19 December 46

Proceeding

Reuter

Thursday, 19 December 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Hearing of the matters raised by the Defense relative to proposed motions to dismiss to be introduced at the close of Prosecution's case in chief.

Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth
of Australia.

Reported by:

Julian Wolf
Official Court Reporter
IMTFE

Appearances:

For the Prosecution Section:

MR. A. J. MANSFIELD
BRIGADIER R. H. QUILLIAM
MR. CARLISLE W. HIGGINS
MR. FRANK S. TAVENNER, Jr.

For the Defense Section:

MR. WILLIAM LOGAN, Jr., Counsel for the Accused KIDO, Koichi
MR. MICHAEL LEVIN, Counsel for the Accused SUZUKI, Teiichi
MR. ROGER F. COLE, Counsel for the Accused MUTO, Akira
MR. LAWRENCE P. McMANUS, Counsel for the Accused ARAKI, Sadao
MR. ALFRED W. BROOKS, Counsel for the Accused KOISO, Kuniaki
MR. OWEN CUNNINGHAM, Counsel for the Accused OSHIMA, Hiroshi
MR. JOSEPH G. HOWARD, Counsel for the Accused KIMURA, Heitaro
MR. ARISTEDES LAZARUS, Counsel for the Accused HATA, Shunroku
MR. FLOYD J. MATTICE, Counsel for the Accused MATSUI, Iwane
MR. JOHN G. BRANNON, Counsel for the Accused NAGANO, Osami
MR. G. F. BLEWETT, Counsel for the Accused TOJO, Hideki
MR. GEORGE YAMAOKA, Counsel for the Accused TOGO, Shigenori
DR. KIYOSE, Ichiro, Counsel for the Accused TOJO, Hideki
DR. UZAWA, Chief Japanese Counsel
MR. USAMI, Rokuro, Counsel for the Accused HIRANUMA, Kiichiro
MR. KANZAKI, Masayushi, Counsel for the Accused HATA, Shunroku
MR. OKAMOTO, Toshio, Counsel for the Accused MINAMI, Jiro
MR. ITO, Kiyoshi, Counsel for the Accused MATSUI, Iwane.

For the Office of the General Secretary, IMTFE

Mr. C. A. MANTZ, Clerk of the Court

The proceeding was begun at 1315.

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THE PRESIDENT: This conference is called on your request, Mr. Logan.

MR. LOGAN: That is right. Defense have requested this conference for the purpose of clarification of three points in connection with the proposed motions by defense to dismiss after the prosecution has rested its case.

The first point is whether or not the Court will entertain such a motion, and the second, if it does, the procedure to be adopted in connection with the motion, and, thirdly, with respect to the quantity of proof required by the Court in dealing with such motions.

On the first point, the Charter makes no provision for the motion to dismiss after the prosecution's case, but,as we all know, such motions are invariably entertained in all criminal cases in perhaps every nation represented in this Court and I don't think the absence of such a provision in the Charter means that the defense is barred from making such a motion when the prosecution rests. I might point out that in the Nuernberg case it is my understanding that such a motion was entertained off the record in

connection with the organizations, but there was no such motion in connection with the individuals. However, the Nuernberg case is decidedly different than the present case because there there were only four counts, whereas,in the present case, we have fifty-five counts and it seems to us that the issues should be narrowed in this case and the Court entertain such a motion because we believe that by so doing and ruling on these motions, that perhaps several months will be saved of evidence when the defense comes to presenting its case.

With respect to the second point, it was our thought that if the Court intends to entertain such a motion that we would be permitted to make one general motion on behalf of all the accused -- making a concise motion on behalf of the accused.

And the third point is with respect to the quantity of proof required. We would like to find out on a hearing of such motion whether or not the Court will use as a guide the proposition that the prosecution should submit on its case substantial proof, or merely prove a <u>prima facie</u> case or whether the Court would deny the motion on behalf of the accused if a mere scintilla of evidence is produced.

I might say, your Honor, that in the Manual

of Courts Martial there is a specific section which I would be glad to read if you wanted it in the record to present to the other Judges with respect to such motions.

