

In the Matter of Merchant Mariner's Document No. Z-521480 and all
other Licenses, Certificates and Documents
Issued to: FABIAN GARCIA CRUZ

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

823

FABIAN GARCIA CRUZ

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 3 September 1954, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-521480 issued to Fabian Garcia Cruz upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as an ordinary seaman on board the American SS KATHRYN under authority of the document above described, on or about 10 April 1954, he wrongfully assaulted the Chief Officer of said vessel with a dangerous weapon; to wit, a piece of lumber.

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

Thereupon, the Investigation Officer and Appellant made their opening statements and the Investigation Officer introduced in evidence the testimony of the Chief Mate of the KATHRYN.

Appellant testified under oath in his defense. He stated that while still on the ship, the Chief Mate refused to give Appellant extended shore leave and then the Chief Mate invited Appellant to go ashore after the two men exchanged angry words; Appellant later saw the Chief Mate on the dock conversing with three or four officials of the shipowner's company; the Chief Mate walked towards Appellant and tried to hit Appellant but missed; Appellant struck the Chief Mate with his fist; the Chief Mate kicked Appellant who then picked up a piece of lumber because the Chief Mate had kicked Appellant; Appellant hit the Chief Mate on the head with the piece of lumber; the two men struggled for the piece of lumber; and the Chief Mate ran away when Appellant was able to regain sole possession of the lumber. Appellant admitted that he was angry because the Chief Mate had refused to give Appellant leave to go to his home at Bayamon and had told Appellant that he would have to work overtime.

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 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-521480 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 conflict in the testimony as to who struck the first blow could have been resolved by the testimony of other witnesses to the incident; it was error for the Examiner to find that the Chief Mate did not succeed in kicking Appellant; and the provocation of being kicked in the groin by the Chief Mate had a reflex effect upon Appellant which caused him to pick up the piece of lumber and swing it at the Chief Mate without reflection or premeditation. For these reasons, it is submitted that the order of revocation for an unproved assault with a dangerous weapon should be modified to an

order appropriate for a simple assault with hands.

APPEARANCES: Mr. Seymour W. Miller of Brooklyn, New York, by
Milton Horowitz, Esquire, of Counsel

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

FINDINGS OF FACT

On 10 April 1954, Appellant was serving as an ordinary seaman on board the American SS KATHRYN and acting under authority of his Merchant Mariner's Document No. Z-521480 while the ship was in the port of Ponce, Puerto Rico.

After the ship arrived in this port on the morning of 10 April 1954, Appellant requested extra shore leave in order to go to his home at Bayamon, Puerto Rico. The Chief Mate refused to grant this request because he wanted Appellant to work overtime. After angry words were exchanged between the two men, the discussion of this subject was discontinued on the ship.

Later, at about 1030 on 10 April 1954, Appellant was going ashore on liberty when he saw the Chief Mate on the dock talking with the ship's agent and other persons. Appellant approached the Chief Mate and asked him if he wanted Appellant to work overtime. When the question was answered in the affirmative, Appellant used his fist to strike the Chief Mate in the face. The Chief Mate then kicked Appellant and the latter picked up a "2 by 4" piece of lumber. Appellant swung the lumber overhead and struck the Chief Mate on the top of the head with it. The Chief Mate tried to get the lumber away from Appellant but was unable to do so. The Chief Mate then ran to the ship to avoid another blow from the piece of lumber.

The Chief Mate received first aid on the ship and later went to the hospital where four stitches were taken in the wound on his head. Appellant was taken into custody by local police at 1100 and released at about 2200 on the night of 10 April. There is no evidence that he received any injury in the scuffle.

There is no record of prior disciplinary action having been taken against Appellant by the U.S. Coast Guard.

OPINION

The findings of the fact related above are substantially in accord with Appellant's own version of what happened except that he testified he was approached on the dock by the Chief Mate and the Chief Mate unsuccessfully attempted to strike Appellant before he struck the Chief Mate. I agree with the contention on appeal that the Examiner erred in finding that the Chief Mate did not succeed in kicking Appellant. Nevertheless, in the absence of any injury to Appellant or evidence of grounds for fear of serious bodily harm to him, Appellant was not justified in picking up the piece of lumber and attacking the Chief Mate with it. There is no showing that it was necessary for Appellant to use this dangerous weapon to repel an attack by the Chief Mate nor does Appellant contend that he resorted to the use of this weapon out of fear for his own safety. Certainly, it was excessive force to hit the Chief Mate on the head with the piece of lumber even though Appellant had been kicked by the Chief Mate. Although Appellants conduct was not premeditated, it seems that he was motivated by anger rather than any element of self-defense when he struck the blow with the lumber. Two of the determining elements in self-defense with a dangerous weapon are that a person must believe danger of serious bodily harm is imminent and he must have reasonable grounds for such belief. *Josey v. United States* (1943), 135 F2d 809. It is not contended that either of these conditions were present herein.

The testimony of the Chief Mate, that he was struck by Appellant's fist after he was again informed that he was expected to work overtime, is a more probable version than that presented by Appellant. It is supported by Appellant's testimony that he became angry when the Chief Mate refused to grant Appellant permission to go to Bayamon; and this refusal was based on the Chief Mate's desire to have Appellant work overtime. But even assuming the men were engaged in mutually voluntary combat, Appellant was not justified in employing a dangerous weapon since the Chief Mate did not resort to such means.

This offense was aggravated by the fact that the attack was

upon the person of the Chief Mate who was second in command to the Master. Hence, this was a gross infringement on the discipline required of seamen who are crew members on ships of the United States Merchant Marine. Appellant's uncontrolled anger was completely unjustified as shown by his frank admission that the Chief Mate had a perfect right not to give Appellant permission to go to Bayamon. For these reasons, the Examiner's order of revocation will be sustained.

ORDER

The order of the Examiner dated at New York, New York, on 3 September, 1954 is AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 21st day of July, 1955.

***** END OF DECISION NO. 823 *****

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