

In the Matter of Merchant Mariner's Document No. Z-531923 and all
other Seamen's Documents
Issued to: PETER J. DE OLIVEIRA

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1475

PETER J. DE OLIVEIRA

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 4 March 1964, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for three months outright plus six months on eighteen months' probation upon finding him guilty of misconduct. The specification found proved allege that while serving as an oiler on board the USAFS AMERICAN MARINER under authority of the document above described, on or about 8 October 1964, Appellant assaulted and battered the master of the vessel and on the next day deserted the ship at the U. S. Naval Base, Trinidad, T.W.I.

At the hearings, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of the master, two photographs of the master, and a copy of Official Log Book entries.

In defense, Appellant offered in evidence his own testimony, a report from the Community Hospital in Port of Spain, and a receipted bill from that institution.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and both specifications had been proved.

The entire decision was served on 26 March 1964. Appeal was timely filed on 24 April 1964.

FINDINGS OF FACT

On 8 October 1963, Appellant was serving as an oiler on board the USAFS AMERICAN MARINER and acting under authority of his

document while the ship was at the U. S. Naval Base in Port of Spain, Trinidad. AMERICAN MARINER is a public vessel operated with a merchant crew by Mathiason Tankers, Inc.

On the morning of 8 October, Appellant began to suffer from an earache. The purser advised him that the air-conditioned spaces of the ship might cause aggravation to the condition and that he should remain on deck in the sun. Later in the day, when the condition had not improved, he requested referral to a doctor.

He was sent ashore in the company of the chief mate. The doctor utilized by the agents, William Kennedy & Co., examined Appellant, gave him some pills, and sent him back to the ship. En route, Appellant decided to seek further medical assistance. He left the taxi cab and went to the American consulate. From there he was referred to Community Hospital, where, he was warned, he would have to bear costs himself.

At Community Hospital he was examined and again furnished medication.

After he had identified himself as a seaman whose vessel was to sail the next morning at 1000, the doctor provided him with a certificate stating that he was suffering from "acute otitis - left and acute fibro myositis" and that he should be given two or three days off duty. There was also appended a note, "Would it be possible to check above mentioned seaman at 7 a.m. to-morrow."

Appellant returned to the vessel and showed the certificate to the purser who told him to lie down. About 2300 that night, feeling no relief from the pain, Appellant again went to the purser's office and asked to be taken to the master. The purser told him that he had already spoken to the master and that the master did not wish to see him. Despite the purser's advice, Appellant made his way to the master's quarters.

There, through the open door, he saw a man whom he took to be the master. (He had never seen him before.) He told the master that he had not been satisfied with the doctor provided by the agent and that he was still in pain. Upon his inquiry as to what the master would do about it he was told that the master did not wish to discuss the matter any more that night. The master then attempted to close the door. Appellant jumped against the door and knocked the edge against the master's forehead, inflicting a small cut.

Appellant then went to the messroom where he asked some friends to wake him early so that he could keep his appointment at 0700.

The master sent for military police to remove Appellant from the ship. When the police arrived, the master changed his mind and dismissed them. The master also sent word to the watch officer that he expected that Appellant would leave the ship and that he wished to be informed when this happened.

The next morning Appellant woke early, packed his gear with the assistance of other crew members, and left the ship at about 0600. The master was so advised.

Appellant was not aboard when the ship sailed at 1000. These findings are in general accord with those of the Examiner.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

(1) The evidence does not establish the offense of desertion, since Appellant's intention on leaving the ship was to seek medical attention and not to abandon the vessel.

(2) The fact that Appellant was in the agent's office before 0830 and was instructed to remain there until after the ship had sailed negatives an intent to abandon.

(3) Assault and battery was not proved because there was no specific intent to inflict injury.

APPEARANCE: Freedman, Landy & Lorry, Philadelphia, Pennsylvania, by Charles Sovel, Esquire.

OPINION

I

The appeal on the assault and battery specification is urged on the theory that "an essential element of any assault is a specific intent to cause injury." This is not a complete statement of the law. There is an exception to this in that the offense is committed when injury is caused by illegal, mischievous, reckless, or wanton conduct. 6 C.J.S. Assault § 63.

The first determination then must be whether Appellant had a specific intent to injure. The decision is silent on this point.

It seems indisputable that Appellant went to the master's quarters to complain about his physical condition. There was no

question of any animosity on Appellant's part against the master. In fact, the testimony of the master and that of Appellant when taken together clearly indicated that they had never seen each other prior to their meeting at the master's door.

