

In the Matter of Merchant Mariner's Document No. Z-502944
Issued to: NATHANIEL BRYANT

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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NATHANIEL BRYANT

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.

By order dated 12 January, 1954, an Examiner of the United States Coast Guard at San Francisco, California, revoked Merchant Mariner's Document No. Z-502944 issued to Nathaniel Bryant upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a utility messman on board the American SS MARINE PHOENIX under authority of the document above described, on or about 10 November, 1947, while said vessel was in the Port of Sydney, Australia, he had in his possession certain narcotics; to wit, marijuana.

Appellant was served with the charge and specification on 2 March, 1953. At the beginning of the hearing on 13 April, 1953, Appellant was given a full explanation of the nature of the hearing. Appellant was represented by an attorney of his own selection. Although no plea was entered to the charge and specification, the hearing was conducted on the assumption that a plea of "not guilty" has been entered.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence a certified copy of two log entries pertaining to the alleged offense. It was stipulated that Appellant was on the vessel at the time in question.

At this point, the Examiner denied counsel's motion to dismiss the case on the ground of laxity on the part of the Coast Guard in taking action against Appellant, at this time, for an incident which occurred in 1947. The Examiner stated that no prejudice had been shown as a result of the delay and that the transient nature of seamen made it difficult to contact them at permanent addresses.

The Investigating Officer then offered in evidence various documents in order to prove that Appellant had been convicted in an Australian court for unlawfully importing marijuana at Sydney, Australia, on 10 November, 1947. These documents included a Certificate of Conviction on 11 November, 1947, signed by F. W. Stevenson, Acting Clerk of Petty Sessions, at Sydney, as custodian of the Petty Sessions records; and there was an authenticated document, signed by the United States Consul at Sydney, which certified that F. W. Stevenson was the Acting Clerk of Petty Sessions at Sydney. Over strenuous objections by counsel for Appellant, the Examiner received in evidence the above two documents and also the Information against Appellant. The Investigating Officer then rested his case before counsel raised the additional objection that the Certificate of Conviction had not been properly authenticated. The Examiner permitted the latter objection and reserved ruling on it until further argument. The defense rested its case and the hearing was then adjourned on 28 May, 1953.

When the hearing reconvened on 10 June, 1953, the Investigating Officer and counsel submitted oral argument as to the admissability of the Certificate of Conviction and the weight to which it was entitled if it was received in evidence. After both parties reserved the right to submit further argument, the Examiner adjourned the hearing to await his ruling as to the admissibility and weight of the Certificate of Conviction.

The hearing reconvened 18 September, 1953. The Investigating Officer had submitted a written motion dated 24 August, 1953, to substitute a copy of the record of Conviction for the Certificate

of Conviction. The copy of the record of Conviction indicated that the original record of Conviction was signed by the residing Stipendiary Magistrate, R. C. Atkinson; and the copy of Conviction was certified by the same F. W. Stevenson, Acting Clerk of Petty Sessions, Sydney, as custodian, to be a true copy of the Conviction of which it purports to be a copy. This copy was accompanied by an authenticated Certificate, signed by a United States Vice Consul at Sydney, which certified that F. W. Stevenson was the Acting Clerk of Petty Sessions at Sydney; that he was the lawful custodian of the record of which the attached copy of Conviction was a copy; and that F. W. Stevenson's true signature was subscribed to the copy. Counsel for Appellant objected to his evidence on the grounds, among others, that this was new evidence which the Coast Guard had not used due diligence to obtain during the six years since the time of the alleged offense and that the Coast Guard was precluded from introducing new evidence after the Investigating Officer had rested his case. The Examiner granted the motion to substitute and also granted counsel's request for a continuance in order to obtain Appellant's testimony when he returned from a voyage.

When the hearing reconvened on 11 January, 1954, Appellant testified under oath in his own behalf. Appellant admitted that he had been convicted on a plea of guilty as indicated by the documents in evidence and that he had served nine months of the one year sentence received as a result of his conviction in Australia; but he denied that he had any knowledge that there was marijuana in the trousers which he was wearing when he was searched by an Australian Customs Officer. Appellant stated that the marijuana must have been "planted" in his trousers since he had not worn them between the time they were cleaned in New Zealand and when he was arrested in Sydney. Appellant also testified that he had not been afforded an opportunity to contact the American consul or to obtain counsel in Australia despite his request to be permitted to telephone a lawyer; that Appellant had not been permitted to cross-examine the witnesses; and that he was convicted in 1950 in California for possession of narcotics.

