

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-836920-D1 AND ALL
OTHER SEAMAN'S DOCUMENTS

Issued to: Raymond MILLY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1901

Raymond MILLY

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 May 1970, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as a deck steward on board SS MARIPOSA under authority of the document above captioned, on or about 22 May 1970; at Suva, Fiji, wrongfully engaged in an unnatural sex act with a male of minor age.

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 voyage records of MARIPOSA, a judgment of conviction in a Fiji court, and the testimony of a witness.

In defense, Appellant offered in evidence his own testimony. Although the Administrative Law Judge's decision states that Appellant testified in his own behalf, the record shows that Appellant was permitted to testify on the limited issue of "due process" in the Fiji court and that cross-examination on the merits was not permitted.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then entered an order revoking all documents issued to Appellant.

The entire decision was served on 20 May 1970. Appeal was timely filed on 8 June 1970 and perfected on 15 January 1971.

FINDINGS OF FACT

On 22 May 1970, Appellant was serving as a deck steward on board SS MARIPOSA and acting under authority of his document while the ship was in the port of Suva, Fiji.

At that time and place, Appellant wrongfully engaged in an unnatural sex act with a male of minor age. On the same date, Appellant was convicted on his plea of guilty in the First Class Magistrate's Court, Suva, Fiji, of having, on that date, had carnal knowledge of a minor male, against the laws of nature.

Section 168(a) of the Penal Code of Fiji, Chapter 11 prohibits unnatural carnal knowledge of any person.

BASES OF APPEAL

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

- (1) During the proceedings in Fiji, Appellant was denied his constitutional right to counsel;
- (2) during the proceedings in Fiji, Appellant was denied his constitutional right to be tried by a jury;
- (3) during the proceedings in Fiji, Appellant was not advised that he had a constitutional right to remain silent;
- (4) the Coast Guard proceedings were invalid because Appellant was denied the right to cross-examine adverse witnesses;
- (5) the Coast Guard proceedings were invalid due to the improper admission of the document entitled "Copy of Record."

APPEARANCE: Sullivan & Johnson, San Francisco, California, by
Alfred G. Johnson, Esq., of counsel.

OPINION

I

At the outset of consideration of the issues in this case I am confronted by the fact that since the date of the Administrative Law Judge's decision in this case the National Transportation Safety Board handed down in the DAZEY case (see Decision on Appeal

No.1769) its Order No. EM-11. That Order may be construed by some as controlling in the instant case. It appears best to me to state my opinion upon which my affirmance of the Administrative Law Judge's order in the instant case is predicated, and then to discuss the DAZEY order.

II

In looking first, then, to Appellant's brief in the case, I find that after stating five specific grounds for appeal, it breaks off into other considerations. Since most of these citations and considerations can be assimilated to one or another of the five points asserted, I do not intend to consider each court decision cited separately, but propose to state the broad principles which I perceive in the laws which I think are dispositive of this case.

III

One element is common to each of Appellant's first three points, i.e., that the Federal Constitutional rights of a citizen of the United States follow him into a foreign court. I admit that the Administrative Law Judge apparently thought that this was the case in his discussion of Appellant's right to confrontation of witnesses in the Fiji court and his conclusion that the right had been waived by Appellant's plea of guilty in that court. (I point out here that Appellant has asserted that he was not talking about his right of confrontation in the Fiji court but of his right to confrontation in the R.S. 4450, 46 CFR 137 proceeding, a matter I will discuss below.). I cannot accept this theory. If an American citizen is in a foreign nation, there is no doubt that that person is subject to the civil and criminal jurisdiction of that nation. If the person violates the local law, he does so at his peril. Under international law there is no question about this.

The question may be raised, however, as to the effect of the foreign criminal judgment when it is sought to use that judgment in a proceeding under the laws of the United States. There appears to be no specific case in point decided in a court of the United States. About such a decision (and I suggest here that only a court of the United States can finally decide the point, and not an administrative tribunal whose judgment giving no force and effect to the foreign judgment is, under the present state of U.S. law, unappealable and unreviewable), I necessarily resort to analogies and the spirit of United States law as explicated by the Supreme Court of the United States and as apparently understood by the Executive.

What we are principally concerned with here is the question of what respect is due in tribunals of the United States to judgments

made by courts of foreign countries. It seems to me, on both judicial and executive precedent, that a high degree of respect is due to them so that at least as high, if not higher, degree of respect must be accorded to them by administrative tribunal than in judicial tribunals, until the judiciary says otherwise.

I would like to make clear here that we are not dealing with the "full faith and credit" clause of the United States Constitution nor with the effect of the Fourteenth Amendment of the United States Constitution, nor with a "conflict of laws" question, under which each State of the United States may be considered a "foreign sovereign" for judgment purposes under the Federal Union and the Federal Constitution. We are dealing nakedly with an international question, and "foreign" applies to sovereigns who are not subject to the American Federal System.

