

In the Matter of Merchant Mariner's Document No. 256383-D4 and all  
other Seaman's Documents  
Issued to: ELVIN DANIEL FAILES

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

1476

ELVIN DANIEL FAILES

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 2 June 1964, an Examiner of the United States Coast Guard at Galveston, Texas, suspended Appellant's seaman's documents for two months outright plus four months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a Chief Cook on board the United States SS AMERICAN HUNTER under authority of the document above described, on or about 24 July 1963, Appellant wrongfully assaulted and battered a fellow crew member by use of fists and a piece of dunnage while the vessel was in Manila, Philippine Islands.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence by stipulation various writings which included (a) Report of Personal

Injury (CG924E) that had been submitted by the vessel's master to the Officer in Charge of Marine Inspection, Galveston, Texas, (b) Medical Report of Personal Injury issued by Waterous Clinic, In., dated 25 July 1964, (c) a written statement of an eyewitness, (d) certified copies of logbook entries and (a) a sworn statement of the victim.

In defense, Appellant testified in his own behalf.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been found proved.

The decision and order were served on 2 June 1964. Appeal was timely filed on 5 June 1964.

#### *FINDINGS OF FACT*

On 24 July 1963, Appellant was serving as a Chief Cook on board the United States SS AMERICAN HUNTER and acting under authority of his merchant mariner's document while the ship was in the Port of Manila, Philippine Islands.

While ashore in Manila, Philippine Islands, on 23 July 1963, Appellant gave some money to a crew member, a messman, to hold. During the morning of July 24th at a request for the return of the money, only a portion of it was given back. Appellant went to the messman's room aboard ship, at about 1300 hours on 24 July 1963 to demand the amount that was withheld. The messman was there lying on his bunk. During an ensuing period of about forty-five minutes spent arguing for his money, the Appellant was the butt of vulgar and abusive language directed toward him by the messman. The use of this language made him so angry that he started to hit the messman with his fists and with a stick. While attempting to avoid Appellant to avoid Appellant's blows, the messman struck his head at least twice against portions of the bunk and bulkhead and began to bleed from the scalp. As a result he was hospitalized having suffered a mild cerebral concussion, a linear fracture at the right temporal region, laceration of the scalp and multiple contusions of the shoulders, chest, right lumbar and both upper extremities. A roommate of the messman was in the room at the time. He was the only eyewitness.

### *BASES OF APPEAL*

This appeal has been taken from the order imposed by the Examiner. It is contended that:

1. Upon the vessel's return to this country in November 1963, Appellant was informed by a Coast Guard Investigating Officer, investigating the victim's injuries, that he had nothing to worry about, so he made no effort to secure any witnesses or prepare a defense.

2. Prior to the hearing, a different Investigating Officer who prepared and served the charge told him he did not believe any serious outcome would result from the hearing.

3. When confronted with abusive and humiliating language, plus his need for the money, Appellant concluded that there was no other way to "handle the matter."

### *OPINION*

#### I

The statement made by the Investigating Officer at the time he investigated the messman's injury upon the vessel's return to this country was infelicitous. It would affect this proceeding if it legally concluded the case, the Investigating Officer acted in bad faith, or it clearly prejudiced Appellant.

The Investigating Officer could have terminated the matter by delivery of a warning under authority of 46 CFR 137.05-15(a)(6). Such warning if not protested would be entered on Appellant's record and would have precluded charging him later for the same offense. *Commandant's Appeal Decision No. [820](#)*. I have determined from the Investigating Officer's report on file with the Coast Guard, of which I take official notice, that in accordance with 46 CFR 137.05-15(a)(2) the Investigating Officer recommended closing the case and taking no action. The word "recommend" connotes that this was not a final action. In this instance a reviewing authority overrode the Investigating Officer and directed

further action under R.S. 4450, as amended. It follows therefore that the Investigating Officer did not conclude the case with his report and that he had acted in good faith.

The record does not reveal any prejudice to Appellant. The Examiner explained to him that he could have witnesses subpoenaed to testify in his behalf and he could apply to have the testimony of witnesses taken by deposition. Similar advice had been given to him by the Investigating Officer at the time the charge and specification were served upon him. When asked by the Examiner if he was ready to proceed with the hearing, Appellant replied in the affirmative. More importantly, the record shows that when testifying as a witness in his own behalf, Appellant admitted battering the messman save he was uncertain as to whether he used a stick (R.6) and he also stated that the only eyewitness was a man named Hayes (R.7). Hayes' written statement which had been given to the master, was stipulated into evidence by Appellant.

Appellant's first contention is therefore not deemed sufficient to disturb the Examiner's decision.

## II

Nowhere does the record indicate any basis for Appellant's second argument on this appeal. Any action against a seaman's document is considered serious. In fact, the Investigating Officer while serving the charge on Appellant informed him that his document could be revoked, suspended, suspended on probation or an admonition could be rendered. The Examiner repeated this advice. These were clear warnings of the consequences that might flow from the hearing. Further, it is not considered likely that the current Investigating Officer, having been told by Appellant of the questionable information previously given him, would make a similar error. Accordingly in the absence of any indication in the record to support Appellant's claim, it cannot receive favorable treatment.

## III

In the light of Appellant's admission, made as a witness in his own behalf and reasserted in the third point in this appeal, it is clear he committed an assault and battery.

No legal defense has been presented. The law of the case is well expressed in that "No words, no matter how irritating or opprobrious, will justify an assault" - Wharton's Criminal Law Vol. 1 Sec (1932). I said in a similar vein in *Commandant's Appeal Decision* No. [451](#) that a verbal attack is not sufficient provocation to justify a physical assault. Again, where there was extreme provocation because the victim used language reflecting on his assailant's racial extraction, I said in *Commandant's Appeal Decision* No. [1324](#), that provocation by words does not excuse the offense of assault and battery.

However, this reason was considered to be a matter in extenuation. The Examiner gave great weight to it since the order is lenient for this serious offense.

#### CONCLUSION

It is concluded that the charge and specification were properly proved and the Examiner gave adequate consideration to the extenuating circumstances of the case - particularly since Appellant's prior record consists of two admonitions for fighting.

No error is found on this appeal which requires any modification.

#### ORDER

The order of the Examiner dated at Galveston, Texas, on 2 June 1964, is AFFIRMED.

P.E. TRIMBLE  
Rear Admiral, United States Coast Guard  
Acting Commandant

Singed at Washington, D. C., this 18th day of November 1964.

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