

MINUTE PAPER

SUBJECT: TRIAL OF JAPANESE WAR CRIMINALS - COL. KOBAYASHI AND MAJ. TAMURA.

D. P. W. & I (for Confirming Authority).

I have read through the proceedings of the War Crimes Court held on 14th and 15th December, 1945 for the trial of these two officers when they were found guilty of committing a war crime, that is to say, murder of a prisoner of war and were sentenced to suffer death by shooting.

2. I have also read the petition dated 17th December, 1945, against the finding and sentence of the Court.

3. This trial is one of a number of trials held arising out of the execution of three Australian air-men and one American air-man on 23rd March, 1945 at Talaud Islands.

4. There is no dispute about the facts. The story brought out at all these trials was as follows :-

5. Prior to 23rd March, 1945, the four Airmen referred to had separately crashed either on the Island or close thereto and had been taken prisoners by the Japanese.

6. The Colonel in charge of the Japanese troops on the Island alleges that as a result of orders received from higher command (but such orders were not satisfactorily proved and were denied by a staff officer of the higher command) he decided the four Airmen were to be executed. No trial or legal proceedings to convict them of an offence was held.

7. A few days prior to 23rd March, 1945 a conference of officers was held at which the orders for the execution of the prisoners were announced and it was decided that the execution would take place on a formal parade.

8. On 23rd March, 1945 the formal parade of all troops was held for the presentation of colours which had been received from the Japanese Emperor. At the termination of this formal parade, details of four Companies of the Battalion, apparently consisting of some 20 or 30 men were formed up and marched some little distance to what has been referred to as the execution ground. It was there the Companies were formed up separately under their respective officers and one prisoner was handed over to each Company for execution.

9. A large cross had been erected in front of each Company and a grave dug and the prisoner was blind-folded and tied to the cross facing the Company on parade. The officer in charge of each Company stood in front of his men and between them and the prisoner to be executed.

10. Each Company Commander then called out a man from the ranks, and in one case two men were called, and the man advanced and came to attention in front of the prisoner when the officer in command of the Company gave the order "Fix bayonets." "Prepare to lunge" and "Lunge" when the Private bayoneted the prisoner in the heart. The Private who had actually bayoneted the prisoner then marched back to his position in the ranks, the prisoner was untied and buried and the whole parade then marched off under their officers.

11. Capt. Iwasa was in command of one of the above Companies and personally gave the commands to his Private to carry out the execution. The whole parade and execution were carried out at the direct orders of Colonel Kobayashi, the senior officer on the Island through Major Tamura the officer in immediate command of the troops.

12. The defence was raised that the War Crimes Act was invalid, not being within the legislative power of the Commonwealth. I am of the opinion that such Act was within the legislative power of the Commonwealth and that it is a valid exercise of such power.

13. The question arises whether upon the above facts Col. Koba and Maj. Tamura were guilty of a war crime. The real question is whether the obedience of an illegal order is a defence for such a crime.

14. Up to 1940 the law governing the matter was stated to be as follows (See page 288, M.M.L. Australian Edition) :-

"It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter."

15. After 1940, the above declaration of the law was altered to read as follows :-

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

16. The above being the law governing the question, I am of the opinion that Col. Koba and Maj. Tamura were lawfully convicted of a war crime, the punishment for which may be death.

17. The fact that the crimes were committed not at the independent will of the accused but as the result of orders from higher command must be considered on the question of punishment.

18. I am of the opinion that such a flagrant breach of international law as the execution of prisoners of war without proper trial and conviction of an offence should be known to be illegal by all commissioned officers and I therefore cannot advise that the death penalty in the case of Col. Koba and Maj. Tamura is too severe and I do advise that the petition may be dismissed and the findings and sentences legally confirmed.

Thomas Luckin

JUDGE ADVOCATE GENERAL.

14.1.45.