5-24-1948

Dissent on Defense Motion to Strike

Paul M. Hebert
Judge, Tribunal VI

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UNITED STATES MILITARY TRIBUNAL VI
SITTING IN THE PALACE OF JUSTICE, NURNBERG, GERMANY
24 MAY 1948

THE UNITED STATES OF AMERICA	:
	:
- vs -	:
	:
CARL KRAUCH, et al.,	:
	:
Defendants	:

DISSENT

The undersigned, Paul M. Hebert, Judge of Tribunal VI, and Clarence F. Merrell, Alternate Judge of Tribunal VI, cannot agree with the finding of the Tribunal by a majority of its members that the statement of Defendant Schmitz, dated 17 September 1945, made a part of the affidavit of Defendant ter Meer being Prosecution Exhibit No. 334, was obtained under duress, and we therefore disagree with the order striking from the exhibit such statement.

On 22 May 1948, there was filed by R. Dix, Counsel for Defendant Schmitz, a motion to strike the Schmitz statement from the ter Meer affidavit, and on 4 May 1948, after giving the matter careful consideration, the Tribunal overruled said motion. At that time Judge Morris, during a statement made on the record on behalf of the Tribunal, said,

> "He" (referring to Defendant Schmitz) "does not contend in his showing, in support of the motion, that he knew of the order or that it influenced him in making the statement. In fact, the circumstances disclosed by the record point to the contrary and it appears that the statement was made on the part of the Defendant Schmitz of his own volition and without duress."

On 7 May 1948, a motion was filed on behalf of Defendant Schmitz in which the following was set out:

> "'Corrected and Supplemented Record of the Interrogation of Hermann Schmitz — Frankfurt 2:30 to 3:30 PM 11 September 1945 Tuesday
>
> Q. I call your attention to Ordinance No. 1, Article No. 2, Section No. 33, as issued by the Military Government. (Handing a copy of the Ordinance to the witness, who reads the indicated section.)
>
> A. Yes. I have read it.'"

The record of the proceedings on 10 May 1948 in open court shows that the following occurred:

> "DR. DIX: * * * the Tribunal will remember my application for my client in reference to Ordinance No. 1 of the American Military Government, which was brought up during his interrogation. In my last application I included the copy of a record of interrogation of Schmitz at which, according to the text of this copy, his attention was called to this ordinance and he was asked whether he read it. He said 'yes.' I asked the prosecution for the purpose of a stipulation to check whether this copy of mine agreed with the original. * * *

"I would be grateful to Mr. Sprecher if, before the end of the proceedings, he would make a statement as to whether he can check this text of this record and stipulate with me.

"MR. SPRECHER: * * * We have been unable in this short period of time to check this interrogation of which Dr. Dix says he has a copy. For the purposes of this proceeding we will stipulate on the basis of Dr. Dix's statement, that such an interrogation did take place as indicated in his motion.

"THE PRESIDENT: I believe, Dr. Dix, that you said to the Tribunal that if the prosecution would accept your statement as having been made that that would obviate the calling of witnesses on your part to substantiate your facts. Is that true? In other words, it will now raise a question of law for the Tribunal to pass upon rather than one of fact to be first determined.

"DR. DIX: That is my opinion, Mr. President. I don't want to be misunderstood. It is my opinion that if the quoted text of this record is stipulated it will not be necessary to all witnesses. I am not sure that I think a legal question will remain to be decided by the Tribunal.

"THE PRESIDENT: You are correct in that regard.

"Now, counsel--and I am addressing this inquiry primarily to counsel for the prosecution--in other words, do we understand, Mr. Prosecutor, that you are willing to stipulate for the purposes of the matter under controversy that the interrogation, the questions and answers that were contained in the showing made by Dr. Dix are correctly reported to the court in Dr. Dix's statement?

"MR. SPRECHER: That is correct, Mr. President.

"THE PRESIDENT: Very well. That puts that matter at rest for the time being. By that I mean to say that, in view of the prosecution's stipulation which the Tribunal now accepts and the position stated by Dr. Dix, the Tribunal sees no necessity of hearing any further evidence on that issue."

On 5 May 1948, there was filed on behalf of all defendants a motion to strike all affidavits of Defendants Schmitz, von Schnitzler and Lautenschlaeger, who did not testify on the witness stand, including Prosecution Exhibit No. 334 dated 22 April 1947 insofar as it reproduces the statement of Defendant Schmitz of 17 September 1945.

The court, by a majority, ruled upon that motion on 11 May 1948. During the course of that ruling, Judge Morris, speaking on behalf of a majority of the Tribunal, said:

"The motion also includes an affidavit of Dr. ter Meer, Document NI 5187, being Prosecution's Exhibit 334, dated 22 April 1947, in which Dr. ter Meer sets forth a quotation from a statement given to him by Dr. Schmitz, which the affiant ter Meer discusses at considerable length in his affidavit.

