

In the Matter of Merchant Mariner's Document No. Z-974911 and all
other Seaman Documents
Issued to: JOSE MALLIARE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1044

JOSE MALLIARE

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.

By order dated 8 November 1957, an Examiner of the United States Coast Guard at New York, New York suspended Appellant's seaman documents upon finding him guilty of misconduct. One specification alleges that while serving as First-class Waiter on board the American SS INDEPENDENCE under authority of the document above described, on or about 5 October 1957, Appellant did assault and batter a fellow crew member with a metal retaining batten.

At the beginning of 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 counsel of his own choice. He entered a plea of not guilty to the charge and specification.

The Investigating Officer made his opening statement and introduced in evidence two entries from the Official Logbook of the vessel, and a sketch of the berthing compartment prepared by the person allegedly assaulted. Both parties stipulated to the admission of a statement by a crew member, D'Amico, given before a Coast Guard officer in Naples. Angelo Campodonico, the person assaulted and Frederick Ebel, a crew member, were called to testify.

In defense, Appellant testified in his behalf.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then advised the Appellant of his decision in which he concluded that the charge and specification had been proved. An order was entered suspending all documents, issued to Appellant, for a period of 12 months outright and 12 months on 24 month's probation. Appeal was timely filed on 27

November 1957.

FINDINGS OF FACT

On 5 October 1957, Appellant was serving as First-class Waiter on board the American SS INDEPENDENCE and acting under authority of his Merchant Mariner's Document No. Z-974911 while the ship was in the port of Barcelona, Spain.

On that date at about 0400, Malliare returned from shore leave, entered his room and turned on the overhead lights. While undressing he became nauseous and vomited into the sink. Campodonico was disturbed by the lights and the Appellant's choice of place of vomiting and an argument ensued. Campodonico got out of his bunk to close the door and turn out the lights. Malliare then grabbed the retaining batten from the bookcase and hit Campodonico with it. Campodonico was subsequently taken to the hospital and eighteen stitches were taken in his head.

Appellant has no prior disciplinary record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the decision is against the weight of the evidence; that the conclusions drawn by the Examiner are in conflict with the sworn testimony and are based upon speculation and surmise; and that the outright suspension of the Appellant's documents for one year with an additional one year on probation for a period of two years is harsh and unreasonable.

Appearances: George J. Regan, Esq. 101 Park Avenue New York, New York

OPINION

Appellant admits that he struck Campodonico, but alleges that he acted in self-defense. Appellant would have us believe that Campodonico climbed from his bunk and approached Appellant with clenched fists; that he could not retreat because the door would not open until Campodonico was upon him. Then, in fear of being struck, he turned, took the guard out of the bookcase and, in self-defense, struck Campodonico on the head with it.

The Examiner chose to believe Campodonico's version of the incident and not the Appellant's. Questions of credibility are for the trier of the facts and his determinations will not be disturbed unless they are clearly erroneous. Appellant's claims are not supported by the physical evidence. When Ebel, a roommate of the

parties involved, separated his bunk curtain seconds after Campodonico was struck, the door to the room was open. Appellant failed to state why he could not open the door until the attack was imminent and, more important, why, once he had succeeded in opening the door, he chose to strike Campodonico rather than depart from the scene. The fact that the Appellant was by the open door when Ebel looked out further indicates that he had no intention of retreating.

Appellant contends that the decision of the Examiner is speculative and certainly is not proved beyond a reasonable doubt or at least by a preponderance of the evidence necessary in this criminal or quasi-criminal proceeding. Hearings held pursuant to R.S. 4450 (46 U.S.C. 239) are remedial and not penal. This position is fortified by the statute itself which provides for the referral of cases involving criminal liability to the Department of Justice for action by that Department, thus recognizing and providing for the separability of the penal from the remedial or administrative function.

In these remedial administrative proceedings the degree of proof required is that the findings be supported by substantial evidence. 46 CFR 137.21-5. Substantial evidence has been defined by the courts to mean such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Examiner, being in a position to evaluate the testimony, rejected the version of events given by the Appellant. The evidence which the Examiner accepted more than meets the requirement of substantiality and supports the ultimate findings.

In view of the nature of the assault, I do not consider the order to be excessive.

ORDER

The Order of the Examiner dated at New York, New York, on 8 November 1957 is hereby AFFIRMED.

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

Dated at Washington, D. C., this 9th day of June, 1958.