

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-1181552  
AND ALL OTHER SEAMAN'S DOCUMENTS

Issued to: JOSE PABON

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1803

JOSE PABON

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 17 October 1969, an Examiner of the United States Coast Guard at Mobile, Alabama, suspended Appellant's seaman's documents for three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a fireman/watertender on board SS GULF MERCHANT under authority of the document above captioned, on or about 4 October 1969, Appellant wrongfully engaged in a fight with another crew member, Julius Martinez, while the vessel was at sea.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of Martinez and voyage records of GULF MERCHANT.

In defense, Appellant testified in his own behalf.

After the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of three months on twelve months' probation.

The entire decision was served on 20 October 1969. Appeal was timely filed on 24 November 1969. Although Appellant had until 2 February 1970 to add to his initial statement of grounds for appeal, nothing further has been received.

FINDINGS OF FACT

On 4 October 1969, Appellant was serving as a fireman/water

tender on board SS GULF MERCHANT and acting under authority of his document while the ship was at sea.

At a union meeting on that date, Appellant seconded a motion concerning the order of serving meals which could be construed as a criticism of Martinez, who was the chief steward. After the meeting, Martinez, in the presence of one Guzman, accosted Appellant. There was an exchange of hostile remarks. Appellant then either placed a hand in his pocket or put both hands in his pockets. (I cannot further resolve this because the Examiner made no findings on the matter. The only finding made by the Examiner was that Appellant ". . . did on or about 4 October 1969, while said vessel was at sea, wrongfully engage in a fight with another crewmember, Julius Martinez." In his opinion, summarizing the testimony, the Examiner speaks both of placing a "hand" and of "hands" in a pocket. In the testimony itself, both versions appear. No one saw fit to pin the point down. In a case like this, it is apparent that whether a person places one hand in a pocket, as though to remove something therefrom, as Martinez declared he construed the action, or places both hands in different pockets, such as to constitute a form of disarmament at the time, the question is obviously of significance. Since no one addressed himself to the matter at hearing or in initial decision, I find no reason to attempt to make findings for the first time based on a resolution of conflicting testimony, especially in view of the deposition to be made of this case.)

During this gesture, Martinez hit Appellant with his fist. Appellant replied in kind. The witness Guzman intervened and separated the parties. If there was more than one exchange of blows before the intervention, there were only a few.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the evidence does not support the findings. In view of the disposition of the case, other grounds urged by Appellant, not necessarily persuasive, need not be set out.

APPEARANCE: Marquez-Diaz and Parker, New Orleans, Louisiana, by  
Nestor Marquez-Diaz, Esquire

#### OPINION

I

Before proceeding to the actual grounds for decision in this case, I must make it clear that Examiners' opinions, even if

couched in terms of findings are no substitute for "findings." It can be seen that the findings which I have substituted for those of the Examiner, quoted, go beyond the one sentence statement made by the Examiner. I must also make it clear that mere repetitions or summaries of testimony by an Examiner do not constitute "opinion." Having made his findings, an Examiner must state his reasons or basis therefor upon all the material issues. This may involve analysis of the testimony, but the mere recitation of testimony does not ordinarily constitute a reason for rejecting it or accepting it. 5 U.S.C. 557.

## II

The issue raised by Appellant in this case is the question of self-defense. The issue was specifically raised at hearing and is repeated on appeal.

"Self-defense" is usually thought of as a defense to a charge of assault and battery, of whatever degree. The specific allegation of "wrongfully engaging in a fight" I consider to be the same as "engaging in mutual combat," which has been held in these proceedings to be a lesser included offense of "assault and battery."

In view of the facts of this case, some clarification of the latter concept appears necessary.

It is misconduct for a seaman to engage in mutual combat or to engage in a "fight," as a lesser offense than assault and battery, when it is shown that the conduct constituted a willing participation in a disturbance involving physical violence of two seamen upon each other. When only engagement in a "fight" is alleged, the principals of the law of self-defense still apply.

I must emphasize here that the concept of wrongful mutual combat, or wrongful fighting, involves an element of willingness. Thus, if two seamen agree to fight on the fantail and do so, it is not necessary for one to consider the niceties of civil or criminal law of assault and battery. In such a case it would not matter who had struck the first blow, or whether one or the other had used force beyond that necessary to repel attack. It is evident, however, that even when "wrongful fighting" or "mutual combat" is in question, the use of force by one party upon the other, even after resistance had ceased or become impossible, would constitute assault and battery. Even if only "mutual combat" or "wrongful engagement in a fight" had been alleged a finding to that effect could be sustained when the evidence supported a finding that there had been a willing engagement in the combat, or that an assault and battery had occurred in the course of resisting an assault, even if

it had not been charged.

### III

The question posed in this case is different from those considered before. In this case the Examiner, albeit in his opinion, found that Martinez had struck the first blow while Appellant's hand was in his pocket, or his hands were in his pockets. On the record of this case there is no question but that Martinez committed an assault and battery on Appellant. Construing the evidence in the most damaging fashion to Appellant, nothing more can be seen than that Martinez suspected that Appellant was reaching for a weapon. (I see no good reason to quote the testimony of Martinez verbatim; for the purpose of this appeal I can accept it in its worst construction as to Appellant when he hit him.)

### IV

Whatever suspicion Martinez might have had as to Appellant's unclarified movement toward his pocket, in an action between two private persons, a mere belief that another, no matter how well one knows the other or his type of person, may be reaching for a weapon, does not justify action of battery. Briefly, the Martinez evidence, as found by the same Examiner in a companion case not here on appeal, does not raise the issue of self-defense for Martinez. In Appellant's case, the Examiner's decision admits that Martinez committed an assault and battery on Appellant.

Many discussions of self-defense are found in cases involving homicide or infliction of serious bodily injury. Such cases need not be considered here. The law is clear that the theory of self-defense is available to any victim of physical aggression, of whatever sort.

"The right of self-defense arises the moment an attack is made, even though the party assailed may not have reason to believe his assailant intends to inflict on him `great bodily injury.'" It may be, as it perhaps was here, that the assailant intends to chastise or whip his victim without any real or apparent intention of inflicting serious bodily injury, but the moment he makes the attack, . . . The right of defense arises and clothes the intended victim with legal authority to resist and, if possible, prevent the execution of such unlawful purpose. No man has the right to lay hostile, threatening hands on another, . . . and the man who does so acts at the risk of being met with sufficient superior force and violence to overcome such assault." State v. Woodward (1937), 58

Idaho 385, 74 P. 2nd 92.

The force allowable to resist a battery is the force needed to cause the assailant to desist. Appellant was entitled to reply with sufficient force to make Martinez stop hitting him, but was, of course, not authorized to use greater force than that. See State v. Woodward, supra.

The evidence here is that, at most, a few blows were exchanged. No weapon was involved. The fight was terminated by the intervention of Guzman. It is clear that the force used by Appellant was not even enough to cause Martinez to desist, much less than sufficient to cause Appellant to have become an assailant. There was, in the common parlance, a "fight." Not all such "fights" are wrongful for both parties. The evidence here is insufficient to support a finding that Appellant engaged in "mutual combat," or willingly engaged in a "fight" other than to cause his assailant to desist from his attack.

#### CONCLUSION

I conclude that there is not sufficient substantial evidence to support a finding that Appellant wrongfully engaged in a fight.

#### ORDER

The order of the Examiner dated at Mobile, Alabama, 17 October 1969, is VACATED. The charges are DISMISSED.

C. R. BENDER  
Admiral, U. S. Coast Guard  
Commandant

Signed at Washington, D. C., this 21st day of July 1970.

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