

1 of 4 DOCUMENTS

© Oxford University Press 2007

Journal of International Criminal Justice

1 March 2007

*ICJ 5 1 (228)***LENGTH:** 750 words**TOPIC:** CRIMINAL LAW**TITLE:** Gustav Alfred Jepsen and Others Case

British Military Court sitting at Luneburg, Germany Judgment of 24 August 1946 n1

**TEXT:**

## The Facts

[On or about 2 April 1945, with the approach of the Allied forces, a party of 300 to 400 prisoners of war and concentration camp detainees, unfit to march, were put on a train at Mariensiel, near Wilhelmshaven, Germany, to be transported to the parent camp at Nuengamme, another German town. Within a space of nine days all of them were dead, with the exception of two or three survivors. Many of them died as a result of a bombardment carried out by the British Royal Air Force on Luneburg while the train containing the prisoners was standing in the siding; however, some eighty of them were still alive after that bombardment. The Prosecution laid their death at the door of the three accused. They were jointly charged with a war crime 'in that they at Luneburg and elsewhere [...] in violation of the laws and usages of war were concerned in the ill-treatment and killing of Allied nationals, internees of concentration camps, during a train journey.' Jepsen, a Dane, was a member of the Waffen SS; the other two accused, Freitag and Muller, were German; the former was the head of the local Gestapo, the latter was the local police commander.]

## The Law on Participation in War Crimes

[as set out in the summing-up of the Judge Advocate, E. Garthmoore, Barrister-at-Law:]

'[...] There is this to be said about this: There is a Latin tag which I think will be familiar to both the defending advocates, *qui facit per alium facit per se*, which means a person who does something by the hand of another is responsible in law for what has been done. If you get somebody else to commit a crime for you, you are as much liable for that crime as the cats paw you employed. If JEPSEN actively associated himself with and assisted the other guards in a wholesale slaughter, the act of every one of those persons became the act of all. We are told that some eighty bodies were found in this communal grave bearing all the signs of having met their deaths not by the air raid but by a shot from a small calibre weapon - a piece of evidence which fits in quite logically with much else to which we had to listen. If JEPSEN was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act. That is a consideration which is of some importance if you are concerned with the question of the proportion of allied nationals to German nationals amongst the rank of the victims. If you are influenced by the evidence which the Prosecution has given as to the numbers of nationalities of the people concerned, then it becomes so unlikely that none of those eighty was an allied national that, although it is a matter for your discretion, you may think it is a possibility so

remote that it can with perfect safety for the interests of justice be ignored.

When you are considering JEPSEN's case, consider it very largely on his own evidence. On his own evidence he took part in the killing of whatever internees were still alive by about the 11th April. Bearing in mind what I have said about the fact that superior orders cannot be a defence to a manifestly illegal act, bearing in mind what I have said about duress, are you satisfied on his own evidence (corroborated as it is in certain particulars by other evidence with which he does not agree) that he unlawfully killed a number of those internees? If you have any doubt, let him be acquitted. If you are satisfied, let him be convicted and later on you will have the opportunity of considering whether or not there be any circumstances of mitigation which can substantially affect an act of this magnitude.' [241] [...]

[On 24 August 1946, the Court found Freitag and Muller 'not guilty of the charge'. Jepsen was found guilty (WO 235/229, at 244). However, he was not sentenced to death: in announcing the sentence, the Judge Advocate said the following:]

'Gustav Alfred Jepsen, you have been found guilty of the gravest criminal conduct, conduct for which the normal penalty is death. But for the fact that the Court considers that there is an element of doubt as to whether or not you acted under some degree of compulsion, that is the penalty which would have been imposed upon you. As it is, the least sentence which the Court feels able to pass is that you be imprisoned for life, and that is the sentence of the Court upon you.' [245] [...]

Return to Text

#### FOOTNOTES:

n1 The original 'Record of the proceedings' of the case is in the Public Record Office, Kew Gardens, London, file WO 235/229; a photocopy of the relevant section of the record of proceedings is on file with the Journal. The pagination of the text, as it appears in the original typescript, is indicated in square brackets.

LOAD-DATE: 04/12/2007