

In the Matter of Certificates of Service Nos. C-155099 and E-402894
Issued to: MARION L. LEVINE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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MARION L. LEVINE

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

On 4, 5, 7 and 10 October, 1949, Appellant appeared before an Examiner of the United States Coast Guard at New York City to answer a charge of "misconduct" supported by two specifications. The first specification alleges that while Appellant was serving as an oiler on board the American SS WILLIAM J. WORTH, under authority of his duly issued Certificate of Service, he did, on or about 18 September, 1947, while said vessel was in a foreign port, have in his possession a dangerous weapon without proper authority. The second specification alleges that while Appellant was serving as aforesaid, he did, on or a bout 18 September, 1947, while said vessel was in a foreign port, assault and inflict a fatal wound upon the person of Royce C. Bailey, crew member, with a dangerous weapon, without reasonable cause.

At the hearing, Appellant was fully informed as to the nature of the proceeding, the rights to which he was entitled and the possible outcome of the hearing. Appellant was repeatedly warned as to the seriousness of the charge and his right to obtain counsel

to represent him at the hearing. After two adjournments for the purpose of allowing Appellant to secure counsel, he was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and each of the specifications.

The Investigating Officer made his opening statement and mentioned that although the charge and specifications had been drawn up on 21 November, 1947, in New Orleans, a copy was not served on Appellant at that time because he was not available. The original of the summons was served on Appellant on 4 October, 1949, in the port of New York. Appellant was also informed of his right to have counsel, and his other rights, at the time of service. Appellant's counsel stated in his opening statement that he would attempt to prove Appellant's attack on Bailey was not "without reasonable cause."

The Investigating Officer introduced in evidence a certified copy of an entry in the official log book of the SS WILLIAM J. WORTH, dated 18 September, 1947; a copy of an Operations Memorandum of the United States Department of State; and a record of the preliminary investigation conducted by the Coast Guard at New Orleans. He then rested his case. Appellant was the only witness to testify in his own behalf. He voluntarily testified under oath and stated that his actions were in self defense.

After both parties had completed their arguments and had been afforded an opportunity to submit proposed findings and conclusions, the Examiner made his own findings of fact. On the basis of his findings, he concluded that the first specification was "not proved" and that the second specification and charge were "proved." The Examiner thereupon entered an order revoking Appellant's Certificates of Service Nos. C-155099 and E-402894 and all other valid licenses, certificates and documents issued to him by the United States Coast Guard or its predecessor authority.

Appellant contends in his appeal that the deceased had threatened him on previous occasions and, hence, he was in fear of his life and acted only in self defense; that he had been continuously tormented on board the ship because he was a negro and the deceased was the leader of the white crew members; that the Master had refused to pay him off since no serious trouble had occurred aboard the ship; that he had a good previous record during

his six years at sea; and that he has a wife and one child to support and he knows no other trade. For these reasons, Appellant requests that he be given another chance by granting him another hearing or imposing a less harsh order than that of revocation.

Appellant's prior record, during his six years at sea, is clear except for an admonition received in 1944 for failure to appear at a fire and lifeboat drill aboard the SS DANIEL LOWNSDALE. He is now twenty-five years of age.

FINDINGS OF FACT

On or about 18 September, 1947, Appellant was in the service of the American SS WILLIAM J. WORTH, acting under the authority of his duly issued Certificate of Service in the capacity of oiler, while the ship was in the port of Aalborg, Denmark.

On the above date at shortly after 1700, Appellant purchased a loaded gun from an unknown individual while he was just outside of a cafe at Aalborg, Denmark. Appellant then entered the cafe and sat at a table occupied by two of the three other negro crew members of the WILLIAM J. WORTH and two white women.

Shortly thereafter, at approximately 1730, the deceased, Royce C. Bailey, entered the cafe and, upon seeing the occupants at Appellant's table, he commenced making derogatory remarks about white women sitting with "niggers." Bailey then sat at a table with three other crew members and one white woman about ten feet from Appellant's table. He continued to comment about white women associating with men of Appellant's race. Bailey had provoked Appellant and the other three negro crew members on previous occasions because of their race.