"It is the opinion of the Tribunal, and it therefore rules, that the entire affidavit of Dr. ter Meer, who did go on the witness stand, is admissible in evidence and will be considered with respect to all defendants, and that the

statement of Dr. Schmitz will not be stricken therefrom as requested by the motion."

Thereafter, to wit, 12 May 1948, there was filed by R. Dix, Counsel for Defendant Schmitz, a renewal of his request to strike the Schmitz statement from Prosecution Exhibit No. 334, being the ter Meer affidavit. It is that request that the Tribunal, by majority, has granted and with which the undersigned for the record express their disagreement.

The only change in the record since the Tribunal's prior ruling on a similar request is the fact stipulated on the record on 7 May 1948 that the attention of Schmitz was called to Ordinance No. 1 of the Military Government at the outset of his interrogation on 11 SEptember 1945, and asked whether he had read it and Schmitz said, "Yes. I have read it."

Asking him whether he had read the Ordinance does not necessarily constitute duress as the phraseology of the Ordinance also includes the obligation to speak the truth where the statement is voluntarily made. For there to be duress, some showing of a connection between a threat and a statement must be made and it must appear that the statement was the result of compulsion. As a leading American authority states:

> "Confessions obtained by threats are, generally speaking, inadmissible in evidence as being involuntary. But it is not every threat that will render a confession made subsequently thereto involuntary. There must be some connection between the threat and the confession, showing that the mind of the accused was overcome by the threat, and the confession was a product of such compulsion and intimidation. It is not sufficient, either, to say that if the confesser makes his confession because of fear, it is inadmissible, for a secret fear existing in the mind of the confesser not directly induced by the persons to whom the confession is made will not affect the voluntary nature of the statement. In other words, a confession should not be rejected merely because it was made under great excitement or mental distress, or fear, where such state of mind was not produced by extraneous pressure exerted for the purpose of forcing a confession, but springs from apprehension due to the situation in which the accused finds himself. And when the confession is made at some interval after certain threats have xxxx made, the influence that the threats have upon the confession must be observed and inquired into as bearing upon the voluntary nature of the confession at the time it is made. The reason generally given for the exclusion of confessions induced by threats and menaces is not that there has been an illegal extortion of the statement, but rather because the party making the statement is deemed to have been thus influenced to make an untrue confession. But what threats or acts will induce the fear that will vitiate and render involuntary the confession depends upon the circumstances of the concrete case before the court." (Wharton's Criminal Evidence, Vol. II, Sec. 613)

The statement attributed to Major Tilley is not established by any evidence in the record and, even if established, is too remote in point of time to have influenced the statements made by Schmitz four months later in September of 1945. Therefore, the only additional element here present and not specifically covered by the ruling of the Tribunal of 4 May 1948 is knowledge of the Defendant Schmitz of the Ordinance. There is no showing whatsoever that this knowledge influenced him in making the statement. The record as to the circumstances surrounding the giving of the statement otherwise remains exactly the same. We submit that the ruling of the Tribunal of 4 May

1948 was correct, and that now as then, the circumstances disclosed by the record point to the contrary to the contention advanced by and on behalf of Defendant Schmitz that his statement was made under duress. It clearly appears from all the circumstances that the statement was made on the part of the Defendant Schmitz without duress.

The circumstances referred to are set out fully in ter Meer's affidavit (Prosecution Exhibit No. 334). Those circumstances include the following:

1. Schmitz submitted a written statement, dated 26 August 1946, which is embodied in the ter Meer affidavit, undertaking formally to withdraw his first statement--not because of duress or undue influence, but because of some inaccuracies in the first statement. This circumstance has particular significance inasmuch as it appears from the ter Meer affidavit that Schmitz "cooperated with Dr. Gierlichs" (assistant counsel for Defendant Schmitz in this case)"when working out his statement of 26 August 1946." The record clearly shows that the concern of Defendant Schmitz and his counsel Gierlichs was correcting what they regarded as errors in the first statement rather than effect of any duress or undue influence with respect to the giving of the first statement.

2. It further appears from the Schmitz statement of 26 August 1946, prepared with the assistance of his lawyer Gierlichs, that the Schmitz statement of 17 September 1945 was based on several interrogatories of Schmitz over a period of several days, and that it was signed only after making corrections; that the errors not corrected were discovered only after conferences with several of the other officials of Farben at Cransberg in 1946; that the errors were due to "absence of files" and "incorrect impressions which had been communicated to me" (Schmitz) "by von Schnitzler"; that the "unclear parts of the statement" (of 17 September 1945) "were also caused partly, as comparison with the original dictation of Weissbrodt shows, by the crossing out of sentences and parts of sentences which I" (Schmitz) "could not accept or by alterations through which the original sense was disjoined or became a source of misunderstanding." Furthermore, it affirmatively appears by Schmitz's own statement incorporated in the subsequent statement of 26 August 1946 that he signed the statement of 17 September 1945 " * * * in order to avoid the impression that I" (Schmitz) "might not be willing to cooperate in the clarification of the business of I. G. Farben." This clearly indicates that his purpose in giving the statement was to create the impression that he was willing to cooperate with the Military authorities who were investigating Farben's affairs and all of the above circumstances show that no element element of compulsion or duress was present.

