20 december 46

Proceedings

~~Reuters~~

Friday, 20 December 1946

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

CONTINUATION

Of

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:

Jack Greenberg
Chief Court Reporter
IMTFE

Appearances:

For the Prosecution Section:

MR. FRANK S. TAVENNER, Jr.
BRIGADIER R. H. QUILLIAM

For the Defense Section:

MR. WILLIAM LOGAN, Jr., Counsel for the Accused KIDO, Koichi
MR. MICHAEL LEVIN, Counsel for the Accused SUZUKI, Toiichi
MR. ALFRED W. BROOKS, Counsel for the Accused KOISO, Kuniaki
MR. GEORGE C. WILLIAMS, Counsel for the Accused HOSHINO, Naoki
MR. LAWRENCE P. McMANUS, Counsel for the Accused ARAKI, Sadao
MR. EDWARD P. McDERMOTT, Counsel for the Accused SHIMADA, Shigetaro
MR. G. F. BLEWETT, Counsel for the Accused TOJO, Hideki
MR. OWEN CUNNINGHAM, Counsel for the Accused OSHIMA, Hiroshi
MR. DAVID F. SMITH, Counsel for the Accused HIROTA, Koki
DR. KIYOSE, Ichiro, Counsel for the Accused TOJO, Hideki
MR. ARISTEDES LAZURUS, Counsel for the Accused HATA, Shunroku
MR. KANZAKI, Masayushi, Counsel for the Accused HATA, Shunroku
MR. R. S. RUTCHICK, Counsel for the Accused KAYA, Okinori

For the Office of the General Secretary, IMTFE

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

The proceeding was resumed, pursuant to adjournment, at 0900.

MR. BLEWETT: Can we continue the discussion, your Honor?

THE PRESIDENT: Yes, Mr. Blewett. I would like to listen.

MR. BLEWETT: This matter has not been brought up by one person; the whole group has discussed this for several months and at many meetings, and there was not unanimity in the meetings. One of the groups took the stand that by right they could make this motion and that the Court, of course, could determine whether or not an argument should be heard. But the fact of the motion itself was assumed from our practice at home. I do not know whether it is the rules of Court or whether it is the rules of procedure.

THE PRESIDENT: Well, subject to what the Charter says, yes.

MR. BLEWETT: We would just simply, naturally, take it for granted.

THE PRESIDENT: If the Charter denies it expressedly or impliedly, of course, then it could be taken for granted.

MR. BLEWETT: If we can assume that we have

this by right, then, of course, the prosecution is not permitted to argue in opposition to that. The prosecution's stand would then be, if we are permitted to make the motion -- it would be the Court's prerogative, of course, to determine then whether or not it shall hear argument, and either hear argument or dismiss the motion or listen to argument. Then, of course, the prssecution would come in and argue in opposition to the motion itself and not against the motion.

So this group of defense counsel feel that, perhaps, the minority report should be made of our committee -- the Rules Committee, assuming that we have the right and the privilege to make the motion but asking your Honor's only consideration on the question of whether we can argue it, although we realize that the proper time to take that up is at the end of the prosecution's case. But, for orderly procedure, we only ask that we have the right to make argument and, if so, whether we can have the right to make a general argument and also an individual argument.

MR. LEVIN: Mr. President.

Are you through?

MR. BLEWETT: Yes.

MR. LEVIN: I am very much in accord with everything that Mr. Blewett says, and I would like to supplement that by a discussion for a moment only on whether or not the Charter impinges the right to make a motion to dismiss. All of us defense counsel had assumed that there was no question that at the conclusion of the prosecution's case we would have a right to make a motion to dismiss. The Charter provides, first: that there is procedure for a fair trial, Section III, Article 9; then, a(1) as a provision for an Indictment; c as a provision for counsel for the accused.

