All pleaded not guilty.

Harders was shown to have been in charge of an office (*Dienstselle*) of the German Security Police at 's Hertogenbosch, Holland, the purpose of which was to track down and suppress the Dutch Resistance Movement. Under his orders came one Hardegan, who was not among the accused, but who had been in charge of squads who went out to make arrests. Under Hardegan's directions came various persons including all the remaining accused.

It was shown that, on Hardegan's orders, three cars left the *Dienststelle* building on July 9th, 1944, containing between them all of the accused except Schonfeld, Klingbeil, Harders and Koeny. The cars proceeded to a house in Tilburg, 49 Diepenstraat, which was then raided by certain members of the party. During the raid, the three airmen, who were in hiding, were shot by Rotschopf. There was no evidence that the victims had been armed. Trial of Hans Renoth and Three Others. United Nations War Crimes Commission. Miss Leoni van Harssel testified that she and a fellow member of the Dutch Resistance Movement who had been known as Aunt Coba (Footnote 1) , and who had taken into hiding the three Allied flyers, had been interned by the Germans, and while in internment Aunt Coba had told the witness that on July 9th, 1944, at about 11.15 to 11.30 a.m., she went to the door of Diepenstraat 49, her home, in answer to a ring. A man entered, bearing a weapon. She followed him into the house and saw the three pilots with their hands raised, being backed through the kitchen door. She could not follow further because other Germans had entered the house, but she heard shooting. Trial of Hans Renoth and Three Others. United Nations War Crimes Commission. Mr. Nico Pulskens, whose house was opposite that of Aunt Coba, stated that on the morning of 9th July, 1944, at about 11.0 to 11.15 a.m. he had

Footnote 1: The latter had died before the opening of the trial. Evidence of her statements was admitted in Regulation 8 (i) (a) of the Royal Warrant, which provides : " (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence as statements made by or attributable to such witness."

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called on Aunt Coba and seen three English pilots. The latter were carrying no arms and were dressed in civilians clothes. Shortly afterwards he returned to his own house and heard shots and groans from the direction of Aunt Coba's house. Looking in that direction from his own house, he saw a man in a blue raincoat " threatening with a sten gun," the shooting continued until the groaning of the victims ceased. He identified Rotschopf as the man who performed the shooting.

Mrs. Pulskens stated that, looking from her upstairs window she saw a man in Aunt Coba's back yard at about 11 a.m. on 9th July, 1944, firing a series of shots at the already prostrate bodies of two Allied pilots, whom the witness had seen in Aunt Coba's house the previous day.

Another prosecution witness, Mr. Van Eerdewyke, identified Rotschopf as the man whom he had seen just after 11 a.m. on July 9th, 1944, shooting two persons in Aunt Coba's back yard. The witness had seen the events from the upper window of the next house. Rotschopf fired perhaps a hundred shots and was seen to kick the victims when they were on the ground, critically wounded. The witness claimed to have seen more than two other persons in the yard, besides Rotschopf, during this time, perhaps three others. He saw one of the bodies afterwards and it was terribly maimed.

The accused Harders claimed that he did not concern himself with the precise reason for any individual use of the cars belonging to the *Dienststelle* beyond making certain that the petrol was only being used for official purposes ;Hardegan was in charge of squads which went out to make ; arrests.

The evidence showed that Harders was not present at the scene of the offence, and there was no proof that he gave any of the accused any orders regarding their duties in the Tilburg mission.

Rotschopf claimed that his orders were to arrest persons of a Resistance group but of whom he had received no description. His instructions from Hardegan at Tilburg were to pass through the house and secure the back of it. According to his evidence, while passing through the living room with his sten gun under his overcoat, he saw three persons in civilian clothes at a table. When he reached the yard behind the house, he saw three men running towards him. When they ignored his shouts of " Halt. Hands up," he shot at them and they fell immediately. Cremer then came over the wall from the right, Hardegan and possibly Roesener from the left.

Rotschopf admitted that, in his view, the three men died as a result of his firing. He said that he did not know that the three men were members of the Allied Forces and that " We did not go there to murder them." He denied backing the men into the yard and there shooting them in accordance with a concerted plan. He admitted that his gun was loaded when he entered the house but he denied that the three pilots surrendered. Rotschopf said : " I saw no other way out, and I considered myself under pressure." Hardegan had told him that if he was attacked he should use his gun, as the persons to be arrested might be armed. He said he did not think that if he had merely pointed the gun at the men it would have stopped them. He said that the events all happened suddenly, and his act was done in self-defence.

