In the Matter of License No. 66932
Issued to: PETER WILLIAM MADSEN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

581

PETER WILLIAN MADSEN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

On 10 March, 1952, an Examiner of the United States Coast Guard at Mobile, Alabama, suspended License No. 66932 issued to Peter William Madsen upon finding him guilty of negligence based upon a specification alleging in substance that while serving as Master on board the American SS PROVO VICTORY under authority of the document above described, on or about 30 November, 1951, while said vessel was at sea, he did:

"* * * fail to take proper precautions in making a landfall on the Coast of Korea, in that you proceeded into dangerous waters when you did not know the position of your vessel, and while doing so, failed to take soundings by fathometer or sounding lead, your action resulting in the grounding of your vessel, the SS PROVO VICTORY, causing serious bottom damage."

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by

an attorney of his own selection and he entered a plea of "not guilty" to the charge and specification proffered against him.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence the testimony of Second Mate Stanley Meyer who was on watch at the time of the grounding, the helmsman A. B. Fred James, the lookout Edward N. Kelly and the man who was lookout shortly before the grounding.

After the Investigating Officer rested his case, counsel for Appellant made his opening statement and Appellant testified under oath in his own behalf.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order suspending Appellant's License No. 66932, and all other licenses, certificates of service and documents issued to this Appellant by the United States Coast Guard or its predecessor authority, for a period of three months on twelve months' probation.

From that order, this appeal has been taken, and it is urged that:

1. The Investigating Officer did not sustain his burden of proof in that the evidence adduced was not a sufficient showing of negligence to overcome the presumption that Appellant used due care; such presumption arising from his thirty years service as a Master without any charge ever having been made against his license.

2. The Examiner erred in finding that Appellant "did not know the position of his vessel." Not only was this finding not supported by material evidence, but it affirmatively appeared that both the Master and the other licensed officer on watch were as reasonably sure of the position of the vessel prior to the strand as those in charge of the navigation of vessels at sea ordinarily are under the circumstances then existing.

3. The Examiner erred in finding that a failure to take soundings resulted "in the grounding of his vessel, the SS PROVO VICTORY." This finding is not supported by material evidence and it affirmatively appeared from the testimony that there was no connection between the failure to take soundings and the subsequent strand.

4. The Examiner erred in finding that the Appellant failed "to take proper precautions in making a landfall on the coast of Korea." This finding was not supported by material evidence and it affirmatively appeared that Appellant took every precaution that a reasonable and prudent Master would take under the circumstances then existing.

5. Under the exigencies of the occasion, Appellant did not fail to do what a reasonably prudent experienced Master would do under the same circumstances; he could not, therefore, be guilty of negligence.

APPEARANCES: Messrs. Pillans, Reams, Tappan, Wood and Roberts of Mobile, Alabama.
George F. Wood, Esquire, of Counsel.

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

FINDINGS OF FACT

On a voyage including the date of 30 November, 1951, Appellant was serving as Master on board the American SS PROVO VICTORY and acting under authority of his License No. 66932 while his ship was en route from Yokohama, Japan, to Pusan, Korea. The vessel was carrying a general cargo of Army supplies which caused her to draw a mean draft of 22 feet, 9 1/2 inches.

After passing through the Inland Sea of Japan to the Korea Strait, Appellant set a course of 305° true for Pusan Harbor which was approximately one hundred and ten miles distant. Appellant did not make any allowance for the set from the current because the sea

was smooth. The weather was clear and the visibility good at this time and until the time of the grounding which occurred about two hours after sunset.

Appellant was familiar with Pusan Harbor since he had entered it four times within the last year. All of the latest Notices to Mariners and other available information concerning aids to navigation were aboard but Appellant did not consider this to be very reliable since the ship was in an area operating under wartime conditions. Under such conditions, information as to the location of lights and their characteristics was not always accurate and was sometimes changed without advance notice.

At 1636, Second Mate Meyer was standing the 4 to 8 watch and he obtained a fix by cross bearings on a light and a tangent of Tsushima Island while the island was approximately abeam to port of the ship. This fix indicated that the ship was right on her course line of 305° true, the rate of advance was 16 knots, and Pusan Light was about thirty miles dead ahead. Some time later, the Second Mate sighted a white light bearing 307° true which seemed to be flashing every eight seconds. The characteristics of the Pusan Light were listed as a white light flashing every six seconds. The ship took her arrival at 1830 off the sighted light which was assumed to be Pusan Light.