In determining what occurred at the master's door, the Examiner accepted the testimony of the master and rejected that of Appellant insofar as it was inconsistent with the master's. That decision has been followed in the Findings of Fact herein, but other matters in the testimony require review in the attempt to ascertain Appellant's intent.

Thus, Appellant testified that he was carrying the form issued to him at the Community Hospital when he arrived at the master's door. The master was silent as to this, but the statement is plausible, since the note on the certificate had to do with Appellant's activity the next morning. It is evident from the master's testimony that he was not cognizant of all the facts when he spoke to Appellant. He stated: "I told Peter that Doctor Reece was considered one of the best doctors in Trinidad and that if he wasn't satisfied with the medical attention he got there, it was his privilege to go elsewhere." (R-9) Obviously, the master did not know that Appellant had already exercised the privilege, nor that, as he testified in connection with the intent to desert, an appointment for the early morning had been made.

It seems probable then that when Appellant "leaped" against the closing door, after being told that there would be no further discussion of his condition, he had on intention of holding the conversation open, of communicating to the master facts of which he was unaware. I conclude, then, that the evidence does not point to an intent on the part of Appellant to injure the master by his action at that time.

The question then remains whether Appellant was engaging in a course of conduct, illegal, mischievous, reckless, or wanton in nature, such as to lead to injury.

I have previously reviewed cases involving such imputed intent. (Appeal Decisions 822, 841, 1212, 1235, 1333, 1358.) In four of these the conduct was the reckless wielding of a knife. In one it was the reckless handling of a pistol. In one there was a deliberate pouring of hot water on the victim.

A review of cases of imputed intent in the criminal courts shows that, generally, when the course of conduct is mischievous or careless, the instrumentality used is usually a dangerous weapon, e.g., firearms, a knife, or a recklessly driven automobile. State v. Paxson, 99 Atl. 46, 29, Del.249; State v. Fine, 23 S.W.2nd 7,

324 Mo. 194; Cittadino v. State, 24 So. 2nd 93, 199 Miss. 236; People v. Carmen, 228 P. 2nd 281, 36 Cal. 2nd 768; (firearms). Grant v. State, 180 So. 332, 28 Ala. App. 80; Brown v. State; 38 So. 268, 142, Ala. 287 (knife). Davis v. Commonwealth, 143, S.E. 641, 150 Va. 611; Tift v. State, 88 S.E. 41, 17 Ga. App. 663; Balee v. Commonwealth, 156 S.W. 147, 153, Ky. 558 (automobile).

In the instances of lesser instrumentalities, the striking has been deliberate, as in the cases of teachers chastising children. Wood v. Commonwealth, 140 S.E. 114, 149, Va. 401; Vanvactor v. State, 15 N.E. 341 (Supreme Ct. Ind. 1888).

None of these situations is comparable to the case, nor are the cases in which there has been an intentional placing of hands on the victim, although without intent to injure, State v. Hemphill, 78 S.E. 167, 162 N.C. 632; Combs v. State, 116 S.W. 595, 55 Tex. Cr. R. 332; Greer v. State, 106 S.W. 359 (Cr. App. Texas 1907); State v. Kotowski, 183 N.E. 2nd 262, 20 Ohio and 296.

I have been able to find only one case in which the facts approach those here. In Atkinson v. State, 138 S.W. 125, 62 Tex. Cr. R. 419, a man, mistaking the identity of two women, followed them to the residence of one of them. They entered and closed the door. The accused knocked. One of the women opened the door narrowly, heard incomprehensible speech, and hastily closed it. "Appellant then threw his weight against it and the door came open. The door in opening struck the lady on the arm."

After conviction the reviewing court found that there was no intent to injure and that the Appellant's intent had been only to gain access to the house.

Most significantly, the court said that it was evident that "he did not know she was behind the door." From this, I take it that had such knowledge been established the conviction could have stood.

Appellant's case is so close to this, with the added fact that he certainly knew the master was at the door and liable to be struck if its direction of movement were suddenly reversed, that I am constrained to uphold the finding that he committed assault and battery.

II

The two bases of appeal on the question of desertion are issues raised on the record of hearing. In his Findings of Fact, the Examiner made on findings as to Appellant's actions after he left the vessel except to note his absence at the time of sailing.

In the Opinion appears this:

". . . he left the ship and went to the hospital. After being at the hospital awhile, he was sent to the ship's agent by the doctor. While at the agent's officer about 8:30 a.m. the agent spoke to his employee down at the dock by radio-telephone. The person charged heard himself being described as a deserter." (D-6).