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The accused Schwanz, according to his own account, was ordered simply to drive the car containing Roesener, Rotschopf and the captured Dutchman, to Tilburg. He did not know that anyone was to be arrested until he got to Tilburg.

Schwanz, according to the evidence, was the first to enter the house. Here he claimed to have seen three civilians and asked who they were. They gave no reply but rose and ran away. Schwanz stated that he then heard a call of " Hands up " and the sound of shots being fired. He became afraid and ran into the street where he remained with his car.

Roesener maintained that he had questioned a Dutchman who was arrested in the early hours of 9th July, 1944, and that he understood from the answers given that in a house in Tilburg there were armed Allied airmen in civilian clothes.

According to Roesener, Hardegan had ordered him to keep himself in readiness for arresting airmen in Tilburg. After an abortive search of one house in which Cremer accompanied him, he was ordered by Hardegan to proceed with Cremer to a house on the left of the house in front of which Rotschopf and Schwanz were standing, in order to guard the back yard of the latter building.

He affirmed : " We did not go to murder English flyers. There was no plan to murder." Upon going into the backyard of the house entered by himself and Cremer, Roesener claimed that he heard shots, and he then helped Cremer over the wall. He himself came out into the Diepenstraat after some minutes, and entered house No. 49 Diepenstraat where he met Hardegan in the back living room, who gave him the order to arrest the witness Van Eerdewyke and the order to inform the Dutch police in Tilburg that three airmen had been shot in the house No. 49 Diepenstraat while trying to escape, and to instruct them to take care of their transportation and burial. This order was carried out by Roesener.

Cremer claimed that he was told during the journey that the object was to raid the headquarters of a Resistance Movement, some members of which, including the Dutchman in the leading car, had been captured during the night.

After unsuccessfully searching one house, Cremer, according to his evidence, was ordered to enter the house next to that in which the shooting took place. While he was there, he heard a male voice shouting something like an order, and then a few shots. Roesener helped him over a wall and he saw Rotschopf in the next yard with three bodies which appeared to be dead. Rotschopf looked astonished and later explained to him that the three men had intended to attack him, and that this was why he shot them.

Cremer denied shooting at any of the victims and claimed that the object of the mission was to make arrests.

Rafflenbeul claimed that he merely received orders from Hardegan to drive the third car to Tilburg. The car contained only himself. At Tilburg, Hardegan told him to park the car in a side street and wait until the others returned with the arrested people who were to be taken away in the car. He did so park his vehicle and waited with it until the party returned.

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Brendle, the driver of another of the cars, claimed that he was not told the purpose of the mission and was merely told to follow the leading car, and later, on arrival at Tilburg, to watch over the Dutchman. This he did until the party returned.

The evidence connecting Klingbeil with the offence proved to be very shadowy, as was recognised by the Judge Advocate in his summing up. There was also some positive evidence that in fact he was not in Tilburg on 9th July, 1944.

The evidence showed that the accused Schonfeld had not in fact been in Tilburg on 9th July, 1944 ; nor was there any direct evidence to support the proposition that it was on his recommendation as a Kriminal Sekretir that the squad left the *Dienststelle* for Tilburg.

Nor did the evidence indicate that the accused Koeny had been implicated in the events of 9th July, 1944, at Tilburg.

The Defence argued that no plan to commit murder had been proved. The Prosecution, on the other hand, maintained that " this was a concerted action to murder three British pilots, three people who were known to be British pilots and that they, having surrendered to the accused Rotschopf, were in fact murdered in accordance with the plan."

Much of the argument of Counsel concerned the inferences to be drawn from circumstantial evidence. Thus, the Defence pointed out that Rotschopf was a war-wounded person who was subject to fits, and who had been posted to the *DienststelIe* to perform office work. Schwanz also was primarily an office worker. The Defence drew the conclusion that neither could have been chosen for the task had it been intended to involve killing people. The Prosecution, on the other hand, emphasised that Rotschopf had had considerable experience of street fighting in Russia which would make him a suitable person to send on a killing mission, and that since Schwanz spoke fluent Dutch

he could make enquiries without arousing suspicion. Again, the Prosecution produced evidence to show that Rotschopf's firing had been divided into two bursts, with a short period intervening. This would tend to show that the killing was intended, but the Defence claimed that it was due to spasmodic muscular movements to which Rotschopf was alleged to be subject.