Counsel for Appellant stated that he did not have any evidence to offer in addition to Appellant's testimony. Neither counsel nor Appellant claimed that he had been prejudiced by the inability to obtain the testimony of witnesses or other evidence at the time of the hearing.

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 revoking Appellant's Merchant Mariner's Document No. Z-502944 and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

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

POINT I. The record of the Australian judgment of conviction was inadmissible in evidence because 46 C.F.R. 137.15-5 does not provide for the use of foreign judgments of conviction and also because the Certificate of Conviction was not properly authenticated. A copy of the record of conviction should not have been substituted for the Certificate of Conviction.

POINT II. The foreign judgment of conviction is the only evidence of misconduct and it does not constitute substantial evidence of misconduct. Since a judgment of conviction by a State court constitutes substantial evidence [46 C.F.R. 137.15-5(b)], a foreign judgment of conviction is only entitled to somewhat less weight than substantial evidence. In addition, Appellant submitted his uncontradicted testimony denying possession or importation of marijuana into Australia. He also testified that he was refused the opportunity to consult with the American consul at Sydney or an attorney; he was induced to plead guilty by a representation that probation would be granted if he made such a plea; and he was discriminated against in Australia because he is a negro. For these reasons, Appellant was deprived of due process of law and the foreign judgment of conviction does not constitute substantial evidence.

POINT III. Appellant was denied a fair hearing when the Examiner granted the motion to substitute newly obtained evidence although there was no showing why this evidence had not been obtained sometime subsequent to 1947 and prior to when the Investigating Officer rested his case on 28 May, 1953. The record

indicates that the Examiner deliberately refrained from ruling on the objection to the original Certificate of Conviction in order to permit the Coast Guard to repair its case by obtaining a properly authenticated document.

POINT IV. The laches of the coast Guard require a dismissal of this proceeding. Since Appellant has not constituted a danger to life and property while sailing on merchant vessels after 1947, the order of revocation is penal in nature and the three-year limitation under the Federal Criminal Code should be observed. The long delay operated to prejudice Appellant's defense since witnesses and other evidence cannot now be found.

CONCLUSION. Upon the whole record of this case, and for the reasons set forth above, the decisions should be reversed, the charge dismissed and Appellant's document returned to him.

APPEARANCES: Messrs. Dreyfus, McTernan and Lubliner of San Francisco, California, by Francis J. McTernan, Esquire, of Counsel.

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

FINDINGS OF FACT

On 10 November, 1947, Appellant was serving as a utility messman on board the American SS MARINE PHOENIX and acting under authority of his Merchant Mariner's Document No. Z-502944 while the ship was in the Port of Sydney, Australia.

On this date, Appellant was searched by the Australian Customs authorities when he was leaving the ship. A marijuana cigarette was found in the right hip pocket of the trousers which Appellant was wearing. When Appellant was questioned about the marijuana cigarette, he said he thought it was a Samoan cigar or cigarette. Appellant also stated that the trousers had been cleaned at New Zealand and he did not know anything about the cigarette. Appellant was arrested and held in custody until after his trial.

On 11 November, 1947, Appellant was convicted on his plea of

"guilty" before the Court of Petty Sessions at Sydney as a result of the above incident. Appellant was found guilty of having unlawfully imported marijuana into Australia at the Port of Sydney on 10 November, 1947, and he was sentenced to twelve months hard labor. Appellant was not represented by counsel at the trial but he retained a lawyer when he took an appeal. The conviction and sentence were affirmed and Appellant served nine months of the sentence with three months off for good behavior.

In 1950, Appellant was convicted of a narcotics offense and served a sentence in a California jail.

There is no record of Appellant having served under the authority of his document between 1947 and March, 1952. It was in March, 1953, that Appellant was served with the charge and specification in this case. There is no other record of disciplinary action having been taken against Appellant's document.

OPINION

POINT I.

The substituted judgment of conviction in the Australian court was admissible in evidence. The purpose of 46 C.F.R. 137.15-5 was not to prohibit the use of foreign judgments of conviction in these proceedings but to distinguish between the weight to be given Federal and State court judgments of conviction.

As set forth above, the hearing record shows that counsel for Appellant did not object, on the ground of improper authentication, to the admissibility of the original document (Certificate of Conviction signed by the Acting Clerk of the court) until after the Investigating Officer had rested his case. Consequently, Appellant cannot now object to the motion to substitute a properly certified document (copy of record of Conviction signed by Stipendiary Magistrate and certified by the Acting Clerk of the court) simply because the Investigating Officer submitted this motion after he had rested his case.