THE PRESIDENT: I do not know what is in that Manual, but I would like to state now what is the position in the national courts. Of course, in criminal cases you always have a jury and the motion is that the case be taken from the jury on the ground that there is no evidence to warrant its being left with them. Of course, the amount of evidence may be more than a scintilla and in those cases it would go to the jury. But if it is less than a scintilla or only a scintilla of evidence -- if it is less than a scintilla, we will say, the Court would not allow the case to go to the jury although they don't decide questions of reasonable doubt -- that is, the Court does not. Here the position is different. We are the court and the jury. We are the judges and the jury and we may think that. We may be satisfied, I don't know, to deal with the case immediately if we think the evidence does not establish guilt beyond a reasonable doubt in the case of all or any of the accused. We may be prepared to do that if the Charter permits. But the fact is, that possibly evidence which in a

national court would be sufficient to warrant the court in leaving the case for the jury, would possibly not be held sufficient to place us beyond -- to put us beyond reasonable doubt, and, therefore, we might deal with it. We might ourselves dismiss the case against all or any of the accused, although if we had a jury we would leave it to them. You can see that.

MR. LOGAN: Yes, I understand.

THE PRESIDENT: But I say I do not know what the Charter says about that. I have never considered the Charter in that regard.

MR. LOGAN: The Charter is silent on such a motion, your Honor, but I wanted to point out --

THE PRESIDENT: But it does specifically set out the steps to be taken.

MR. LOGAN: It does.

THE PRESIDENT: And does it anywhere else say there may be modification of those steps provided there is --

MR. TAVENNER: There is a power set forth that might have some influence upon the decision.

THE PRESIDENT: There is?

MR. TAVENNER: Yes.

THE PRESIDENT: What is that?

MR. TAVENNER: Section eleven -- item eleven

of section four of the Charter gives the Tribunal the power to interrogate any defendant. The granting of a motion of this type would be in conflict with the exercise of that power, and, I think for that reason, would probably have a bearing upon the decision because of it being in conflict with the exercise of that power, and I might --

MR. LOGAN: What section is that?

MR. TAVENNER: Section eleven.

THE PRESIDENT: I see what you mean. The Court may say, "Well, the prosecution haven't put enough evidence before us to satisfy us sufficiently beyond a reasonable doubt, but we have a power to interrogate the accused to make up for the lack of evidence on the prosecution's case."

MR. TAVENNER: Or it would take the form of a question arising at any time during the trial of a case that would occasion interrogation of the accused by the court. If a motion were granted at the end of the prosecution evidence of course that power of discretion would be wiped out. There is still another matter in connection with it I would like to point out to your Honor.

THE PRESIDENT: While you are on that power to interrogate the accused do you suggest that if any

of the accused be taken to the box to give evidence the court would require him to go to the box so that he could be examined by Members of the Tribunal. I do not know. I do not know what my colleagues feel about that. You see, different nations use different ways. In some nations a court takes a bigger part than the British or American courts, or British and Russian.

MR. LEVIN: It doesn't --

MR. BROOKS: While you are on that, your Honor; as I recall from reading earlier that it is borne in case the accused does not take the witness stand that the court can comment on that which is unusual. According to our courts the court does not comment and the witness will refuse to take the stand.

MR. JUSTICE MANSFIELD: Refuse to answer, yes, sir.

MR. BROOKS: I know there is something in there.

MR. TAVENNER: If they live.

THE PRESIDENT: I wouldn't decide any of these questions of course without consulting the other Members.

MR. TAVENNER: May I point out to you one further consideration in regard to it? I find on examining the Charter that was issued by SCAP on

December 5, 1940 for the Trial -- for the establishment of military commissions for trials -- such as the trial of HOMMA and YAMASHITA, that there is a provision in those Charters specifically providing for this right. I quote the language of item five of section five which deals with the subject of conduct of trials. It is as follows:

"The witnesses and other evidence for the prosecution shall be heard or presented. At the close of the case for the prosecution the Commission may on the motion of the defense for a finding of "Not Guilty," consider and rule whether the evidence before the Commission supports the charges against the accused. The Commission may defer action on any such motion and permit or require the prosecution to reopen its case and produce any further available evidence."

Now, there is no similar provision in the Charter for the Tribunal for the Far East. There is no similar provision in the Charter for the Nuernberg Trials.

MR. LOGAN: May I point this out to the Court that a motion of this nature more or less deals with a matter of procedure. By that I mean that apparently the Court has had power to make rules as it has done in this case and that this would be merely a manner of

procedure as to whether or not the Court would feel that it would be granting the accused an expeditious trial in dealing with such motions because if the issues can be narrowed, if the prosecution has failed to prove its case on certain counts, they should be stricken, because, after all, the burden has been on the prosecution right along in the case and that, if, when prosecution finishes its case and there is no evidence or slight evidence, and the Court feels that the case should be dismissed as to certain accused on certain points, that should be done. It is merely a procedural matter. It is not affecting a substantial right of the prosecution, and, I think, the Court in its inherent power would have a right to entertain such motions even though it is not specifically granted in the Charter. Certainly it is a right that all English-speaking nations recognize and insofar as requiring the accused to take the stand.