It would seem to me that, generally speaking, the entire theory of this trial, I would say, is the method of the Anglo-Saxon method of trial. Six of the Justices or six of the countries that are represented at the trial follow, I believe, the Anglo-Saxon method, and it seems to me that the general method which the Court has adopted under the rules of the Charter is the method of the Anglo-Saxon trial.

THE PRESIDENT: Well, it may be as regards military courts, but it is not the Anglo-Saxon method as regards the ordinary criminal trial because it expressly empowers the Court to interrogate

the accused which is a very important departure.

MR. LEVIN: That is quite correct, Mr. President. I would say that it generally implies trials in the Anglo-Saxon method except as modified by the Charter.

THE PRESIDENT: Yes.

MR. LEVIN: Now, I would like to add just one word. The only question that is involved, it seems to me, comes under Section I, Article 12 in the "Conduct of the trial." That was the purpose for posing this problem to the Court. This provides as follows: The Court can "confine the trial strictly to an expeditious hearing of the issues raised by the charges."

Now, as a matter of fact, our request, as Mr. Blewett has indicated, was one rising out of this Section in this Article because, if twenty-seven of us counsel got up and made motions for dismissal in various forms, it might take a week or two weeks, and we might cover ground that others had covered. So, the purpose of our request was, we assumed, the absolute right to make a motion to dismiss and to discuss with the Court the modus operandi rather than question the right to dismiss; and further, to question the right to make the

motion to dismiss.

And I further agree with Mr. Blewett in his statement that, in relation to that, that was a matter with which the prosecution was not concerned and which we were only concerned in discussing with the Court.

MR. LOGAN: Have you finished?

MR. LEVIN: Yes.

MR. LOGAN: If the Court please, I'd like to answer briefly the arguments which were made yesterday by the prosecution in opposition to this motion. They raised the question of the right to interrogate the accused. That has no place in this discussion because that refers to the defendants' case. The accused may stand mute. In any event, it does not refer to what has transpired up to the close of the prosecution's case. That's all we are concerned with here at the present time.

THE PRESIDENT: You contend that it is only if the accused goes into the box that he can be interrogated by the Court?

MR. LOGAN: That's right.

THE PRESIDENT: There may be a lot in that.

MR. LOGAN: That question may only arise in the defendants' case. It has nothing to do up to

the time the prosecution rests. That's all we are concerned with here at the present time.

In the second place, the question arose yesterday about the evidence which may be given on a defendant's case and which might supply deficiencies in the prosecution's case with respect to any of the accused. Well, I know of no rule in any Court which says that on a motion to dismiss after the prosecution's case the Court must take into consideration the lack of evidence in the prosecution's case might be supplied on the defendants' case. The only question here again to be determined is, has the prosecution sustained its burden by its substantial evidence? And we all know that some Courts, even in our country, who lack courage do rely on such deficiency being supplied, but it is neither right nor in consonance with good legal practice for a judge to decide on a motion to dismiss after the prosecution's case that, well, maybe the deficiency might be supplied in the defendant's case. That is not proper practice, although some Courts, as I say, do that.

And the third point that was raised was with respect to these other Charters referred to in the HOMMA and YAMASHITA case. That, too, I don't believe has any application here because, at the time

this present Charter was drawn I do not believe that the framers had in mind that the Indictment in this case would be so extensive in time and im number of Counts. As I say, there is a crying need in this case, in order to shorten the trial, narrow the issues, that this motion be heard and that some of these Counts be stricken if the prosecution hasn't proven them.