Appellant was on the bridge at all times after 1700 until the ship ran aground. At 1830, or shortly thereafter, it was observed by Appellant that the light which had been sighted by the Second Mate was a white and green flashing light. This light was located where Appellant expected the Pusan Light to be. But being somewhat doubtful as to the position of the ship because the characteristics of the light differed from the listed characteristics of Pusan Light, Appellant gave orders to swing the ship in a complete circle to starboard so that he could survey the shoreline.

Lights on the beach were observed in the vicinity of the white and green light. Appellant did not have information about any navigational light or settlement at any other place along the coast in this area except at Pusan. Consequently, he concluded that the white and green flashing light must be the Pusan Light with changed characteristics; and upon completion of the circular course, he gave orders to steady up on the Pusan entrance course of 302° true

at a speed of approximately three knots. No soundings were taken by means of the fathometer or otherwise. There was a lookout on the flying bridge and a seaman on standby watch, both of whom were capable of taking soundings.

After remaining on course 302° true for more than ten minutes, Appellant ordered hard right rudder since he did not see the Pusan breakwater lights or recognize any of the other harbor lights as those of Pusan. The ship had swung around to 311° true when she ran aground at 1900 on a sharp rock pinnacle in Suyon Bay. Considerable damage was done to the bottom of the vessel.

It was later ascertained that the green and white flashing light was an airplane beacon which had recently been set up in conjunction with Army ground installations located at Suyon Bay about five miles up the coast from Pusan. There is no reference in the record as to the status of the Pusan Light at this time except the testimony by Second Mate Meyer that he saw it at irregular intervals of about two or three minutes for about ten minutes before the stranding. There is no record of any prior disciplinary action having been taken against Appellant during his thirty years as a Master.

OPINION

I do not intend to base this decision solely upon the narrow question as to whether the grounding resulted from Appellant's failure to take soundings when proceeding into Suyon Bay. The specification provides for the broader proposition that Appellant failed to take proper precautions and, therefore, he proceeded towards shore without knowing the position of his vessel as a result of his own negligence. In other words, the specification alleges that Appellant generally navigated the ship without exercising the due care required under the existing circumstances. The Investigating Officer's opening statement and the evidence produced by both parties clearly indicate that proof of the charge was not dependent upon proof that the taking of soundings would have shown that the ship was not entering Pusan Harbor. And it has been stated that in these administrative proceedings the proof need not adhere strictly to the wording of the complaint or specification so long as there is no surprise. *Kuhn v. Civil*

Aeronautics Board (C.C.A.,D.C. 1950), 183 F.2d 839.

Appellant contends that the Examiner erred in finding that the failure to take soundings resulted "in the grounding of his vessel, the SS PROVO VICTORY" (Examiner's Finding No. 1). The quotation is cited out of context since the Examiner stated that "his action" resulted in the grounding. This obviously refers to entering the dangerous waters since it was in these waters that the vessel ran aground. The failure to take soundings was only one of the proper precautions neglected - an "omission" rather than an "action" taken.

It is stated that the failure to take soundings would have served no purpose because they would have revealed substantially the same information whether the ship was entering Suyon Bay or Pusan Harbor. I am not able to make an independent determination concerning this proposition because neither the number of the chart nor the chart itself, which was frequently referred to during the course of the hearing, appears in the record. But this does not seem to be important since we are required, as urged by Appellant, to view such situations without the benefit of hindsight; and Appellant did not know at the time that he was entering Suyon Bay if not Pusan. Therefore, he was technically at fault in not taking soundings in such close waters at night even if this action would have produced the same results in both places.

Appellant also claims that he took every precaution which was reasonably required under the circumstances and that he was reasonably certain of the position of his vessel prior to the stranding. Appellant quite properly states that the criterion in such cases is the significance of the word "reasonable" under the prevailing circumstances and that this should be determined by considering the situation and circumstances as they appeared to Appellant at that time rather than as we now know them to have been. But I do not agree with the further proposition submitted by Appellant that he was in an "ordinary" situation which only called for the exercise of the ordinary degree of care and skill.

Briefly, the most important circumstances concerning the navigation of his ship which should have impressed themselves upon Appellant were that he was approaching an area which was operating under wartime conditions; the landfall would be made under cover of

darkness; the only aid to navigation which he had any reason to depend upon was the flashing white light at Pusan; and the information he had about aids to navigation in this area might not be accurate.