The Defence maintained that it was most unlikely that the victims would be led outside into the open air if the intention were to shoot them, and the Prosecution on their part used the fact that the victims were later cremated as a significant fact.

The Judge Advocate in his review of the evidence, said that, in view of the nature of the duties of the accused in Holland, no particular significance attached to the fact that all the accused were dressed in civilian clothes or to the fact that they were all armed. The Court might, however, ask " in the light of subsequent events why Rotschopf carried a sten gun ".

Six of the accused were found not guilty, namely : Klingbeil, Brendle, Harders, Rafflenbeul, Koeny and Schonfeld.

Four were found guilty and sentenced to death by hanging, namely : Roesener, Schwanz, Rotschopf and Cremer.

These findings and sentences were confirmed by higher military authority.

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B. NOTES ON THE CASE

1. THE COMPLICITY OF ROESENER, SCHWANZ AND CREMER IN THE OFFENCE

It was clearly established that the killings were carried out by Rotschopf alone, yet three others were also found guilty of being " concerned in the killing ". This circumstance constitutes the question of major interest in the trial.

Regulation 8 (ii) of the Royal Warrant, of 14th June, 1945, as amended, under which war crime trials by British Military Courts are held,(Footnote 1: See Volume I of this Series, pp. 105-110) was deemed by the Prosecutor in his opening address to be " very relevant in this case." It provides as follows :

" Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case, all or any members of any such unit or group may be charged and tried jointly in respect

of any such war crime and no application by any of them to be tried separately shall be allowed by the Court."

In his summing up the Judge Advocate stressed, however, not this rule of evidence, but a rule of English substantive law :

" In our law if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are present, whether they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly. british_military_law.htm " If the original object is lawful, and is prosecuted by lawful means, yet in the course of its prosecution one of the party kills a man, whilst those who aid and abet the killer in the act of killing may, according to the circumstances, be guilty of murder or manslaughter, yet the other persons who are present at the killing, and who do not actually aid or abet it, are not guilty as principals in the second degree.

" You will therefore ask yourselves the question : What was the object of this assembly in or about Diepenstraat 49 ? Was it an assembly to commit murder, or was it an assembly to effect arrests ? If the former, did the members of the assembly know the purpose for which they were there, and if the purpose was the crime of murder, did they participate in the design to murder ?

" If the court take the view that the object of the visit to Diepenstraat 49 was in its origin lawful, that is to say, to effect arrests, and was being carried out by lawful means, but that, in the course of its prosecution, Rotschopf killed the three men, but that the others did not aid or abet such killing, then no doubt the court would find them not guilty of the

charge of ' being concerned in the killing.' If the court were to find, however, that any one of them did aid and abet Rotschopf in the act of killing, then no doubt the court would arrive at a different finding."

It will be noted that the Judge Advocate pointed out that if the rule regarding " common design " were found to be applicable the others who were present would be guilty of murder *whether or not they aided or abetted the offence*.

Nevertheless, the Judge Advocate went to some pains also to expound the law concerning parties to an offence in relation to a charge of being " concerned in " a killing.

He began by exempting from responsibility in the present type of case persons whose activities related to the time after the commission of the offence : " Conduct on the part of an accused subsequent to the death, while it may throw light on the nature of the killing and the reason for it, that is to say whether it was justifiable or a crime, cannot by

itself be regarded as constituting the offence of ‘ being concerned in the killing ‘, or any degree thereof.”

The Judge Advocate then proceeded to set out the law relating to accessories, and aiders and abettors, as follows :

“An Accessory before the Fact to Felony is one who, though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony.

“ If the party is actually or constructively present when the felony is committed, he is an aider and abettor. It is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed. A tacit acquiesence, or words which amount to a bare permission, will not be sufficient to constitute this offence.

“ If the accessory orders or advises one crime and the principal intentionally commits another ; that is to say that the principal offender is ordered to burn a house and instead commits a larceny, a theft, the accessory before the fact will not be answerable in law for the theft. If, however, the principal commits the offence of murder upon A-and you may think that this is important-when he has been ordered to commit it upon B, and he does that by mistake, the accessory will be liable in respect of the murder upon A.

“ The accessory is, however, liable for all that ensues upon the execution of the unlawful act commanded ; that is to say, if A commands B to beat C, and B beats C so that he dies, A is accessory to the murder of C. There must be some active proceeding on the part of the accessory, that is, he must procure, incite or in some other way encourage the act done by the principal.