And fourth, the argument submitted by the prosecution was that, even if some Counts were stricken and the conspiracy charges were not stricken, that no time would be saved -- that argument is beside the point for two reasons: First, if the prosecution has failed to prove any single Count it should, as a matter of law, be stricken irrespective of the question of time; and secondly, that in the prosecution's opening statement it is apparent, at least to some of us, that it has little faith in the conspiracy charge; and furthermore, on the basis of the Nuernberg decision, we urge that here, too, the fourteen years alleged conspiracy is out of all proportions, and it was cut short in the Nuernberg trial -- it was specifically mentioned; lastly, we submit, if this motion is not considered, that this trial would more or less lose the appearance of a

trial as we know it with the usual motions. And it seems to me it would result more or less in this Court being relegated to a position of an investigating body. And we urge that the procedure used in criminal trials, both national and military in practically all jurisdictions that I know of, be followed here. We contend that this is an inherent right which should not be lightly discarded. And furthermore, it is a matter of procedure, not of substance, which, under Article 7 of the Charter, it has a right to permit.

And furthermore, your Honor, I sincerely believe that, if this motion is not heard, and we believe there are a number of Counts that should be stricken, that in all probability this trial might go on for another year on the defendants' case.

THE PRESIDENT: Well, I don't know. I have been thinking over how the defendants might put their case, keeping in mind that I am not conducting the defense. It appears to me that it would not be prejudicial to the accused to put all they have to say in writing, to read what they have to say. I know there is an element of the demeanor of a witness, but it is seldom if ever displayed in the course of examination in chief.

Now, if they put their statements in writing, we can have the translation in English given at the same time. That would halve the time taken to put their respective cases, and written cases are always shorter than oral examinations; written statements are always shorter. Well, of course, you would have to be protected against having your written statements reaching the prosecution. They would have to go to the interpreters, of course. The demeanor of the witness would be indicated on cross-examination if there is any. It may not be. I don't know.

MR. LEVIN: Mr. President.

Pardon me. Go ahead.

MR. BROOKS: I am strongly in favor of that.

THE PRESIDENT: I have not discussed this with any of my colleagues. They may disagree with me. But it occurred to me that I might mention that as something that was passing through my mind as a method of shortening the proceedings without prejudicing the defense. You may be able to convince us that it would be prejudicial to the defense. Of course, I cannot see that it would be. We have that American rule then that the accused could be cross-examined only on matters arising out what he has said. We have that in any event.

MR. LEVIN: Mr. President, I thought I'd like to add to my discussion of the procedure, and it was Anglo-Saxon procedure, the fact that we have had direct examination and cross-examination; there have been rulings by the Court that questions have been leading, and so forth. In other words, very generally, our practice has followed, I should say, the Anglo-Saxon procedure. And, therefore, it would certainly be in consonance with that procedure to entertain the motion to dismiss. I am quite sure, Mr. President, that many of us, in discussing what you have just said, have given some thought to the presentation of a portion of our evidence by way of statements, and I haven't discussed it with my colleagues, but I am sure that we have given some thought to it. I have already prepared some affidavits that I intend to introduce. So, I am sure, in relation to that, that it may be that other of my colleagues intend to introduce evidence in that form. I assume that the Court would not issue an Order to that effect.

THE PRESIDENT: I do not know what they would do, really. I have not discussed this matter with my colleagues.

MR. LEVIN: Of course, that's a matter be-

side our direct discussion here.

THE PRESIDENT: Yes. I discuss every matter with the eleven Judges from time to time. I do nothing else. It is much better for me to have it recorded here now. They read all these proceedings. They will see what I say.

MR. McMANUS: If your Honor pleases, I dislike to disagree with your Honor, but I thought your Honor said we have an American ruling that cross-examination is confined to the scope of what the witness testifies to.

THE PRESIDENT: That is a Federal rule, I am told. You can contradict it, and I could not contradict you. It is only what I have been told on the bench. I have never heard of such a rule nor has the English Judge. The Canadian Judge says they have it in Canada, too.

MR. McMANUS: If this matter has not been discussed fully, I thought I might take the initiative in doing something about the questioning in Court in inquiring about what time would be allotted to the defense to prepare fully and completely their case. Whether or not your Honor wants to hear me now or whether I should make any motion about whether we should be granted a few weeks or some weeks or

something to preapre our case after the prosecution's case is over, why, I shall abide by the Court's decision.

