

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-752750 AND ALL
OTHER SEAMAN DOCUMENTS

Issued to: JOSEPH L. SOMYAK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1500

JOSEPH L. SOMYAK

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-01.

By order dated 9 July 1964, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman documents for six months outright upon finding him guilty of misconduct. The two specifications found proved allege that while serving as an able seaman on board the United States SS WILD RANGER under authority of the document above described, on 8 January 1964, Appellant wrongfully cut crew member David Rivers with a knife, and wrongfully engaged in a fight with the same seaman.

At the hearing, 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 David Rivers and several other crew members as well as exhibits.

Appellant testified that he was afraid of Rivers and used a pocketknife in self-defense after Rivers had knocked Appellant down.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and two specifications had been proved. The Examiner then entered an order suspending all documents, issued to Appellant, for a period of six months outright.

FINDINGS OF FACT

On 8 January 1964, Appellant was serving as an able seaman on board the United States SS WILD RANGER and acting under authority of his document while the ship was at sea en route from Kobe, Japan, to Yokohama.

Appellant, ordinary seaman Rivers and able seaman McCree shared the 4 to 8 deck watches alternating as helmsman, lookout and standby. They also lived in the same room on the ship. Appellant and Rivers have known each other for approximately 15 years,

occasionally had drinks together while ashore, and once rented an apartment with some other seamen. There is no evidence in the record of prior serious difficulties between the two and McCree considered them to have been "buddies" for a long time.

At the time, Appellant was 47 years of age and weighed about 165 pounds. Rivers was 37 years old and weighed approximately 210 pounds.

It was dark on 8 January when Appellant went to the bow at 1830 to relieve Rivers of the lookout watch so he could take his turn at the helm. McCree was then steering and Appellant was on standby. Rivers refused to be relieved, stating that ordinary seamen were not allowed to steer the ship in those waters. Appellant went to bridge, confirmed with the mate on watch that it was all right for Rivers to take the helm, and returned to the bow.

When Appellant told Rivers what the mate had said, Rivers became angry. He said Appellant was an able seaman and he could stand the wheel watch. There was no further exchange of words as both seamen remained on the bow. Appellant used his flashlight several times to look at his wrist watch. The telephone on the bow rang and the mate complained to Rivers about the light flashing on the bow.

Then, without warning, Rivers approached Appellant and struck him on the side of his face. Appellant fell on the mooring lines, got up, ducked another blow, and backed away toward the starboard side of the forecabin as he attempted to keep the flashlight shined in River's eyes in order to blind him. Appellant backed down the ladder to the main deck. River in pursuit at a distance of about 8 or 9 feet. Rivers had no weapon in his possession. By the number one hatch, Appellant took out his pocket knife, opened the four-inch long blade, and swung it in front of him cutting Rivers in three places. Rivers stopped, Appellant backed farther away, then turned and ran aft on the starboard side. Appellant had retreated 25 to 30 feet before he used the knife. Appellant testified he was afraid that Rivers would stomp him and throw him over the side if he caught Appellant.

Rivers was given first aid for his three wounds which required a total of 27 stitches (deposition, p.9). The cut on the abdomen was three inches long and about an inch deep; he was also slashed on the right hand and cut on the left buttock (R. 37). Rivers was hospitalized at Yokohama on the following day. He was still an outpatient when he testified, by deposition, at Seattle on 28 February. Appellant was not noticeably injured. (R.17).

Although they both had been ashore drinking to some extent on the afternoon of 8 January before getting under way, neither was intoxicated while on watch. They had been performing their duties satisfactorily until this trouble developed.

Both seamen have been going to sea for approximately 20 years. Rivers has never been charged to appear at a hearing and this was the first time for Appellant.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that since Rivers had threatened to kill Appellant before the ship left San Francisco, Appellant was in fear of being stomped to death and tossed over the side. Hence, he opened his knife and swung it a few times to stop Rivers.

It is requested that the order be modified to three months.

OPINION

The above findings of fact contain the version of the fight presented by Appellant and accepted by the Examiner as the truth. River's version is that after he pushed Appellant and he fell on the mooring lines, he cut Rivers on the buttock as he was hanging up the telephone receiver) and twice more when Rivers turned around. Rivers testified that he could not explain Appellant's conduct since there was no reason for him to fear Rivers and he had never hurt Appellant (deposition, cross-int., pp. 13-14). There were no other eyewitnesses to the incident.

Although River's story is more plausible in some respects, I have acceded to the credibility determinations of the trier of the facts rather than making defferent findings based on an evaluation of the cold record. In any event, we both reach the conclusion that Appellant was guilty of misconduct by wrongfully cutting Rivers with a knife. Since it is clear from the record that Rivers started the fight the fight by knocking Appellant down, the conclusion that the other specification was proved is vacated and the specification is dismissed.

Judging from Appellant's testimony, his fear of Rivers was based on an earlier threat to kill Appellant (R. 76), River's reputation for stomping people (R. 126) (but Appellant admitted he knew of no specific instance of this (R. 128), the knocking down of a man 8 months before by Rivers (no stomping) (R. 73), and the knocking down of a seaman by Rivers in 1952 (no stomping) (R. 74).

Opposed to this are the past indications of companionship, at least, between the two men as recited in the findings of fact, the fact that they had no particular prior difficulties as roommates on the voyage, and the probability that Rivers could have indulged in any stomping he desired to do when he knocked Appellant down on the forecastle.

A balancing of these factors strongly indicates that, although Rivers was the initial aggressor, there was no basis for a reasonable belief that Appellant was in imminent danger of great bodily harm by stomping or otherwise when he cut Rivers with the knife. Therefore, Appellant's fear that he would be stomped by Rivers and thrown overboard was not reasonable. As to the possibility of danger of serious injury by other means, the likelihood that this condition existed is not borne out by the record. Rivers had no disciplinary record with the Coast Guard, Appellant did not know of any case where Rivers had displayed such viciousness, and Appellant had just been able to get up from the deck after the blow by Rivers on the forecastle. Moreover, there were persons on the bridge who would have been able to assist Appellant if necessary. As stated by the Examiner, Appellant could have, with the use of his flashlight, moved aft faster than Rivers if Appellant had not slowed down

or stopped in order to open his knife.

Since Appellant was neither in imminent danger of serious bodily injury nor was there any basis for a reasonable belief that he was in imminent danger of great bodily injury when he cut Rivers, the assault with a deadly weapon was not justified. Commandant's Appeal Decisions No. 1188 and 1322.

The order will not be modified as requested. The Examiner considered the mitigating circumstances including the disparity in the size and age of the two seamen. Considering the extent of the injuries inflicted, the order of six months suspension is lenient, rather than excessive, regardless of the dismissal of the other specification.

ORDER

The order of the Examiner dated at San Francisco, California, on 9 July 1964, is AFFIRMED.

P.E. TRIMBLE
Rear Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 13th day of May 1965.

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