One of the women sitting at Appellant's table went to the table at which Bailey was seated to apologize to him for having gone out with one of the negroes rather than with Bailey the night before. Bailey told her to get away because she associated with "niggers." Appellant heard all of these remarks and, finally, he got up and walked over to Bailey's table. Appellant told Bailey to attend to his own affairs. Bailey stood up at the table, Appellant swung at him and Bailey broke a glass on the table and held it in

his right hand apparently ready to attack Appellant with it. Appellant realized that he was in danger of being cut in the face with the jagged edges of the glass, so he pulled the pistol out of his pocket and shot Bailey in the right side intending to shoot him in the right arm to prevent Bailey from injuring him with the glass. Bailey was then standing between Appellant and the entrance to the cafe. Bailey staggered into another room holding his right side and was later taken to the hospital in an ambulance. He died on 22 September, 1947, from complications in his right lung resulting from the wound inflicted by Appellant.

After he had fired the single shot, Appellant fled to the ship but he was taken ashore by the police and put in jail. Before the ship left port, statements were obtained from some of the crew members who had been present at the scene of the shooting.

On 28 November, 1947, before a court and jury in Aalborg, Denmark, Appellant was tried and convicted for the shooting of Bailey and his subsequent death. At the trial, the Appellant was represented by counsel. The statements made by the crew members and the testimony of other eye witnesses were introduced in evidence. A nurse from the hospital testified that Bailey had stated that he was himself to blame for what had happened. Due to the latter and other extenuating circumstances brought out during the trial, Appellant was sentenced to merely three years imprisonment. He was required to serve only one and one-half years imprisonment because of his good behavior.

OPINION

The evidence clearly establishes that Appellant purchased the gun, with which he shot Bailey, immediately before entering the cafe in which the fatal shooting occurred. There is also ample evidence to support Appellant's contention that he obtained the pistol in order to defend himself from attacks by the white members of the crew; and that Appellant had been abused on prior occasions by Bailey and other crew members because Appellant was a negro. Apparently, the only prior physical provocation had been attempted while the crew was on shore leave and, for this reason, the Master had refused to release Appellant from the articles for the voyage.

Under these circumstances, Appellant entered the cafe and later

shot Bailey as a result of what transpired therein.

It is true that a person has the right to deliberately arm himself, provided he rightfully believed there might arise a possible need for self-defense; but because Appellant armed himself to prepare to act upon the defensive gave him no right to kill in the absence of facts that would give him the right to defend. *Gourko v. United States (1894)*, 153 U.S. 183. Hence, we may assume that Appellant was justified in acquiring the gun since his intent was simply to defend himself against serious physical injury.

But judging from Appellant's actions after he entered the cafe, his contention that he shot Bailey because he was in fear of his life is not convincing. Appellant had no reasonable ground for fearing any bodily injury so long as he remained seated at his own table. And he did not give any indication of fear when he got up and approached Bailey who was seated at a nearby table. Appellant was definitely the aggressor in the altercation which ensued at this point and, therefore, was bound to take any steps in his power to avoid serious consequences. Since the evidence does not sustain Appellant's statement that Bailey lunged at him with the broken glass, Appellant was obliged to retreat at least until he had reasonable cause to fear serious injury to his person. This is in line with the view expressed in *Brown v. United States (1921)*, 256 U.S. 335, that failure to retreat is not categorical proof of guilt but it is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing. And it was stated in *Allen v. United States (1896)*, 164 U.S. 492, that a person assaulted is, in general, bound to retreat as far as he can before slaying his assailant. Even though Bailey was between the cafe door and Appellant, the evidence indicates that Appellant had ample room to retreat before being forced into a position of defending himself against serious physical injury. The fact that he induced danger to himself, by approaching Bailey's table, increased the burden on him to avoid any fatal results to the best of his ability.

It is clear that to establish a case of justifiable homicide it must appear that something more than an ordinary assault was made; it must also appear that the assault was such as would lead a reasonable person to believe that his life was in peril.

Allen v. United States (1896), 164 U.S. 492. In view of the latter case, Appellant's deliberately aggressive attitude and the lack of evidence to establish any serious threat to Appellant's life, I am of the opinion that Appellant's behavior was not justified.

CONCLUSION

Considering the circumstances of this incident and the necessity to protect the lives of other merchant seamen (as emphasized in the Examiner's opinion), it is expedient that the order of revocation be sustained regardless of any personal hardship resulting to Appellant.

ORDER

The Order of the Examiner dated 10 October, 1949, should be, and it is AFFIRMED.

J. F. FARLEY
Admiral, U. S. Coast Guard
Commandant

Dated at Washington, D. C., this 22nd day of December, 1949.

***** END OF DECISION NO. 397 *****

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