

In the Matter of Merchant Mariner's Document No: Z-72312-D1
Issued to: NOEL BECKFORD

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

477

NOEL BECKFORD

This appeal comes before me by virtue of Title 46 United States Code 239(g) and 46 Code of Federal Regulations Sec. 137.11-1.

On 17 July, 1950, an Examiner of the United States Coast Guard at New York City revoked Merchant Mariner's Document No. Z-72312-D1 issued to Noel Beckford upon finding him guilty of "misconduct" based upon a specification alleging in substance, that while serving as officer's waiter on board the American S.S. EXCALIBUR, under authority of the document above described, on or about 22 April, 1950, he wrongfully had in his possession fifteen grains of hashish while said vessel was in the Port of New York.

At the hearing, Appellant was given a full explanation of the nature of the proceedings and the possible consequences. Although advised of the seriousness of the alleged offense and of his right to be represented by counsel of his own selection, he elected to waive that right and act as his own counsel. He entered a plea of "guilty" to the charge and specification.

The Investigating Officer then made his opening statement and Appellant made a statement under oath declaring that "I was

ignorant of the fact of what it [hashish] was" and that he believed it was a laxative "something like ExLax" because "it looks like Ex Lax." The Examiner changed the plea to one of "not guilty" because Appellant's statement was inconsistent with his plea of "guilty" by which he had admitted "wrongful" possession of the hashish.

Thereupon, the Investigating Officer introduced in evidence the testimony of the Customs Officer who had searched Appellant and found the hashish on his person. During this testimony the hashish found on Appellant was examined and it was stipulated that its color was a light brown. Before the Investigating Officer rested his case, there was received in evidence a certified copy of the U.S. Customs Laboratory report which disclosed that the substance found on Appellant was hashish.

Appellant repeatedly replied in the negative when asked by the Examiner if he wanted any witnesses to appear for him. Appellant stated that the person who had given him the hashish had been subsequently investigated and denied it, so that Appellant did not want him as a witness; and that there were no other witnesses he desired. Appellant then testified under oath in his own behalf before resting.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant, the Examiner found the charge "proved" by proof of the specification and entered an order revoking Appellant's Merchant Mariner's Document No. Z-72312-D1 and all other documents issued to him by the Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that Appellant was given the brownish substance by one of his shipmates, Santiago, while in a bar; that Santiago broke off small bits and passed them around; that Appellant was told the substance was like a laxative; that he forgot about it until it was discovered on his person ten or twelve days later by the Customs Officer; and that he was totally ignorant of the fact that it was hashish since he had never seen or used any kind of narcotics. Appellant further requests clemency, on the basis of his unblemished record for five years, because of his wife and four children.

Based upon my examination of the Record submitted, I hereby make the following

FINDINGS OF FACT

From prior to 9 April, 1950, until 22 April, 1950, Appellant was serving as officer's waiter, under authority of his Merchant Mariner's Document No. Z-72312-D1, on board the American S.S. EXCALIBUR.

On 9 or 10 April, 1950, while the vessel was at Genoa, Italy, Appellant was in a bar room drinking with some shipmates and their female acquaintances. At some time during the course of the evening, after Appellant had consumed a few drinks, one of his shipmates who was sitting at the same table took a cake of some material out of his pocket, broke off small pieces of it and gave the pieces to the other seamen at the table. The original size of the caked material was about two and a half inches by one inch. There is no indication in the record that this caked substance had any covering on it when taken out of the seaman's pocket.

Appellant was given a piece about 5/8" by 1/2" by 1/8". Upon his questioning as to what it was, Appellant was informed that it was a laxative something like Ex-Lax which would be good to take after drinking. Appellant then wrapped it in a piece of cellophane from a pack of cigarettes and put it in the left breast pocket of his suit coat. In this pocket there was also a handkerchief which was folded in the regular square manner with two opposite ends turned in and the bottom end turned up. At some time prior to 22 April, 1950, the cellophane wrapped substance fell into the bottom fold of the handkerchief.

