

DEPUTY JUDGE ADVOCATE'S OFFICE
7700 W.A.R. CRIMES GROUP
EUROPEAN COMMAND

13 June 1947

UNITED STATES

vs

Feter MERTEN, Mathias
LAMBERTI and Emil DITTGEN,
German nationals

Case No. 12-2593

REVIEW AND RECOMMENDATIONS

1. TRIAL DATA:

Tried jointly at Dachau, Germany
Date: 18 - 20 March 1947
General Military Government Court

<u>ACCUSED</u>	<u>DATA</u>	<u>SENTENCE</u>
MERTEN, Feter	Age 59 Ortsgruppen- leiter	2 years confinement from 21 June 1945
LAMBERTI, Mathias	Age 51 Civilian Carpenter	3 years confinement from 16 August 1945
DITTGEN, Emil	Age 40 Civilian Contractor	Acquittal

CHARGE: Violation of the Laws
of War.

	<u>Pleas</u>	<u>Findings</u>
PARTICULARS: In that Feter MERTEN, Mathias LAMBERTI and Emil DITTGEN, German Nationals, did, at or near HUTTERSDORF, Germany, on or about 3 August 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the commission of an assault upon Ralph S. BRACKENS, a wounded member of the United States Army, who was then an unarmed and sur- rendered prisoner of war in the cus- tody of the then German Reich.	MERTEN NG LAMBERTI NG DITTGEN NG	G G NG

2. RECOMMENDATIONS: That the findings and sentences be approved.

3. EVIDENCE:

For the Prosecution: On or about 3 August 1944, Ralph S. BRACKENS, an American airman, parachuted from his plane and landed in a tree (F-EX 1, R 38) in the vicinity of Huttersdorf (R 14), near Saarbruck, Germany. A crowd gathered and he was freed from his parachute by civilians and

found to be suffering from wounds on his forehead, hand and thigh (R 18). All accused were among those present at the scene (F-Ex 2, 4). The accused WERTEN was the Ortsgruppenleiter (party official in charge of the town) (R 19) and was charged with the duty of investigating airplane crashes in his vicinity (F-Ex 2). He urged the crowd to beat the flyer to death (R 42, F-Ex 3, translated into English at R 11). Co-accused LAMBERTI hit and kicked the flyer several times (R 43, 50). One witness saw him with a knife in his hand (R 67). The flyer made an extrajudicial statement that he had been attacked with a knife by the one of the group of civilians who later hit and kicked him (F-Ex 1). Accused LAMBERTI made an extrajudicial statement (F-Ex 3, translated into English at R 12) admitting pushing the flyer and stating that he was so excited that he did not know what else he may have done. The local police chief intervened (R 62) and thereafter secured a representative of the Red Cross who gave first aid (R 23) and removed the flyer to a hospital (R 26).

For the Defense: Accused WERTEN offered testimony that his reputation was good (R 87, 97) and that he assisted many persecutions (R 90, 97, 98). Accused WERTEN elected to testify and denied seeing LAMBERTI hit the flyer (R 137), or making inflammatory remarks (R 139). Co-accused LAMBERTI, however, testified that accused WERTEN's remarks concerning the flyer excited him, causing his attack on the flyer (R 163).

Accused LAMBERTI elected to testify and admitted "nudging" the flyer with his elbow (R 155), but denied hitting or kicking him (R 156). Other defense witnesses saw no one hit or kick the flyer (R 83, 89, 97) or use a knife (R 83, 92, 96).

4. JURISDICTION: The Court was legally constituted and had jurisdiction of the persons of the accused and of the offense.
5. COMMENTS: No error is disclosed in the record which resulted in any injustice to either accused. A prima facie case was established by the prosecution as to each of the accused WERTEN and LAMBERTI and the motion

by the defence, at the close of the prosecution case, for an acquittal, was properly denied. The denial of the motion as to accused NITGEN merits no discussion as he was subsequently acquitted.

Throughout the trial the prosecution offered various documents into evidence, viz., Prosecution Exhibits 1, 2, 2A, 3, 4, and 4A. The defense interposed an objection to the admissibility of Exhibit F-1, which was the sworn statement of Ralph S. Brackens, upon the ground that no proper foundation had been laid in that there had been no previous evidence identifying the maker or of his connection with the matter on trial. Brackens did not appear as a witness at the trial.

The Court correctly overruled the defense's objection and admitted the exhibit into evidence. It is provided in the Manual for Trial of War Crimes and Related Cases, Section 270, subdivision c (1), 15 July 1946, as amended 1 March 1947, that "A Military Government Court shall in general admit oral, written, and physical evidence having a bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof". The statement of Brackens and the testimony of the witnesses establish that he was the victim of the assault referred to in the particulars of the charge.

Exhibit F-2 is the English translation of the sworn statement of accused Peter WERTEN and F-2A is the sworn statement in German; Exhibit F-3 is the sworn statement of the accused Mathias LAMBERTI, in German; Exhibit F-4 is the English translation of the sworn statement of the accused Emil NITGEN and F-4A is the sworn statement in German. Objection to the introduction of these documents was made upon the ground of no proper foundation and upon the further ground that each purported to be a confession, inadmissible as to the accused other than the one making the statement. The first objection is answered by the same reasons presented in reference to the admissibility of Exhibit F-1. The second objection is without merit. The rule permits the admission of any evidence which, in the opinion of the Court, is of probative value (Manual for Trial of War Crimes and Related Cases, Section 270,

subdivision c (1), supra). The general rule, applicable in courts-martial, that the confession or admission of one accused, made out of Court, is admissible only as against such accused, is simply an application of the hearsay rule. A confession or admission, made out of Court, is admissible against the maker as an exception to such rule (Manual for Courts-Martial, par. 114; FM 27-255, par. 94) and, of course, that exception is not applicable when the statement is used against another accused. The fact that the basis for the admissibility of an extrajudicial statement of one accused against another accused is simply the application of the hearsay rule, is demonstrated by the fact that one co-accused may testify in Court against his co-accused. It is clear that a statement made out of Court by one accused is admissible before a Military Government Court against all accused to the same extent as any other hearsay evidence (Manual for Trial of War Crimes and Related Cases, Section 270, subdivision e). The objections were correctly overruled.

The testimony against accused LAMBERTI that, without provocation, he assaulted an unarmed and injured prisoner of war is overwhelming. Therefore, the Petition for Review filed by his defense counsel, dated 28 March 1947, is not concurred in.

6. CLINENCY: Consideration was given to Petition for Review filed by Captain Frank E. Morse, defense counsel, dated 28 March 1947, but for the reasons stated above in paragraph 5, no reduction in the sentence is recommended.

7. CONCLUSIONS:

a. It is recommended that the findings and sentences as to accused Peter MERTEN and Mathias LAMBERTI be approved.

b. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

/s/ Oliver C. Hardy
/t/ OLIVER C. HARDY
Attorney
Post Trial Branch

Having examined the record of trial,
I concur.

/s/ C. T. Straight
/t/ C. T. STRAIGHT, COL. JAGD
Deputy Judge Advocate for War Crimes