

In the Matter of Merchant Mariner's Document Z-450449 and all other
Seaman's Documents
Issued to: JOSE DAVID AGUILAR

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1478

JOSE DAVID AGUILAR

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 11 June 1964, and Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for six months outright plus six months on twelve month's probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as an oiler on board the United States SS BIDDEFORD VICTORY under authority of the document above described, on or about 30 August 1963, Appellant wrongfully cut a fellow crewmember, one Rodolfo Hernandez, with a knife.

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

The Investigating Officer introduced in evidence the testimony of Hernandez and of one Enrique Gonzales.

In defense, Appellant offered in evidence his own testimony and two documents, one a record of medical treatment, the other an extract from Grand Jury minutes.

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

The entire decision was served on 15 June 1964. Appeal was timely filed on 17 June 1964.

FINDINGS OF FACTS

On 30 August 1963, Appellant was serving as an oiler on board the United States SS BIDDEFORD VICTORY and acting under authority of his document while the ship was in Brooklyn, New York. The vessel paid off from a foreign voyage that day and Appellant was

hired as one port crew. He remained on board the vessel since he had the watch from 4:00 p.m. to midnight. At about 11:30 p.m. he was permitted by the engineer of the watch to leave the engine room for the purpose of calling the relief watch and dressing.

Two members of the relief watch, Hernandez and Gonzales, who had been ashore since the pay off, came aboard and met Appellant outside the door to their room. All three entered the room, where the two relief men changed clothes.

What happened in the room cannot be determined on this record. Although all three persons present testified to a brawl beginning in the room, in the course of which Hernandez was cut by a small penknife wielded by Appellant, the Examiner found that no cutting took place in the room, but rather that after Hernandez had pushed Appellant out of the room into the passageway Appellant drew the knife in a fit of pique and cut Hernandez.

Appellant was arrested and held overnight by the local police. After he furnished bail the next day he was released. He then went to the nearest hospital for treatment of lacerations on the top of his head.

Subsequently he appeared before a grand jury which failed to indict.

BASES OF APPEAL

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

1. A motion to dismiss at the conclusion of the Investigating Officer's case should have been granted;

2. The Examiner's ultimate findings are inconsistent with his opinion;

3. The Examiner improperly rejected evidence furnished by Appellant to the effect that he had been injured and had acted in self-defense.

APPEARANCE: Alan Nemser, Esquire, Brooklyn, New York

OPINION

The defense in this case is that Appellant drew a penknife from his pocket and cut Hernandez lightly to make him desist from striking Appellant on the head with a chain or other flexible metal object.

The Examiner rejected this defense, saying: "I am not

satisfied from the testimony of Aguilar that the person charged had been struck over the head by a wire or other flexible object in the hands of Hernandez. There is no evidence except his own testimony to that effect." This last sentence, by itself, is not an adequate reason to reject the testimony. However, the Examiner did go on to find "improbability" in Appellant's version, which if true, would support rejection.

Evidence tending to corroborate Appellant's description of his injury is the undisputed fact that he was treated at a hospital the next day for lacerations of the scalp. The Examiner gave no weight to this because the hospital record of treatment from 2:15 to 2:45 p.m. describes "lacerations of scalp 16 hours old." The Examiner says, " Sixteen hours prior to 2:15 p.m., 31 August, would be 10:15 p.m., 30 August, which would be before Hernandez and Gonzales had returned to the vessel." I am far from satisfied that attributing such pinpoint precision to the phrase "sixteen hours" is justified. Counsel points out that applying the sixteen hours to the "2:45 p.m." on the hospital record brings the time closer to the time of the incident.

The Examiner was "not satisfied from the testimony of the person charged that the incident occurred when he was defending himself from a wire in the hands of Hernandez."

To deny credibility to Appellant's testimony on this issue is to leave to speculation the source of the head injury. There is no evidence that it occurred after the fight on board. During the entire period up to his appearance at the hospital, Appellant was in the custody of the police. Nor is there evidence that the injury had been incurred before the fight, as the Examiner implies, because neither the victim nor his roommate admitted to seeing any sign of it.

If it be hazarded that the wound was received before the fight, the engineer of Appellant's watch would presumably have known of it, and if Appellant did not have it immediately after the fight both the chief mate and a day worker named "Gus", referred to in the testimony of Gonzales, would have known that fact. The arresting police officer also might have shed some light on this. Without the testimony of witnesses on this aspect of the case, the record is incomplete.