Although he had been drinking before this event transpired, there is no indication that Appellant was intoxicated. He left the cafe about midnight, slept in town overnight and returned to the ship on schedule between 0600 and 0700 the next morning to perform his regular duties. When he returned aboard, Appellant hung his suit coat in his locker and did not use it again until he went ashore at Jersey City, New Jersey, on 22 April, 1950. Prior to the time Appellant went ashore on this date, Customs officials had conducted a search of the ship during which time Appellant's coat remained in the locker. The pockets of the coat were searched but

the article in the breast pocket was not noticed.

When Appellant went ashore on 22 April, 1950, he wore this same suit coat with the same handkerchief in the breast pocket. A Customs Officer asked him if he had anything to declare and he replied in the negative. During the ensuing search of Appellant's person, the Customs Officer found the cellophane wrapped material in the bottom fold of the handkerchief. Appellant first said that he didn't know how it got there and then said he thought it was a piece of chocolate. About ten or fifteen minutes later, after he had been taken to the Customs Office and questioned, Appellant stated that he thought the substance was Ex-Lax or something that looks like Ex-Lax which had been given to him in Genoa, Italy, by a fellow shipmate.

Subsequent analysis disclosed that this substance was fifteen grains of hashish which had not been declared by Appellant. Another search of Appellant's quarters aboard the ship was made but no additional hashish was found.

Hashish is one of the many names applied to the caked form of narcotic which is made from the resin of the Cannabis sativa plant. This is the same plant on which the commonly known marijuana grows. Legally speaking, in this country the term "marijuana" means all parts of the plant Cannabis sativa, including its seeds and resin, except the mature stalks of such plant. Hashish is a hard substance, it varies in color and has a musty, incense-like odor.

The hashish found on Appellant was a light brown color and had a very hard surface with a distinctive, although slight, odor. Hashish is a much harder substance than chocolate and the two have entirely different odors. Ex-Lax is a dark brown colored chocolate, no harder than and with the same peculiar odor as ordinary chocolate bars.

At the time of the hearing, Appellant had been released on \$500 bail pending his trial before a Federal court in connection with this matter.

There is no record of any prior disciplinary action having been taken against Appellant during his actual time at sea of approximately three years over a period of five years. Appellant

is in his thirties and is a married man with four children.

OPINION

The Examiner's third finding of fact states that Appellant "wrongfully and knowingly" had the hashish in his possession but the opinion seems to waver between whether Appellant actually knew he had hashish or simply that there were sufficient facts and circumstances present to create "a reasonable suspicion in his mind as to the nature of the substance." In view of this uncertainty expressed in the Examiner's opinion, the third finding of fact is altered to read as follows:

"The hashish had not been declared nor had any tax been paid on it by the person charged and it was wrongfully in his possession."

It has been pointed out in my opinions involving narcotics cases that "wrongfully" encompasses more than "knowingly" and that a specification alleging "wrongful" possession may be found "proved" even though it is found that the person charged did not "knowingly" have possession of the narcotic in question. It was stated in Headquarters Appeal Case No. 423 that such a finding "can be sustained if the record shows that the person concerned knew, or had reasonable ground for suspicion or belief, that the substance in his possession was marijuana." This, of course, would apply equally to any other narcotic. It should be noted that the above case was remanded for the taking of further evidence because the Examiner, on the basis of the evidence contained in the record, implicitly believed that the person charged was free from fault. However, the Examiner expressed no such belief in his opinion in this case.

In any event, the Investigating Officer made out a prima facie case of both knowledge and reasonable suspicion against Appellant by proof of the fact that a certain substance was discovered on his person by the Customs Officer and that this substance actually was hashish. The wrongful aspect of such possession arises from the great danger which results from the use of narcotics. It was not necessary to prove any criminal intent since intent implies that the act was done knowingly but, as noted above, the latter is not

an essential element to the proof of "wrongful" possession.

Thus, the Investigating Officer's prima facie case was based on a rebuttable presumption which is sufficient to establish the case so long as there is no substantial evidence to the contrary. Although the burden of proof did not shift, the effect of this prima facie proof was to put the burden on the Appellant of going forward with the evidence. It was up to him to submit substantial evidence to prove not only that he did not know that he had hashish but also that there were not reasonable grounds for him to have suspected that he had some type of narcotic in his possession.

