

In the Matter of Merchant Mariner's Document No. Z-978537
Issued to: RICHARD COX

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

650

RICHARD COX

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 23 December, 1952, an Examiner of the United States Coast Guard at New York City revoked Merchant Mariner's Document No. Z-978537 issued to Richard Cox upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as messman on board the American SS INDEPENDENCE under authority of the document above described, on or about 25 November, 1952, while said vessel was at sea, he wrongfully exposed his private parts to the view of two female passengers.

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. Although advised of his right to be represented by an attorney of his own selection, Appellant voluntarily elected to waive that right and act as his own counsel. 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 the two passenger witnesses, Elisa Del Vecchio and Dorothy Calcognini. The Investigating Officer then rested his case.

The hearing was then adjourned to await the return of the INDEPENDENCE in order for Appellant to obtain witnesses. The Examiner advised Appellant to produce witnesses because a prima facie case had been established.

In defense, Appellant testified under oath in his own behalf. Appellant denied that he was the guilty party and stated that he was busy operating his shoe shining concession on "B" deck near the crew gangway from 1300 to 1600 on the date in question. In addition, he said "a lot of colored fellows on there" dress alike and "probably a lot of guys look like me and they figured it was me." Appellant also offered in evidence the testimony of one alibi witness who stated that he was in the vicinity "practically all afternoon" where Appellant was shining shoes from approximately 1330 until he went back to work in the mess hall at 1600.

At the conclusion of the hearing, having 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-978537 and all other licenses, certificates of service 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, assuming without admitting this alleged act of exposure by Appellant, the findings do not support the conclusion that Appellant's conduct was deliberate rather than accidental; Appellant's witness testified that Appellant was shining shoes from 1330 to 1600 and there is at least one other witness to this fact which proves that Appellant could not have been on "C" deck between these hours; the identity of Appellant as the guilty party is based upon speculation since his identification by the complaining witnesses rested solely on the fact that Appellant was dressed in a white jacket and khaki trousers but at least several other men on board were so dressed and of similar physical appearance as

Appellant; the lack of motive must be construed in favor of Appellant; and the personal facts that Appellant is married, lives with his wife, and has no prior record, together with the thin evidence against him in this case, are sufficient to dismiss the charges herein or to impose a less drastic order. It is requested that the order of the Examiner be set aside or, in the alternative, that a further hearing be granted so that Appellant may be represented by counsel and present his witnesses including the one who did not appear at the hearing from which this appeal has been taken.

APPEARANCES: Danton L. McDougald, Esquire, of New York City, of Counsel.

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

FINDINGS OF FACT

On 23 December, 1952, Appellant was serving as messman on board the American SS INDEPENDENCE and acting under authority of his Merchant Mariner's Document No. Z-978537 while the ship was at sea.

At approximately 1500 on this date, Appellant was standing on "C" deck at the bottom of a ladder in the passenger area. He was wearing a white jacket and khaki trousers. Appellant's trousers were open and he was indecently exposed. One of the passengers, a Miss Del Vecchio, saw Appellant in this condition while she was going to her cabin on "C" deck. About an hour later, Miss Del Vecchio again saw Appellant at the same place and in the same exposed position; and at approximately the same time, another passenger, Miss Calcognini, saw Appellant in the same indecent condition when they passed each other on a ladder between "A" and "B" decks. Appellant did not, at any of these times, gesture, move towards, or attempt to otherwise molest either of the passengers.

At about 1900 on the same day, Miss Del Vecchio identified Appellant from among many other members of the crew who were also dressed in white jackets and khaki trousers. On the next morning, Miss Calcognini picked Appellant out of a similar line-up. Again, there were many of them dressed in white jackets and khaki

trousers.

During less than one years's service in the American Merchant Marine, Appellant has been admonished twice by an Investigating Officer for minor breaches of discipline.

OPINION

To suggest that Appellant's condition might have been accidental rather than deliberate, is incongruous with the fact that he was observed in the same state of disattire on three different occasions. Proof of such a gross act of misconduct in a passenger area is in itself sufficient to support the allegation that Appellant's conduct was "wrongful." According to his own admission, Appellant had no right even to be in a passenger area. By the same token, no proof of motive or overt act is required. It was stated more than a century ago, by Judge Story, that owners are contractually bound to protect passengers against personal rudeness by members of the crew and that there is a strict obligation to comply with a higher than average degree of respect for female passengers. *Chamberlain v. Chandler, Fed. Cas. 2575 (1823)*.

Concerning Appellant's contention that he could produce another alibi witness, the record discloses that the hearing was adjourned twice in order to enable Appellant to obtain witnesses from the ship. After his only witness had testified, Appellant did not request an additional continuance of the case. Hence, the record indicates that Appellant was permitted sufficient time to produce his witnesses. In addition, it would serve no useful purpose to reopen the hearing to allow another witness to testify in Appellant's behalf because of the fact that he was so conclusively identified by two different passengers; and since an additional alibi witness could offer no testimony which would be of a more favorable nature to Appellant's cause than the testimony which was given by the witness who did appear in Appellant's behalf. The Examiner who saw and heard the witnesses was entitled to assign to their testimony whatever weight he deemed fit and proper; and he rejected the alibi testimony given by Appellant and his witness.

As to the identification of Appellant which was made on board the ship, Appellant did not attempt to refute the testimony of the

two passengers to the effect that he had been identified from among many other members of the crew who were similarly dressed. The indecently exposed person was seen by the two passengers on separate occasions when they were not together; and Appellant was independently identified by the passengers, at different times, as the guilty party. The testimony of these two women as to their identification of Appellant in that manner, was the best possible evidence which could have been obtained. Undoubtedly, it was extremely embarrassing for them to appear and testify; and to be directly confronted by Appellant on cross-examination.

Although it has not been suggested that the two passengers had some ulterior motive for accusing Appellant, the only reasonable alternative to Appellant's guilt is complete fabrication of the three incidents by the passengers. Such a choice would be highly speculative and conjectural especially since both of the complaining witnesses are presumably above average intelligence since they are college graduates. Hence, I think there is considerably more than merely substantial evidence to support the identification of Appellant.

For the reasons stated, the various points raised on appeal are not considered to be conducive towards reversing or otherwise disturbing the order imposed.

ORDER

The order of the Examiner dated at New York, New York, on 23 December, 1952, is

AFFIRMED

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

Dated at Washington, D. C., this 7th day of April, 1953.

***** END OF DECISION NO. 650 *****

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