IV

The first analogy which I can see as indicating a guide as to the respect which a court of the United States will pay to a judgment of the court of a foreign sovereign is in the field of civil litigation. The rule of the United States Supreme Court is clearly stated and is easy to follow.

Two landmark decisions of the U.S. Supreme Court, decided the same day, Hilton v. Guyot (1895), 159 U.S. 113, and Ritchie v. McMullen (1895), 159 U.S. 235, sum up the position of the United States on the respect to be accorded to foreign court judgments. When a foreign court has rendered a judgment in civil litigation and one or the other of the parties seeks to relitigate the same matter in a court of the United States, the matter is res judicata, thus precluding relitigation, if the foreign court would give the same effect to a judgment of a United States court; if the foreign court does not accord such effect to a judgment of a United States court, the matter is not res judicata and is subject to relitigation, but the foreign judgment is prima facie evidence of the facts in the case.

It is conceded that a foreign criminal conviction is not conclusive of the facts alleged under this doctrine but the analogy shows that it remains prima facie evidence of the facts recited and remains so far sufficiently to form the basis of an Administrative Law Judge's findings, no matter what attack is mounted on it, unless he is persuaded by other evidence that the judgment should be disregarded.

V

It is mentioned again that the Administrative Law Judge in the

instant case specifically spoke of the right of confrontation as one element of due process that follows an American citizen into a foreign court. It is true that he correctly determined that the right of confrontation was waived by Appellant's plea of guilty in the Fiji court, and it is also true that Appellant insists that he is not arguing the right of confrontation in the Fiji court but in the R.S. 4450 hearing itself. It is interesting to note, however, that in Hilton v. Guyot, supra, the defendant in the French proceeding complained that one of the plaintiffs had been permitted to testify without being placed under oath and that the defendant had not been permitted to cross-examine him. The Supreme Court held that this did not affect the validity of the French judgment, although such evidence, plus certain documentary evidence, would not have been admitted in a court of the United States. The test, said the Court, was whether the trial was conducted within the laws of the country in which the trial was held. This reinforces the view expressed above that the tests for "due process" in the instant case should be "due process under the law of the sovereign having jurisdiction" not "due process" under the Constitution of the United States, or under the constitution of any State thereof.

It is apparent to me from this that while the U.S. Supreme Court itself has never sought to speak of "due process" in foreign court actions, because the term as used in the Constitution of the United States has absolutely no application to proceedings in foreign courts, if one attempts to smuggle the term in through the back door, "due process," with respect to proceedings in a foreign court can mean only "due process" under the law of the sovereign sitting in judgment. It means only that the American citizen must have had his trial in the foreign tribunal under the same laws and procedure as any other person, national or foreign, would have received.

I repeat here that what constitutional rights follow an American citizen into foreign tribunals is not a matter for an administrative agency to decide. It is a matter which only a court of the United States may decide. Anticipatorily, I say here, again, that it should not be decided adversely to the jurisdiction of a United States tribunal by an administrative tribunal whose judgments adverse to the "jurisdiction" are not reviewable in nor appealable to a United States court.

To conclude this part, I think that the respect owed to foreign judgments as stated in Hilton v. Guyot and Ritchie v. McMullen is so clearly delineated by the Supreme Court that no flouting of these foreign judgments can be accepted or respected in collateral attack in a United States proceeding unless there is overwhelming evidentiary volume.

Under judicial principles of comity, "due process" in the instant case means process correct under the law of Fiji, and the Fiji judgment is prima facie evidence of the facts recited therein.

VI

In view of what has just been said there is no need to pass upon the specific denials of constitutional rights mentioned by Appellant but some interesting points may be commented upon.

As to a right to counsel, the witness who was present at the Fiji trial testified that he heard Appellant being advised that he could have counsel. When one speaks of a right to remain silent, one is talking of extra-judicial confessions and the right not to testify at trial. Appellant made no extra-judicial confession and was not compelled to testify at trial. A court has the right to call on an accused to plead to charges. There is no "constitutional" right not to plead. Appellant pleaded guilty.

VII

On Appellant's fourth point, whatever the extent of the right to confrontation by and cross-examination of adverse witnesses may be in an administrative proceeding, he was not denied that right at the hearing. The witness who appeared and testified was subject to cross-examination. The other evidence at hearing was the record of the Fiji court. There can be no cross-examination of a record. Appellant cannot mean that he had a right to confrontation by and cross-examination of every person who participated in the making of that record. Properly identified records made in the regular course of business are admissible in evidence even without the direct testimony of all those who contributed to the collection of information on which the record is based. A record of conviction in a court is a record made in the regular course of business of the court.

VIII

As to Appellant's fifth point, it can be said that the record of the Fiji court was properly admitted into evidence because Appellant stipulated before the Administrative Law Judge that the record was authentic.