THE PRESIDENT: There is only one charge. There is ordinarily more than one count in an indictment. There may be in certain special cases no more than one. Therefore, you deal with the whole lot at once but here there are fifty-five.

MR. LOGAN: Which makes it different from other counts.

THE PRESIDENT: I may say on 28 and 29 there is no evidence but the trial goes ahead and the accused gives evidence on the others, and, of course, they give evidence the same by supplying evidence of the other counts upon which the prosecution have failed to give evidence. Then what do you do? Then the men are clearly guilty on the whole of it, I would say, and unless you try to deal with them because you have struck out the counts in which there was no evidence when the prosecution finished. The position is somewhat different from a national court where there is only the one charge substantially. Duplicity is not allowed except in special cases where one crime is really part of another.

MR. LOGAN: Well, it may even be, your Honor, that prosecution has failed to prove any count as to certain defendants and why should they be held required to put therein proof. I am speaking now of all counts.

THE PRESIDENT: Very often accused giving evidence supplies evidence against himself where the prosecution has failed to do so. He may be cross-examined into making admissions which supply something lacking in the prosecution's case.

MR. LEVIN: Mr. President --

THE PRESIDENT: Now, I should say a defendant

very often does.

MR. LOGAN: That of course assumes that all these accused are going to take the stand.

MR. TAVENNER: May I point out one further matter to the extent that time-saving elements might be involved in the Tribunal's decision. I think it is very doubtful that any time could be saved thereby in the event that certain counts were struck out as to certain individuals because of the fact that there are general conspiracy counts here and all evidence that would be available to any defendant in support of his defense as to any one of those counts would also be available to him and most likely used in defense of the conspiracy counts unless, of course, the conspiracy counts are struck out. Now, as long as there is any chance of the conspiracy counts remaining I can't see how there can possibly be any substantial reduction of testimony by the ruling on various counts. The fact of the matter is that in preparation for analysis of arguments and the making of summaries of the testimony at this time would in itself consume considerable time.

THE PRESIDENT: I used to welcome these motions to take the case because it gave me an opportunity to refresh my mind on the evidence and on

the law, very often in a difficult case. But I don't know that my colleagues will take that stand here. For various reasons they may not be disposed to do it.

MR. TAVENNER: May I point out still one further point of consideration that virtually all of the counts charging substantive offenses are material as overt acts in the conspiracy. To rule on the question of involvement of a defendant now under one of those substantive offenses might result in a situation where the Court would conceivably hold that the evidence is not sufficient to hold him on a substantive offense, but would be sufficient on the conspiracy involving the same thing. But that would be proceeding in a piecemeal way to consider matters and could result in a very involved situation as to these various counts, so which are substantive offenses, some of which are really overt acts performed in executing the conspiracies. So, I think it is a very involved situation if the piecemeal consideration is given.

MR. McMANUS: I think the prosecution has --

MR. LOGAN: With respect to this conspiracy count, of course, we feel that without getting into the merits at this time, we feel that there has been no sustaining by the prosecution of that charge of

conspiracy.

THE PRESIDENT: Well, I cannot discuss it now.

MR. LOGAN: Yes, I don't want to enter that discussion at this time, but even if the conspiracy charge is held to be good, we still feel that where a man has been accused in many counts and during part of that time he was not in a position or in an office which required any act on his part with respect to other counts for which he is charged, that, if the court entertained our motion to strike out those various counts, we would not offer any evidence on those counts as it would result in a material saving of time.

THE PRESIDENT: It is half-past one now and we haven't had much opportunity to discuss this. I think I will adjourn this for further argument. You are in no great hurry, are you?

MR. LOGAN: No, we would like to know. The time is drawing close. We have to prepare these questions.

THE PRESIDENT: We will adjourn until nine o'clock tomorrow morning.

(Whereupon, at 1330, an adjournment was taken until Friday, 20 December 1946, at 0900.)

NOTE:

The attached pages are corrected pages and should be substituted for the corresponding pages in the Proceedings in Chambers, dated Thu 19 Dec 46.

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