Appellant attempted to do this by means of his sworn statement and his testimony. Assuming that the Examiner accepted it as a fact that Appellant did not know that he had hashish in his possession (although this is not made entirely clear by the Examiner's opinion), it is definitely clear that the Examiner did not accept and believe Appellant's story to the extent that the Examiner thought there were not sufficient facts and circumstances present to have created a reasonable suspicion in Appellant's mind as to the nature of the substance in his possession. In other words, the Examiner did not give sufficient, if any, credence to that part of Appellant's testimony which went beyond the denial of actual knowledge of possession. Consequently, the prima facie case of reasonable suspicion was not overcome by Appellant.

This reservation on the part of the Examiner cannot be questioned so long as he did not act arbitrarily by not accepting all of Appellant's testimony as the truth. The Examiner is the best judge as to the credibility of the witnesses and the weight of the evidence depends on the credibility of the witnesses. The rule that uncontradicted evidence must be accepted as true, unless it is improbable, is not pertinent where the witness has an interest. *Broadcast Music, Inc. V. Havana Madrid Restaurant (1949)*, 175 F. 2d 77. It has been specifically held that the uncontradicted testimony of an interested party does not overcome a presumption if his credibility is doubted. *Rosenberg V. Baum (1946)*, 153 F. 2d 10. Hence, the Examiner was justified in rejecting, by implication, Appellant's testimony to the effect that he had no grounds for suspicion because he honestly thought that the hashish was some kind of a chocolate laxative.

In addition, there were several facts and circumstances present to sustain the charge on the ground of reasonable suspicion. Despite the stipulation that this particular piece of hashish was a light brown color, the Examiner stated that it did not, in his opinion, resemble chocolate in the nature of Ex-Lax or otherwise; and Appellant, in his argument, stated that "it isn't definitely the color of chocolate, but under the influence of alcohol it is easy in my opinion to be mistaken for that, and so I wrapped it in the nearest paper I could find and placed it there." This is a strong indication that the hashish did not look like light brown or any other color of chocolate and, therefore, Appellant should have made further investigation to ascertain the true nature of the substance. This would not have been difficult to do. Appellant could easily have found out that this was not chocolate by smelling it or by feeling how much harder it was than any kind of ordinary chocolate. Since Appellant had the hashish in his hand, it is difficult to understand how he could have avoided making the latter test even if done so involuntarily. Appellant testified himself, upon feeling and smelling the hashish at the hearing, that it did not smell like chocolate and that it was a much harder substance than chocolate.

It seems peculiar that although Appellant blames his lack of observation on the fact that he had been drinking, he testified as to the size of the larger piece of hashish, the conversation which took place and that he was careful enough to wrap the hashish in cellophane so as not to stain his clothing. Although not impossible, it certainly is not probable that a man who had been drinking would be so unobservant and careless in some respects and yet so careful and observant with respect to other things which occurred at the same time. There is no indication in the record that the cake of hashish had been wrapped in anything when Appellant's shipmate took it from his pocket, yet it is reasonable to assume that it would have been covered in some way if it were chocolate.

As pointed out by the Examiner, even the circumstances under which Appellant was presented the piece of hashish should have aroused suspicion in Appellant. The seamen were in a bar in a foreign country and, although completely unsolicited, one of the men took out a small caked substance and gave pieces of it to the other seamen at the table. That this story is wholly truthful in itself seems improbable. But even so, what would inspire a seaman

to interrupt his drinking, under such circumstances, to distribute small pieces of a chocolate laxative to his shipmates? Appellant must have learned during his previous experience at sea that the display of narcotics is much more prevalent in foreign countries than in this country. He testified that he had seen marijuana although he had never used it.

Another element unfavorable to Appellant's cause is the fact that he made no attempt to get any of his shipmates, who had been at the bar in Genoa, to testify. He explained why he did not want the man who had given him the hashish to testify but what about the other shipmates who were present at the time? They could have testified without endangering themselves if their testimony would have been favorable to the Appellant.

I agree with the Examiner's statement that Appellant failed to overcome the case made out against him and that the above facts and circumstances constitute substantial evidence to support the finding that a reasonable suspicion that the substance in question was a narcotic would have been created in the mind of the average person.

ORDER

The Order of the Examiner dated 17 July, 1950, should be and it is, AFFIRMED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D.C., this 22nd day of December, 1950.

***** END OF DECISION NO. 477 *****