3. It appears from the ter Meer affidavit (Prosecution Exhibit 334) that for a long period of time at Cransberg in 1946, many officials of Farben, including Schmitz, von Schnitzler, Gajewski, Buetefisch, Hoerlein, ter Meer, Ilgner and von Knieriem, had prlonged conferences as a result of which a full detailed comprehensive statement is embodied in the ter Meer affidavit; that Defendant Schmitz was "not willing to agree to it because, not being a technical expert, he was uncertain whether my" (ter Meer) "statement was a complete and true explanation of the facts involved"; that later Defendant Schmitz, after reviewing some minutes of the proceedings of the Vorstand and further conferences with his associate officials of Farben, became convinced that there were other mistakes in his statement of 17 September 1945 and thereupon prepared his subsequent statement of 26 August 1946 which also is embodied in full in the ter Meer affidavit.

4. Even after all these conferences and circumstances, including the help of his lawyer, at no place in the subsequent statement is there any mention of any compulsion or duress made by Schmitz.

All those circumstances emphatically negative any inference of duress or compulsion felt by Defendant Schmitz when he gave his statement of 17 September 1945. We submit that the ruling and finding of the Tribunal made 4 May 1948 is the correct statement of the effect of the record as it now stands in that, instead of showing that Schmitz

was influenced by duress, that the contrary appears and that such statement was made without duress.

In what has heretofore been said, we recognize and affirm the fundamental rights of defendants as referred to by the majority of the Tribunal in the order striking out the Schmitz statement. However, it is our opinion that there is no basis in the record for the finding that Schmitz was influenced by any element of duress in the giving of the statement of 17 September 1945.

The ruling of the Tribunal obviously is based upon the existence of Military Ordinance No. 1 to which Schmitz's attention was called. An examination of the record of that Ordinance, of which this Tribunal, of course, can and should take judicial notice, discloses that it is a military ordinance enacted by the Military Government of United Nations occupying all of Germany and not merely of American Military Government. Military Ordinance No. 1 is a comprehensive law concerning "Crimes and Offenses," enacted "in order to provide for the security of the Allied Forces and to establish public order throughout the territory occupied by them." Under conditions existing in Germany following its invasion and occupation by the Allied Forces of the United Nations, of which this Tribunal takes judicial notice, such a law was necessary and imperative.

Following the invasion, the Allied Forces were charged with a multitude of duties requiring extensive investigation of German industries with reference to their war potential and having a bearing on reparations. Those investigations included the investigation of I.G. Farbenindustrie Aktiengesellschaft. The report of December 1945 of the Hearings before a Subcommittee of the Committee on Military Affairs of the United States Senate, pursuant to Senate Resolution 107 (78th Congress) and Senate Resolution 146 (79th Congress) authorizing a study of war mobilization problems, explains in a brief manner the purpose and importance of that investigation. It says:

> "A basic purpose of this investigation was to uncover as much information as possible concerning the nature and location of the far-flung and carefully concealed external assets of I.G. Farben. The investigationwas, therefore, an important phase of the program adopted by the Allied Powers at Potsdam to strip Germany of all of her external assets in the interest of future world security and to use such assets for the relief and rehabilitation of countries devastated by Germany in her attempt at world conquest."

The report shows that among others who were engaged in that investigation were Abe Weissbrodt and Lawrence Linville, who conducted the interrogations of Defendant Schmitz.

There is no showing that the interrogation of Schmitz was for the purpose of instituting criminal proceedings against him or that those engaged in such interrogations have had anything to do with the preparation or prosecution of this case against the officials of I.G.Farben. Indeed, the contrary appears. The investigation, of which the interrogation of Schmitz in 1945 was a part, was conducted under the direction of Colonel B. Bernstein, Director, Division of Investigation of Cartels and External Assets, Office of Military Government, for the purposes explained above.

The ruling of a majority of this Tribunal is an unwarranted reflection upon the manner which this investigation was conducted insofar as the interrogation of Defendant Schmitz was concerned, and it is not, in our opinion, justified by the record.

It is the opinion of the undersigned that the ruling and order striking out the statement referred to is improper both under the law applicable to this case and the facts disclosed by the record, and that the Schmitz statement of 17 September 1945 should be left in the evidence along with the subsequent statement of 26 August 1946, all as a part of the ter Meer affidavit (Prosecution Exhibit #334).

signed Paul M. Hebert Judge Military Trib.

Dated this 24th day of May '48 signed Clarence F.Merrell Alternate VI Judge Military Tribunal VI