THE PRESIDENT: I do not know what the Judges think, again, on that, but I feel sure that there will be no time granted for that purpose. If it involves the Judges postponing their sitting or taking a vacation, or something like that, it would not be granted. It is just my feeling. The trial is going to take far longer than we anticipated. We have not wasted any time. I think, as a matter of fact, that if this trial were conducted wholly in English, it would constitute a high-speed record. Already we have taken far more evidence than Nuernberg took in the same time.

MR. McMANUS: If your Honor pleases, prosecution --

THE PRESIDENT: Nevertheless, we hope to finish this trial early next year, without prejudice to the fair trial of the accused.

MR. McMANUS: I am not thinking about the expediency of the trial. I am thinking about a proper and fair defense that should be placed before this Court.

THE PRESIDENT: Well, I have been conducting

criminal cases for twenty-one years, and I have never yet adjourned a case to enable the defense to prepare what it had to say. The trial has gone right on. In twenty-one years I have been trying criminal cases. I have never yet adjourned for a day to enable the defense to prepare its case. We might adjourn to enable a witness to attend, but not to prepare the case.

MR. McMANUS: If your Honor pleases, the prosecution has had six or seven months opportunity, I mean, to prepare theirs, and are we to be stymied immediately, right now?

MR. SMITH: If your Honor please, I am Chairman of the Document Committee. If the Court does not grant us a substantial recess to enable us to work further on the documents and get them in order, this case is going to be a hopeless morass. So far we have processed only a little over a hundred documents. We have three hundred more which are in the process of being translated, and we do not know when we are going to get them. It will just be impossible to go on immediately after the prosecution's case and present ours in any sort of orderly fashion. If the Court is going to drive us, there will be no order; we will just have to bring documents in regard-

less of what they relate to and read them as we get them.

THE PRESIDENT: I do not know what your position is, Mr. Smith. Whatever it is, we will have to consider it seriously.

MR. SMITH: If your Honor notices, in the last few weeks there have been very few counsel in court; and, at my suggestion, we called two emergency meetings of all counsel, Japanese, to see what we could do to speed up the processing of our documents, and at least ten Japanese counsel stay out of court every day just to spend a whole day trying to get these documents in shape. I sit up every night until ten or eleven o'clock reading books and then cutting up material and trying to get it in shape, and we do not have the facilities or the advantage that the prosecution has.

THE PRESIDENT: I know you have an immense task.

MR. McMANUS: Furthermore, I might say, if your Honor pleases, I have been inquiring from the Captain upstairs, and SCAP about the production of my witnesses. I haven't had an opportunity even to interview them as yet. If we are going to go on immediately after the prosecution's case without

having interviewed your witnesses, why, my goodness, that --

MR. LOGAN: Judge, getting back to this particular motion, I think we fully set forth the position of the defense that they have an inherent right under Anglo-Saxon procedure to make this motion. And when we first came in here, it was merely with the idea of setting forth some sort of orderly procedure. We did not anticipate such opposition from prosecution as to what we deemed our rights even not expressly set forth in the Charter. And, as I stated yesterday, we had evolved a plan whereby there would one general motion to dismiss on behalf of all the accused on certain grounds and then concise, individual motions on behalf of the accused. That is the procedure which we had in mind.

And the second proposition under that was whether or not the Court intended to follow the military rules that prosecution had to prove its case by a substantial weight of the evidence on the motion to dismiss after the prosecution's case.

THE PRESIDENT: Referring to that Article 11a or 11c, it would be certainly going a long way if, at the end of the prosecution's case when we thought there wasn't enought evidence to justify the

conviction, we should say, "Oh, we'll call the accused and examine them now to see whether we can supply what the prosecution have not supplied. That certainly would be going a long way.

MR. LOGAN: That refers purely to what happens after prosecution rests. We are just interested in knowing the procedure to be adopted at the moment they rest, not what might happen on the defense's case.

