



2-3-1948

Einsatzgruppen Case: Presentation of Evidence (Durchholz for Ruehl, deputized by Ruehl's attorney to submit one document)

International Military Tribunal

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Recommended Citation

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MR. WALTON: I think Dr. Hoffmann misunderstood me. According to this affidavit in 1933 the affiant was examining judge and Nosske came before him for interrogation in connection with this Horia Sima's escape. At that time in 1944 the now defendant Nosske told this examining judge that the man Guttenberger was denouncing him. Therefore, if your Honors please, this fact was known to Nosske when he took the witness stand in this trial, and he was at liberty at that time to testify concerning it. Now the prosecution contends that since he did not he is now barred from injecting into the case an entirely new feature concerning this testimony about his investigation. He made no mention of anyone denouncing him when he was on the stand here.

DR. HOFFMANN: Your Honor, may I say something about this?

THE PRESIDENT: Well, I will let you, but I think that I can do it just as well. The theory of the document books is that they will contain evidence, not only rebuttal but they are still part of the case in chief -- I am speaking now of the defendants' document books - so that each affidavit could well be a speaking witness. Now Dr. Hoffmann is still presenting his case in chief and he presents this affidavit. He could have called that individual. Well, we know that in lieu of the flesh and blood witnesses we are taking affidavits for the conservation of time and for many other reasons, so that he, in effect, is now presenting a witness who he might just as well have presented before. So I don't think you can charge him with laches. It is not rebuttal; it is his case in chief.

MR. WALTON: Very well, your Honor.

THE PRESIDENT: Very well.

MR. WALTON: Your Honor, I don't know quite how we are proceeding and Dr. Hochwald gets up and then Dr. Hoffmann gets up. I have one document I would like the Tribunal, in order to keep the proceedings regular, to call me at the proper time, when it is the proper time to introduce it.

THE PRESIDENT: You may present it now since you are here at the podium. I don't think Dr. Durchholz will mind.

DR. DURCHHOLZ: Your Honor, I merely have to offer one more document for the defendant Schulz but I am willing to wait until Mr. Hochwald has returned. My colleague Link asked me to deputize for him concerning the defendant Ruehl, and he asked me to submit the Document Book No. III which consists of three documents. His wish was that I may be able to do this for my colleague Link. I think Mr. Walton is competent for this case.

THE PRESIDENT: Yes. All right, you may proceed.

DR. DURCHHOLZ: As Document Book III for the defendant Ruehl I am to submit a few supplementary documents. As Ruehl Document No. 27 I submit an affidavit by Dr. Hans Schmitz of 21 January 1948 on Page 69 of the book. This has the exhibit number 27. Dr. Schmitz talks about the professional activity of Ruehl in 1934 to 1938, when he was a specialist for counter-intelligence matters. He confirms that Ruehl was taken out of this career against his will and the Reich Security Main Office instructed him to be a candidate for the executive service. This document is a supplement for statements made in Ruehl Document No. 7 which is Ruehl Exhibit No. 7. In Document Book No. I on Page 19, an affidavit has been introduced there by Herr Loesse, a government councillor. I also offer as Exhibit No. 28 an affidavit by Erwin Hansen of 16 January 1948. This is Ruehl Document No. 28 on Page 71. The affiant states here further details about the position of Ruehl as administrative officer in the Sonderkommando 10b and confirms that Ruehl was not one of the senior officers after the commander. Hansen also confirms that Ruehl had nothing to do with interrogations, arrests and executive tasks, and neither acted as deputy of the kommando chief nor was he chief of a subkommando nor was he active as such.

MR. WALTON: Now, if your Honors, please, I don't think even the Tribunal can say about this document that he just argued about that it is part of the case in chief. This document is put in specifically to refute the one document or the affidavit of a witness Robert Barth, B-A-R-T-H. We would never get through with this case if rebuttal, sur-rebuttal, sur-sur-rebuttal is continually put in. Now is this witness knew these facts which was brought out certainly in cross-examination that at least the pr

cution thought Ruehl was a deputy to Persterer, the kommando chief, at the time when his document books were presented this should have been in them as part of his case in chief. But, if your Honors please, this is an attempt to rebut the prosecution's rebuttal document, and I think the doctrine of Laches certainly applies in this case.

THE PRESIDENT: Well, do you admit the principle that affidavits form part of the case in chief?

MR. WALTON: Your Honor, at the time, at the proper time they certainly do, but I ask your Honor to take this into consideration. The prosecution put in one document against Ruehl in rebuttal. Now then this comes as part of the case in chief that attacks the rebuttal or it is a sur-rebuttal of the defense, one or the other, and as a matter of point of time--

THE PRESIDENT: Does it make no reference to your case in chief? Does it not reply to anything that you presented in your case in chief against Ruehl?