The question appears whether Appellant had a burden to establish that he had not been injured before the fight. In view of the fact that both adverse witnesses testified that he did not appear to have suffered a wound before the fight, it does not seem that Appellant should have anticipated that an inference would be drawn from the estimated time on the hospital record that he had

been injured before the other men came on board.

Once the inference was made, additional evidence became desirable, but in view of the disposition to be made of this case the matter will be left open.

II

Despite the incomplete condition of the record, I think that other considerations warrant reversal.

Only two witnesses appeared to testify against Appellant. On one collateral issue their statements are squarely in conflict.

Of the events just before their return to the ship, Hernandez declared that, at a bar on Eighth Avenue, Manhattan, he had one bottle of beer while Gonzales had nothing to drink at all. R-23; R-24. Gonzales testifies that he himself drank rum at the bar and that the glass in front of Hernandez was a "shot" glass, not a beer glass. R-49.

On the substance of the incident, Hernandez's own testimony is so inconsistent as to preclude evaluation as "reliable". He testified to being cut both in his room and in the passageway outside it.

At R-19, he said, "As a matter of fact the passageway was full of blood. So the ambulance come, and they pick me up from there..."

Inconsistently, at the same place, after stating that he "was lying down on the floor," when asked "Could you see him?" he replied, "You could see from one room to the other."

At R-29, he said, "No, he run away after he left me on the floor. He ran into the passageway..."

Again, at the same page, appears:

"Q. Isn't it a fact that you chased him into the passageway, and that he ran away from you and begged you to stop?"

A. I tried to get up, but I couldn't get up. At the same time the watchman, he comes in and he says..."

All three of these plainly imply that Hernandez was lying on the deck of his room. But once again, at R-30, he makes statements

which place him lying in the passageway.

At every point, Hernandez has the alleged assault terminated by Appellant's running away after Hernandez had fallen. Gonzales however graphically describes Appellant as astride the fallen Hernandez:

"...Aguilar is on the top of Hernandez like a horse. You never ride a horse? You never sit down on a horse? That's the way Aguilar do. Hernandez fall down and with a knife cut it down on the floor. Aguilar start to push it down with a knife. I try to take the knife out. I got cut twice. It's in the record too, twice." (R-41)

This is not the same scene described by Hernandez.

Probably because of the internal inconsistencies in the testimony of Hernandez, and its conflict with that of Gonzales, the Examiner said, "I reject Hernandez's testimony that he was first cut, unexpectedly while bending over tying his shoelace. I am satisfied that the cutting took place out in the passageway, not in the room."

This rejection, coupled with the rejection of Appellant's testimony about what happened in the room, leaves the record with no evidence as to the commencement of the brawl.

The "Opinion" states, "It is more probable that about the time Gonzales told Aguilar to get out of the room, that Hernandez 'pushed' the person charged out of the room. It is a fair inference that at this time, while Aguilar is out in the passageway that he drew the knife and cut Hernandez". This is speculation and is not founded on anything in the record.

Since there is no reliable, probative, and substantial evidence as to the beginning of the fight, there is no way to judge whether Appellant's use of a small knife went beyond the bounds of legitimate self-defense.

CONCLUSION

I conclude that a remand of this case would have no prospect, in view of the unreliability of the testimony of the witnesses, or providing probative and substantial evidence concerning the origin of the episode involved. No conclusion as to misconduct on the part of Appellant can be drawn.

ORDER

The Order of the Examiner dated at New York, New York, on 11 June 1964 is VACATED; the Findings are SET ASIDE; the Charge and Specification are DISMISSED.

P E Trimble
Rear Admiral U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 18th day of November 1964.

INDEX

EVIDENCE

credibility determination by Examiner, rejected credible, lack of probative, failure of

EXAMINERS

speculation

MEDICAL

record, inference from

SELF-DEFENCE

evidence of prior wound

SPECULATION

insufficient to support findings

TESTIMONY

credibility findings, rejected

WEAPONS

penknife

WITNESSES

credibility findings, rejected
credibility of I.O. witness, rejected

WRONGFUL CUTTING

insufficient evidence