In the Matter of Merchant Mariner's Document No. Z-351180-D1
Issued to: Allen Hugh Branch

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1380

Allen Hugh Branch

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 5 July 1962, an Examiner of the United States Coast Guard at Jacksonville, Florida revoked Appellant's seaman documents upon finding him guilty of misconduct. The sole specification found proved alleges that while serving as a crew member on board the United States SS EXHIBITOR under authority of the document above described, on or about 11 June 1962, Appellant wrongfully had marijuana in his possession.

At the hearing, Appellant was represented by counsel of his choice. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Office and Appellant stipulated that Appellant was a crew member of the SS EXHIBITOR on the date in question and that the substance found in the pocket of a pair of shorts belonging to Appellant was hashish (marijuana). The Government then introduced the testimony of two U.S. Customs agents and one piece of documentary evidence, consisting of an arrest report of the accused by the Customs Agents. Appellant offered in defense his own testimony.

At the end of the hearing, the Examiner rendered the decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order revoking Appellant's document.

FINDINGS OF FACT

On 11 June 1962, Appellant was a crew member on board the United States SS EXHIBITOR and acting under authority of his document while the ship was in the port of Savannah, Georgia. On that day a search of the vessel was conducted by United States Customs officials. They found a quantity of hashish in the pocket of a pair of shorts hanging on a hook on the wall of the cabin

occupied by Appellant and two other crew members. At the time of the search Appellant was on shore and the cabin had been locked. Upon returning to the vessel Appellant was confronted with the shorts and admitted that they were his. However, he denied that the hashish belonged to him and further asserted that he had no knowledge as to the manner in which it found its way into the pocket of his shorts. Thereupon Appellant was arrested by the Customs officials and charged with unlawful possession of narcotics.

BASES OF APPEAL

It is urged on appeal that:

1. The government failed to prove its case "without a reasonable doubt..."

2. The "automatic shifting of the burden of proof to the accused...is converse to all rules of law and...unconstitutional..."

3. The manner in which "possession, (constructive or actual) is assumed in this matter..." is arbitrary.

OPINION

Appellant's first contention can be dismissed without extended discussion. The proceedings against a merchant mariner document are not criminal in nature and therefore the Government need not carry its burden "without a reasonable doubt." The test to be applied is whether or not there is substantial, reliable and probative evidence to support a revocation of the document. See Commandant's Appeal Decisions No. 1081.

Appellant's second contention has been settled since Yee Hem v. United States, 268 U.S. 178 (1925). That case dealt with the construction of a provision similar to that found in 46 C.F.R. 137.21-10. The question before the Court was whether or not Congress had the power to enact provisions with respect to presumptions arising from the unexplained possession of narcotics. The Court held the presumption of wrongful knowledge, which arose when a person was found in possession of narcotics and shifted to the accused the burden of explaining this possession to the satisfaction of a trier of facts, was reasonable and not against due process of law. The Court in the course of its opinion on page 183 made the following comment:

"Legislation providing that proof of one fact shall constitute prima facie evidence of the main fact in issue is but to enact

a rule of evidence, and quite within the general power of government..." This view has been reiterated as recently as Cardova v. United States, 303 F2d 454 (1962).

The next issue to be considered is found in Appellant's third ground of appeal. The question raised there is whether or not there was sufficient evidence to prove possession of the hashish by Appellant in order to justify the shifting of the burden of proof to him.

"Possession" is not a term not susceptible to a precise definition. Former decisions of the Commandant spoke in terms of actual physical possession of narcotics to justify revocation of the document. See Commandant's Appeal Decisions Nos. 1195, 1350. The question then is whether "constructive possession" or ownership of narcotics may be sufficient grounds for revocation. That issue was dealt with in Commandant's Appeal Decision No. 740. In that case marijuana cigarettes were found in the accused person's khaki pants hanging on the wall of his cabin. The accused was on shore at the time of the search, and there was also an indication that other crew members had access to the cabin. The Commandant held that he had "such possession as constituted prima facie proof of guilt which placed the burden on Appellant to explain the possession to the satisfaction of the Examiner ..." There was no evidence in Appeal No. 740 or this case that the article of clothing was touched or tampered with by another person.

There is a rational connection between Appellant's ownership of the shorts and the possession of hashish. It is more reasonable to deduct that the hashish belonged to Appellant rather than speculate that it was "planted" there by another crew member. This reasoning is supported by the failure of Appellant to show any motive or reason why some crew member would put the hashish in Appellant's clothing. The mere fact that his shorts were accessible to others is not, by itself, a sufficient explanation as to the manner in which the hashish found its way into Appellant's shorts. See Commandant's Appeal Decisions Nos. 1081, 1163, 1195, 1262, 1350.

Since Appellant failed to go forward with evidence and rebut the presumption of "conscious" and "knowing" possession that arose when the hashish was found in his shorts, the Examiner was justified in holding that the Government had made out a prima facie case against Appellant. Commandant's Appeal Decisions Nos. 712, 810, 1081, 1165, 1178, 1195, 1262, 1350.

ORDER

The order of the Examiner is therefore AFFIRMED.

E.J. Roland
Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 13th day of March 1963.