MR. LEVIN: Mr. President, you have reference to b of Article 11, "to interrogate each accused and to permit comment on the refusal to answer the question."

Is that what your Honor has reference to?

THE PRESIDENT: Yes.

MR. LEVIN: I think you said "11a." It is "b."

THE PRESIDENT: I do not want to venture any opinion on what that means. That is a matter for all the Judges -- a matter of what the Charter means. I will leave that to the whole of the Judges without expressing any view.

MR. LOGAN: As a matter of law, the Court should determine whether or not the prosecution has proven its case when it rests. After all, they have made these charges. Have they sustained them? That

is all that is to be considered on this motion. What we might do on our case has no place in this discussion.

MR. LEVIN: I am certainly in accord with Mr. Logan. There can be no question about that as I indicated. The prosecution was not concerned with our motions exactly in the same form as we might make a motion and objection to the evidence, or "the question is leading." It is a matter of criminal procedure in a trial of criminal action.

THE PRESIDENT: You should be very careful about moving a Court to, say, dismiss the case on the ground that there is no evidence. Of course, if you do not take up that stand, and you call the accused, if the Court is against it, then you have to call an accused, and the evidence can be supplied by the accused. But a party making a motion of that kind generally stands on it.

MR. BLEWETT: We do not put any defense at all. Of course, we have an appellate right there, naturally, which we do not have here.

THE PRESIDENT: That question has come before the English Courts in several cases, Alexander , and there is some variety of opinion. It is not clear as day. I do not express any opinion on

it. But the practice is, if you see fit to make that motion, to stand on it. I won't say it is universal, that it is the invariable practice, but the general practice.

MR. LOGAN: The old Common Law of demurrer to pleadings.

MR. LEVIN: Of course, it has not been the practice in our State Courts, and there may be a different practice in the Federal Courts.

MR. LOGAN: We make these motions to dismiss after the prosecution's case as a matter of course.

THE PRESIDENT: Yes. Well, I will put all this before my colleagues --

MR. McMANUS: Would your Honor at this time --

THE PRESIDENT: (Continuing) without expressing any views.

MR. McMANUS: Would your Honor at this time advise me whether or not the Court would entertain a motion concerning a short period of time to prepare for defense? I would like to make such motion.

THE PRESIDENT: My colleagues will read what you have to say about it, Mr. McManus.

MR. BROOKS: I would like to make one comment.

MR. LOGAN: We would like to be heard more fully on that, your Honor. It is a very serious problem.

THE PRESIDENT: What time would be necessary? They might want weeks.

MR. SMITH: Your Honor, at least a month. We would like to have two months in order to get this case in the form in which it should be to go ahead. We have worked all through the summer and every day and every night, weekends, and it has been enough just keeping up with the reading matter on the prosecution's case. Most of us haven't had time to even write a letter for weeks.

MR. BROOKS: Normally, too, your Honor, if we go into a case of this magnitude, before we ask this case to be set down for hearing we would request time to prepare our case, before the prosecution put on any of their case. In this case we were not given that opportunity. It was not our fault so much because we weren't here, but we came into the case with it already started without that period of time when the prosecution, having the advantage of

nearly a year ahead of us, with all of their resources of eleven nations behind them, unlimited help and unlimited transportation. All of those things have weighed strongly again; and if the defense, even with the crippled help that we have to put up with along here -- girls working now in cold offices and stuff like that, when we can't even get transportation; two cars here when at the first of the case we had twenty-six: all of that thing. You can't say there is any semblance of a fair trial unless the defense has at least the time to organize themselves and organize the material to put that case before the public. And if we are shoved into the trial, it is going to show.

THE PRESIDENT: It might be better to adjourn this further so you can put your views on that.

MR. LOGAN: I think we should have another hearing to present that question. I think we can show facts and figures to show it is a physical impossibility to go on immediately after the prosecution rests.