Even under ordinary conditions, there is a heavy responsibility placed upon the Master of a ship to maintain a safe course and keep a constant check upon the ship's position. I think that the extreme nature of the circumstances in this case dictated that Appellant exercise more than ordinary care to determine the location of his ship in order to be acting in a reasonable rather than a negligent manner. "Where the danger is great, the greater should be the precaution." *The Clarita (1874)*, 90 U.S. 1.

Appellant should have considered the tidal conditions in the Korea Strait in order to know whether he should expect a set from the current. The tides have their effect whether the sea is calm or not. This precaution should certainly have been taken after passing Tsushima Island even though the fix at that point indicated that the ship had made good her course of 305° true. And in view of the possible misinformation as to the location of the light utilized in obtaining the 1636 fix, it is not extreme to state that a proper precautionary measure was that Appellant should have checked this visual fix with another fix obtained by celestial navigation when approaching a comparatively strange shore at night. According to the testimony in the record, sunset was at approximately 1700. Therefore, the celestial fix could have been obtained at some point between Tsushima Island and Suyon Bay.

The highest degree of caution was required of Appellant after he had sighted the flashing green and white light. Appellant testified that this was the first light he saw and he did not testify that he later saw any other navigational light prior to running aground. Appellant was definitely lost and every possible precaution should have been taken to guard against possible danger to the crew and ship.

The Pusan Light was listed as a flashing white light and this was a flashing green and white light. Appellant had knowledge of the possible irregularities in the lights along the Korean Coast but due to the widely differing characteristics of the visible light and the Pusan Light as listed, he was bound to have

investigated every other possibility before assuming that this was Pusan Light. He did take the precaution of circling the area once but this only attested to the fact that he had doubts as to the location of his ship.

Even at this time, it does not appear that Appellant investigated the possibility of a northerly or southerly set. The absence of the proper light characteristics should have caused a man with Appellant's experience to suspect that his ship had been set off her course by a strong current after passing Tsushima Island or that the 1636 fix was inaccurate and a steady set had been experienced since starting across the Korea Strait. It is noted that a course made good of 307° true from the Inland Sea - only 2° different from the course steered - would carry a ship to the point of the grounding. (See Hydrographic Office Chart No. 5494).

With these factors in mind, a glance at the charted coastline of Korea would have disclosed the strong possibility that the green and white light was in the vicinity of Suyon Bay because it is the only indentation in that vicinity of the coastline which is similar to Pusan Harbor; and Appellant expresses the view that Suyon Bay looked quite like Pusan Harbor bay before he headed the ship in towards shore. But one specific dissimilarity, which is referred to in the record and which is shown on Hydrographic Office Chart No. 3241, is that there was a railroad track on the starboard hand going into Suyon Bay but there was no such track at Pusan Harbor. The lookout testified that he could see railroad trains coming around the bend to starboard of the ship. Presumably, Appellant knew from previous trips into Pusan that no railroad tracks were in that location relative to the Pusan Harbor entrance.

I think it is fair to say that, under the existing circumstances, Appellant was required to take every perceivable precaution and if he had done so, he would not have arrived at the erroneous conclusion that the beacon at Suyon Bay was the Pusan Light. There was no necessity to make a hasty decision nor was this a situation which presented a choice between alternatives likely to be equally hazardous. The choice to remain in the open sea for a longer period of time would have had no element of danger.

Appellant's conduct was imprudent for the additional reason that he had no better grounds for believing that the characteristics of Pusan Light had been changed that he had to believe that this beacon was a new light which was not shown in the navigational material which he had aboard. And there is no indication that Appellant conducted an exhaustive search for Pusan Light although the Second Mate testified that he actually saw it some ten minutes prior to the time of the grounding.

CONCLUSION

The Examiner considered the evidence of Appellant's long unblemished record as a seaman; and, for that reason as well as others, the Examiner imposed an entirely probationary order. The converse to Appellant's proposition that his record raises a strong presumption that he used due care is that Appellant's long experience on ships should have caused him to have fully recognized the dangers present and led him to take additional preventive measures.

ORDER

The Order of the Examiner dated 10 March, 1952, should be, and it is, AFFIRMED.

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

Dated at Washington, D. C., this *4th* day of *August*, 1952.

***** END OF DECISION NO. 581 *****

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