“A principal in the first degree, of whom you have already heard mention in this case, is one who is the actor, or actual perpetrator of the fact. It is not necessary that he should be actually present when the offence is consummated, nor, if he is present, is it necessary that the act should be perpetrated with his own hands. If the agent, that is the perpetrator, is aware of the nature of his act-even if the employer

is absent-he is a principal in the first degree. If the employer is present, the agent, that is the person who commits the act, is liable as a principal in the second degree.

“ Those who are present at the commission of an offence, and aid and abet its commission, are principals in the second degree.

"The presence of a person at the scene of the crime may be actual in the sense that he is there, or it may be constructive. It is not necessary that the party should be actually present, an eye-witness or car-witness of the transaction ; he is, in construction of law, present, aiding and abetting if, with the intention of giving assistance, he is near enough

to ; afford it should occasion arise. Thus, if he is outside the house, watching, to prevent a surprise, or the like, whilst his companions are in the house committing a felony, such a constructive presence is sufficient to make ; him a principal in the second degree . . . but he must be near enough to give assistance. There must also be a participation in the act ; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony. It is not necessary, however, to prove that the party actually aided in the commission of the offence ; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting."

Whether the principle of " common design " were applied or whether the rules regarding accessories and aiders and abettors alone were found to be in point, it was clear that if Rotschopf were found not guilty the other accused could not be found guilty. The Judge Advocate made this clear : " Rotschopf, of course, is the axle upon which the wheel of this case turns. If Rotschopf is to be expunged from this case altogether on the basis that he has committed no crime then automatically it must follow that the other accused are equally not guilty." Of Schwanz, Cremer and Roesener he said : " Your decision in the cases of these accused must primarily depend upon your decision in the case of Rotschopf. If you find Rotschopf guilty, then you must consider whether his guilt must be shared in some degree by those others, who were near at hand ready to afford him assistance."

Of Harders, who was absent from the scene of the shooting and who was later found not guilty, the Judge Advocate made the following remarks :

" In English law, a person can be held responsible in law for the commission of criminal offences committed by others, if he employs them or orders them to act contrary to law. He would, in such circumstances, be criminally responsible for the crimes of his employees whether he was present or not at their commission. Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence, for example, if Harders had reasonable grounds for supposing that his men were going to indulge in committing a war crime against their opponents,

-whether they be Dutch Resistance opponents or Allied airmen opponents -and in fact they did so, and he failed to take all reasonable steps to prevent such an occurrence. I think, if such a doctrine were to be invoked in this case, the court, before acting upon it to the detriment of Harders would require to be satisfied that Hardegan, prior to leaving for Tilburg on 9th July, 1944, had apprised Harders that it was their intention to murder any suspicious characters they found. In any event, the court would have to be satisfied that the crimes alleged were the natural result of the negligence of the accused; in other words,

that a direction from Harders, given at the correct time, would have prevented any unjustifiable killing taking place."

The Military Court did not of course state its reasons for deciding as it did. It may be safely said, however, that, in finding Roesener, Schwanz and Cremer guilty in addition to Rotschopf, the Court was following one of three possible courses :

(i) The Court may have found that the three accused were principals in the second degree in the murders committed by Rotschopf as principal in the first degree, in that they, for instance, prevented the escape of the victims ;

(ii) The Court may have found that the three accused were acting in pursuance of a common plan to commit murder, and were therefore liable for the offence even though the actual killing was committed by Rotschopf ; or

(iii) The Court may have found these rules of substantive law inapplicable, but may yet have applied the rule of evidence set out in Regulation 8 (ii) of the Royal Warrant, which is quoted above.(Footnote 1: See p. 68) An examination of the text of this provision shows that, in order for effect to be given to it, the following circumstances must prevail :

(a) there must be evidence that a war crime was the result of *concerted action*, but it is not said that the aim of such action must be illegal or that it must be the commission of the offence which was in fact committed ;

(b) the war crime must have been in some way the *result* of such concerted action, though, again according to the strict letter of the Regulation, not necessarily the intended result.

In the present case, (a) it was shown that there had been a plan at the very least to make arrests, and (b) the killing was the result of such a plan in the sense that had the raid never taken place the murder would not have been committed. The Court may therefore have taken the view that the evidence against Rotschopf could, under Regulation 8 (ii), be taken as *prima facie* evidence against the other three who were found guilty, and that the evidence produced in defence of the three men was not strong enough to rebut the presumption that they too were responsible for the crime. (Footnote 2: The scope of Regulation 8 (ii) received considerable attention in the course of the Belsen Trial (see Volume II of this series, pp. 138-41).)