THE PRESIDENT: I will make it at one o'clock. We will adjourn, then, until one o'clock.

(Whereupon, at 0930, the proceeding was adjourned until 1300.)

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The proceedings were resumed, pursuant to adjournment, at 1300.

THE PRESIDENT: Mr. Logan, you were going to say something about the necessity for a break between the prosecution's case and the defense case to enable the defense to prepare its evidence.

MR. LOGAN: Well, Mr. President, when we brought this motion in here yesterday we solely had in mind discussing the motion for dismissal after the prosecution's case. But this morning this question of an adjournment was injected into the hearing and we deem this motion to be of such vital importance to the entire defense, and we have been gathering facts in connection with it so that we can present a logical argument to the Tribunal, and we ask that the matter be referred to the entire Tribunal and set down for hearing about a week from now.

MR. LEVIN: That is the matter in relation to the recess, Mr. Logan.

MR. LOGAN: Yes, in relation to the recess.

THE PRESIDENT: Well, it would be an advantage if you could put your points now and save time later.

MR. LOGAN: I wish I would be able to comply with the request but it covers such a large field that I don't think we are in a position to do it logically

at this time.

THE PRESIDENT: I see. At any event, the Court will have to decide that. I was hoping you would put your arguments to me now and I could pass them on so you might be able to reduce the amount of time you would take in court.

MR. LOGAN: I would like to do it, your Honor, but it covers a vast field and we haven't all the facts before us at this time and I think it would be more expeditiously handled and time would be saved in the long run if we were given a little more time on it so we could present it in open court.

THE PRESIDENT: I would like to suggest, Mr. Logan, that when it comes into court you put what you are going to say in writing and give it to the interpreter so that he can have it put into Japanese.

MR. LOGAN: Yes, we will be glad to do that.

THE PRESIDENT: Anything to save time.

MR. LOGAN: Yes. If we set it down for about a week from Monday we will be able to do it.

THE PRESIDENT: I think in these circumstances the Court would be only too happy to hear what you have to say in any of these questions. I prefer it that way as long as we don't waste time in court.

MR. LOGAN: We won't waste time.

MR. McMANUS: May I say something?

THE PRESIDENT: Yes.

MR. McMANUS: If your Honor please, I feel as though this prosecution case now is coming rapidly to a close and it may close in about three weeks or four weeks.

THE PRESIDENT: I hope it closes before that.

MR. McMANUS: It may be a week now. We would like to know exactly, to know whether or not we are going to have any time to prepare our defense.

THE PRESIDENT: I have felt tempted to ask the prosecution how long it will take but I have resisted the temptation.

MR. JUSTICE MANSFIELD: We haven't been right so far in making a forecast.

THE PRESIDENT: I think we will just wait and hope for the best.

However, there is nothing else to do now, Mr. Logan, except to report to the other Judges. The conference is closed.

(Whereupon, at 1305, the proceeding was concluded.)

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NOTE:

The attached pages are corrected pages and should be substituted for the corresponding pages in the Proceedings in Chambers, dated Fri 20 Dec 46.

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MR. BLEWETT: Can we continue the discussion, your Honor?

THE PRESIDENT: Yes, Mr. Blewett. I would like to listen.

MR. BLEWETT: This matter has not been brought up by one person; the whole group has discussed this for several months and at many meetings, and there was not unanimity in the meetings. One of the groups took the stand that by right they could make this motion and that the Court, of course, could determine whether or not an argument should be heard. But the fact of the motion itself was assumed from our practice at home. I do not know whether it is the rules of Court or whether it is the rules of procedure.

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MR. BLEWETT: We would just simply, naturally, take it for granted.

THE PRESIDENT: If the Charter denies it expressedly or impliedly, of course, then it could not be taken for granted.

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something to prepare our case after the prosecution's case is over, why, I shall abide by the Court's decision.

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