MR. WALTON: No, sir. My cross-examination attempted to bring from Ruehl the fact that he was a deputy to Persterer which he denied. The prosecution in rebuttal introduced a document which the Tribunal has pointed out is equal in this case to a flesh and blood witness which refuted that. Now the prosecution comes today- I am sorry, correction - the defense comes today and produces an affidavit from a witness that was known to the defense at the time he was cross-examined and attempts to rebut the prosecution's rebuttal document.

THE PRESIDENT: Until you cross-examined on this subject, how was the defendant informed that he was charged with being a deputy of Persterer? Since it was not in your case in chief how was he informed?

MR. WALTON: He was certainly questioned also, if my memory serves me right, by his own counsel as to what his position was in Sonderkommando 10b. We charged him in the indictment with being deputy commander.

THE PRESIDENT: Well that is what I asked you, if it formed part of the case in chief, and you said no.

MR. WALTON: I believe I should like to correct that. If my memory serves me, in the first pages of the indictment where each man's SS rank is given and his position in the Einsatzgruppen, it definitely states that he was charged as deputy chief of the Einsatzkommando 10b, or Sonderkommando 10b.

THE PRESIDENT: All right, if he was charged with being deputy commander in the indictment and it was part of your case in chief, then on the principle that all these documents submitted by the defense form part of the defendant's case in chief, why wouldn't he be permitted to present this affidavit to refute the charge in the indictment that he was a deputy commander?

MR. WALTON: He would, your Honor.

THE PRESIDENT: Yes.

MR. WALTON: At the proper time, but the point that I am making is that this is a sur-rebuttal document.

THE PRESIDENT: Well, but Mr. Walton, you know of all the difficulties that there are in getting these documents presented and prepared. There are so many mechanical propositions to overcome so that the mere delay in time does not of itself suggest that defense was not diligent.

MR. WALTON: Look at the date of the instrument, your Honor, on the 28th of January 1946. It was obtained after the rebuttal document was in and it comes in as an attempt to sur-rebut the prosecution's rebuttal.

DR. DURCHHOLZ: Your Honor, may I comment on this briefly?

THE PRESIDENT: Mr. Walton, if you had brought in a witness instead of an affidavit then the defense would have had an opportunity to cross-examine that witness, but since you avail yourself of a privilege, which is accorded all counsel, to bring in affidavits in lieu of witnesses how is the defense going to reply or challenge in any way this affidavit less he does it in this way since you did not present the flesh and blood

witness?

MR. WALTON: Very well, your Honor, I put in the objections, the Tribunal rules on them.

THE PRESIDENT: Very well, your objection is overruled.

DR. DURCHHOLZ: Your Honor, may I just make one comment on this? The necessity of introduction of this document was not based on the rebuttal but because of the cross-examination, and the fact that the document was only introduced now is due to the fact that we had no means of obtaining this affidavit before. Apart from that this supplements previous documents on various points.

As my last document I offer as Exhibit No. 29 the Ruehl Document No. 29 on Page 76. This is an affidavit by Karl Kaufmann of 16 January, 1948. The witness confirms that Ruehl was neither introduced as deputy of the kommando chief nor was he ever active as such or as subkommando chief.

That concludes my documents.

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MR. WALTON: Your Honor, the prosecution makes application in open court to have these two witnesses called for cross-examination.

THE PRESIDENT: If they can be obtained.

MR. WALTON: Otherwise we object to the introduction of these last two documents.

THE PRESIDENT: If those witnesses can be obtained forthwith, the application is approved.

DR. DURCHHOLZ: I shall try, if it becomes necessary, to bring these witnesses here for cross-examination.

MR. WALTON: Do I understand the Tribunal that I have the right to cross-examine these witnesses?

THE PRESIDENT: You certainly have.

MR. WALTON: If they are not brought then the Tribunal does not accept the documents, or do they accept it for whatever probative value they choose to give it?

THE PRESIDENT: Well, what is sauce for the goose is sauce for the gander.

MR. WALTON: That is right.

THE PRESIDENT: He has the right to cross-examine your witness.

MR. WALTON: Very true, your Honor.

THE PRESIDENT: Well, can you get your witnessin here?

MR. WALTON: He lives in the French Zone of Austria. I can set the procedure in motion as soon as I leave.

THE PRESIDENT: Well, let's dispose of it this way, Mr. Walton, that if any or all of these witnesses can be obtained and presented to the Tribunal this week then we will hear them. Otherwise we will accept all the affidavits, the ones that you presented and the ones that he presented, and assign to them the probative value which the entire situation will accord to them.

DR. WISSNATH: Dr. Wissnath for the defendant Jost.