Although this appears in "Opinion" it is actually a finding of fact. Necessarily, it is based on the testimony of Appellant. Appellant did not, however, testify that he heard on the radio-telephone that he was a deserter. What he said he heard was, "Leave him there. He is going to be discharged."

The Examiner's opinion does not go on to evaluate the significance of these facts.

In determining whether Appellant's evidence requires evaluation, it may be well to summarize his testimony as to his activities after leaving the ship.

Appellant reported to the hospital, was furnished pajamas, and was told to go to bed. Shortly thereafter, the doctor told him to put his clothes back on, declaring, "I'm loaded with troubles." Later the doctor said, "Leave your baggage here. Go to the Kennedy office. They are waiting for you there."

At the agent's office, before 0830, Appellant heard a conversation between the agent and an unidentified person which took place by radio-telephone, the other person apparently using a two-way radio in the agent's car. The message received at the office was that Appellant was to be discharged.

After being told to "sit there," Appellant sat in the office until after 1130 at which time he was told he was a deserter.

Two affirmative defenses are raised by t his line of testimony, one that the intent was to seek medical treatment on leaving the ship, two that Appellant was discharged before the ship sailed.

The Examiner in ruling on a defense motion to dismiss the desertion charge wrote, "His absence and the removal of his clothing and personal effects are evidence from which it may be inferred that he intended to desert." I can find nothing in the cases directly to support this view, but in light of the presumption against intent to abandon raised by the leaving behind of personal effects I think it is a good statement of the law.

But other factors may permit that the inference not be drawn. Here, the situation was that Appellant was going to a hospital for medical treatment. With the ship sailing in a few hours, he would not want, in the event that he was made inpatient, to have to arrange for the transportation of his effects or suffer their loss.

There is uncontroverted evidence in Appellant's testimony that when he left the hospital to go to the agent's office the doctor told him to leave his luggage at the hospital. This could give rise to an inference that the doctor intended to keep him in the hospital later. No finding or opinion appears as to this.

These defenses should have been considered and a determination made in the Examiner's decision as to whether the evidence was probative.

On this state of the record, the normal requirement would be that the case be remanded to the Examiner for consideration of these issues.

However, in this case I do not perceive that a good purpose would be served by such action. I note that Appellant placed in evidence a receipted bill from the Community Hospital, Port of Spain, dated 13 October 1963. I conclude that in fact he received some treatment at the hospital subsequent to his first visit.

The master testified:

- "Q. Did you know, Captain that when Mr. De Oliverira [sic] left the ship with his suitcase that he was to report to a hospital?
- A. No, sir, I didn't.
- Q. If you had known that would you have considered him to a deserter?
- A. No, sir, wouldn't have considered him a deserter, I would have assisted him to go there if I had known that."
(R-26)

In the light of these two factors, it seems that any doubt must be resolved in favor of Appellant.

III

There is one other point to be mentioned so that no misconception can arise from the recital of the charge and the findings in this case.

Although the charges assert that AMERICAN MARINER was at the time "a merchant vessel of the United States," the evidence shows

and the Examiner found that it is in fact a public vessel. Since vessel are not subject to the provisions of Title 52 of the Revised Statutes a question immediately arises as to the source of jurisdiction in this case.

The answer, I think, is not to be found in the record. The identification of Appellant by the master as a member of his crew not yield an answer. The fact that the vessel is operated by a commercial agent of the government proves nothing. So also, the fact that Appellant, as disclosed in his own testimony, signed articles before a consul does not establish that possession of a U.S. Merchant Mariner's Document was either a statutory requirement or a condition of employment.

Since the matter was not raised at the hearing nor on appeal, I turn for an explanation to an agreement of 24 April 1962, between myself, as Commandant of the Coast Guard, and the Chief of Staff, U.S. Air Force. Under this, the Air Force undertook to ship and discharge crews of USAF vessels of this type under the laws governing merchant vessels, and to require as a condition of employment the holding of merchant mariners' licenses and/or documents by all seamen in the deck, engine, steward, and staff departments. This was such a vessel, and the crew was shipped pursuant to the agreement. This there is jurisdiction in this case.

CONCLUSION

I conclude that there was insufficient evidence as to intent to support the finding of desertion. The charge of assault and battery was supported by substantial evidence.

ORDER

The finding of the Examiner on the specification alleging desertion is REVERSED and the specification is DISMISSED. With this exception the findings of the Examiner, dated at New York on 4 March 1964, are AFFIRMED.

The order is modified to provide for a suspension of three months, and as MODIFIED, is AFFIRMED.

M.D. SHIELDS
Vice Admiral United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 6th day of November 1964.

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