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2. THE LAW APPLIED BY THE COURT

During the trial, rules of English law were quoted, particularly by the Judge Advocate, in connection with the possible liability of various accused either as principals in the second degree or under the doctrine of "common design." It may safely be said, however, that the intention was not to try the accused for offences against English law but simply to amplify and define the charge against them and the war crimes which they may have

committed. As has beensaid in the notes to an earlier trial in this series of Reports(Footnote 1: . The Jaluit Atoll Case, held before a United States Military Commission in the Marshall Islands, 7th-13th December, 1945 ; see Volume I, p. 80. For other examples of the introduction of municipal law concepts into war crimes proceedings, see pp. 75 aad 76-77 of the present Volume and pp. 60, 68-69 and 79-80 of Volume III.) : " In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law."

The Permanent Court of International Justice was empowered, under Article 38 (3) of its Statute (as is now the International Court of Justice under Article 38 (c) of its Charter), to apply the " general principles of law recognised by civilised nations." Professor Gutteridge, in discussing this power, has said that : " All systems of law are incomplete in varying degree, but the problem of filling in the gaps is, perhaps, more acute in the case of the law of nations than in that of private law owing to the absence of an international legislature having power to remedy any deficiencies which may be discovered." (Footnote 2: *British Yearbook of International Law,* 1944, p.2)

It would not be hard to show that, for instance, the rules of English law regarding complicity in crimes, which are frequently quoted in war crime trials before British Military Courts, will be " found in substance in the majority " of systems of civilised law. (Footnote 3: Professor Gutteridge prefers this as the interpretation of the words " general principles of law recognized by civilized nations " rather than the requirement that a principle should " exist in identical form in every system of civilised law " ; *op cit*, pp. 4-5.)

Writing in 1944 of the war crime trials which were then envisaged rather than actual, Professor J. L. Brierly expressed the opinion that :

" In practice courts will probably follow more or less closely the definitions and the procedures of their own municipal law, and in so doing they will be well within the latitude that the laws of war allow. But again that will not mean that they follow their own municipal law because that is the law which they are bound to apply ; it will mean that in the absence of exact definition contained in the laws of war the municipal definition is likely to be the best available guide to the rule that natural justice requires them to apply. (Footnote 4: *The Norseman,* May-June, 1944, p. 169)

No lawyer of the Anglo-Saxon countries would have any proviso to make to Professor Brierly's view set out above. It must be added, however, that the continental practice is to require that an accused war criminal shall be shown either to have committed a breach of the municipal law of

the country whose courts are conducting the trial, which breach was not justified by the laws and customs of war, (Footnote 1: For instance see Volume III, pp. 53-4, regarding the French practice) or (which amounts to the same thing) to have committed a breach of the laws and customs of war which also constituted an offence under that municipal law. (Footnote 2: For instance see Volume III, p. 81, regarding the Norwegian practice)

3. THE STATUS OF THE VICTIMS

There was a conflict of opinion between Prosecution and Defence as to whether the accused knew that the victims were baled-out Allied airmen, or whether instead they regarded them as enemy or Dutch agents or spies since they were wearing civilian clothes.

The status of the victims could have made no difference to the liability of the accused in this trial, however, since even had the former been spies their summary shooting would have been contrary to Article 30 of the Hague Convention, which provides that :

" Article 30. A spy taken in the act shall not be punished without previous trial. "

Counsel for Rotschopf put forward the following argument : " The witness Van Bruggen has testified that two of the pilots . . . discarded their uniforms at her place and dressed themselves in mufti. As was established later, they carried Dutch identity papers and went under the protection of the Dutch Resistance Movement. They renounced the protection of uniform and consequent treatment in case of capture. . . . By wearing civilian clothes the three men renounced the protection afforded them by a uniform and in the case of arrest had to expect to be treated as members of the illegal Underground Movement." Their discarding their uniform "made them participants in the Underground Movement and put them in conflict with the police even if at the moment they had carried out no actual attacks."

It is submitted, however, that whether the airmen lost the protection of the Geneva Prisoner of War Convention (Footnote 3: See Volume I of this Series, pp. 29-30) by wearing civilian clothing or not, they were still entitled to a trial. (Footnote 4: On the essential elements of the right to a fair trial, see Volume V, pp. 73-7, and Volume VI, pp. 100-4.)