Since the latter document was admissible in evidence, it is

important to determine whether it constituted substantial evidence to support the charge and specification. The courts have often stated that hearsay evidence alone is not substantial evidence.

POINT II.

Since 46 C.F.R. 137.15-5 was not intended to affect the ordinary rules of evidence pertaining to the use of foreign judgments of conviction in these proceedings, the copy of the record of conviction is sufficient to make out a prima facie case as to the allegations contained therein if the document qualifies as an exception to the hearsay rule. In order to be qualified as such an exception, an official document must satisfy the principles of necessity (a matter of expediency or unavailability of the witness) and the circumstantial probability of the trustworthiness of the document. *Wigmore on Evidence*, 3d Edition, secs, 1631, 1632. A copy of a foreign judicial record meets these requirements when the copy of the judicial record has been certified by the alleged custodian of the record and this certification has been authenticated by a second certification as to the incumbency of the alleged custodian and the genuineness of his signature on the certificate. *Wigmore on Evidence*, 3d Edition, secs, 1679, 1681(3). Since this burden has been met by the certified copy of the record of Conviction and the authentication by an American Vice Consul in the manner set forth in detail, *supra*, the copy of the record of Conviction is a well qualified exception to the hearsay rule.

It is my opinion that the record of Conviction constitutes substantial evidence in support of the charge and specification and that Appellant's testimony was not sufficient to rebut the prima facie case against him. Appellant admitted on direct examination that he entered a plea of guilty to the charge of unlawfully importing marijuana into Australia. If he did import marijuana, he could not have done so without having it in his possession as alleged in the specification. And it is very unlikely that Appellant would have entered a plea of guilty before the Australian court if he was actually innocent of the offense with which he was charged. Such uncontradicted evidence denying possession of marijuana need not be accepted. See *The Dauntless* (C.C.A. 9, 1904), 129 Fed 715 and cases cited therein at page 721.

Appellant's contentions that he was denied due process of law, in connection with his trial in Australia, is substantially weakened by the fact that the admitted he had voluntarily entered a plea of guilty in his trial before the Australian court and by the fact that the was convicted of a narcotics offense in 1950. The fact of conviction of crime may be shown on cross-examination for the purpose of impeaching the credibility of the person charged. *Wigmore on Evidence*, 3d Edition, secs. 890, 891.

POINT III.

For the reasons stated under Point I of my opinion, I do not consider that it was prejudicial error for the Examiner to grant the motion of the Investigating Officer to substitute evidence. In addition, it is noted that prior to the adjournment on 10 June, 1953, both parties reserved the right to submit further argument; and the subsequent continuance, which was granted on 18 September, 1953, by request of counsel for Appellant, was for a longer period of time than the adjournment from 10 June, 1953, to 18 September, 1953. The motion to substitute evidence was granted on the latter date. Hence, the adjournment on 10 June, 1953, was in the nature of a continuance and this did not deprive Appellant of a fair hearing.

POINT IV.

Appellant contends that the Coast Guard was guilty of laches in that Appellant has been prejudiced in obtaining evidence after the long delay in bringing this case to a hearing.

Laches is an equitable doctrine which is defined in *Black's Law Dictionary*, 3d Edition, as the omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party.

With respect to obtaining evidence, Appellant did not make any claim of prejudice at the hearing even after the Examiner refused to dismiss the case and he specifically stated that there had been no showing of prejudice to the person charged by the delay. After Appellant had testified, his counsel stated that he had nothing further to offer in evidence. Nor is there any evidence that

Appellant made any attempt to produce witnesses or other evidence in his behalf in the Australian court.

The failure to contact Appellant between 1947 and March, 1953, is partially accounted for by the fact that he was in prison in both Australia and California during part of this time; and I take official notice of the fact that the Coast Guard has no record of Appellant having sailed between 1947 and March, 1952. Since it is extremely difficult for the Coast Guard to locate seamen except when they are serving on ships, the length of time involved herein is not unreasonable or unexplained. Appellant was contacted a year after he commenced sailing again. Hence, there is no basis for the application of the doctrine of laches in this case.

CONCLUSION

For the various reasons set forth in this opinion, I conclude that there is substantial evidence to support the charge and specification, Appellant was not deprived of a fair hearing in any respect and the order of revocation shall be sustained.

ORDER

The order of the Examiner dated at San Francisco, California, on 12 March, 1954, is AFFIRMED.

A. C. Richmond
Vice Admiral, U. S. Coast Guard
Commandant

Dated at Washington, D. C., this 28th day of October, 1954.

***** END OF DECISION NO. 773 *****

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