IX

As I have said the appeal in the instant case immediately calls to mind the National Transportation Safety Board Order No. EM-11 dated July 8, 1970, in the case of Leland O. DAZEY. I believe that certain distinctions may be made between the DAZEY

case and the instant case such as to justify the conclusion that the DAZEY Order does not apply here. The DAZEY Order itself has raised many questions in my mind, and I am sure that Coast Guard field personnel are confused as to its application to pending cases. I am therefore moved to consider this appeal in light of possible latent "DAZEY" questions. In an attempt to give a succinct statement of the issues involved, I preface this with a notation that this case, like the DAZEY case, fundamentally involves the use of a foreign judgment of criminal conviction as proof that an American seaman committed an act cognizable as "misconduct" within the meaning of R.S. 4450.

X

Since the DAZEY case cites no judicial precedent nor does it expound upon any specific legal principles I can only assume that its Order is based on an interpretation of facts. The Board's finding that grave doubt exists leads one to believe that the Board must have been swayed by the facts and thereby finding insufficient evidence. Therefore, interpretation of fact would not, of course, affect future investigative or adjudicative activities of the Coast Guard nor of the Board itself. I feel that the Board gave considerable reliance to DAZEY's testimony as to a "frame" by a prostitute. This coupled with the doubts on the admissibility of the documents, and its compassion for DAZEY's incarceration for 42 days before seeing an attorney and 17 more days after sentencing played upon the sympathies of the Board. This the National Transportation Safety Board may do, as the highest administrative reviewing authority in revocation cases; however, in the DAZEY case it must be made clear that no legal principles were expounded upon to change the admissibility of foreign judgments in administrative proceedings./H

XI

The true reason why an act prohibited in a foreign country by a person amenable to action under R.S. 4450 is misconduct within the meaning of the statute is not that the act would be violative of a law of the United States or of a State thereof; it is because the act has violated the law of the country in which the person who is amenable to action under R.S. 4450 is found to have committed the act.

To put the matter in the completely abstract form, if the law of sovereign X prohibits Y and A, an American seaman commits Y while under the jurisdiction of X the act is misconduct within the meaning of R.S. 4450 and its wrongfulness need not be separately proved as being violative of some law of the United States. The principle is correct whether the act is proved by a record of conviction in a foreign court, the strongest proof I can imagine of

the fact of the act, or by testimony of witnesses.

I must hold that any act of a person subject to R.S. 4450 which is violative of the law of the place where it is committed is misconduct within the meaning of R.S. 4450 whether the act violated a law of the United States or any State thereof. It follows that it does not matter how the act is proved. If it is proved by a judgment of conviction in a court of competent jurisdiction, that is about the highest form of proof that could be asked for. If it is proved only by eyewitness testimony, the administrative law judge hearing the case has only the ordinary problem of evaluation of evidence.

The term "misconduct" as used in R.S. 4450, as I have construed it, has always included violation of a foreign law by a person subject to R.S. 4450. Investigative and adjudicative personnel must be guided by precedents established in Appeal Decisions and applicable federal statutes as interpreted by the Supreme Court of the United States and other lower U.S. courts. It is to be noted that there are thirteen decisions addressed to and sanctioning the admissibility and use of foreign court judgments in these administrative proceedings. Such Decisions of the Commandant are Appeal Nos. 361, 773, 916, 975, 998, 1042, 1154, 1318, 1421, 1440, 1466, 1675 and 1770. These are in addition to the DAZEY case, Appeal No. 1769 and subsequent NTSB Order EM-11.

XII

Concerning the admissibility of documents offered into evidence, namely, copies of foreign court convictions and consular reports, et al., it should be noted that properly authenticated official records and documents are authorized by the provisions of 28 U.S.C. 1740 and 28 U.S.C. 1741 and by Rule 44 of the Federal Rules of Civil Procedure. In the DAZEY case the Japanese court case was not properly authenticated nor was it a document that would be admissible in United States court proceedings under 28 U.S.C. 1740 (consular reports) nor 28 U.S.C. 1741 (foreign judgments). Such is not the situation in the instant case since these exhibits admittedly are, and are found to be, properly authenticated. They might be hearsay evidence but they are admissible hearsay evidence, as exceptions to the hearsay evidence rule since they are official records made in the regular course of business of the court.

XIII

Some might argue that the decision in the DAZEY case implies that the Investigating Officer has the burden of affirmative proof of the nature and elements of the offense for which a person

charged has been convicted if he asserts that he was denied "due process." I cannot accept that this is what the Board meant since it would require in every case in which a foreign conviction was relied on that the presumption of regularity recognized under international law in a foreign court proceedings be completely abrogated. It is my opinion that statements going to "due process" are obiter dictum. It should also be noted that the Board made no reference nor does it cite any of the well considered principles of law established by Hilton v. Guyot, supra.

XIV

Certain broad considerations may be stressed here in conclusion. Instinctive xenophobia has no place in American legal proceedings when judgments of foreign courts are to be evaluated. If we expect American seamen to be treated fairly in foreign countries, where they are permitted ashore only as guests of the country and not even as the result of an international convention, we must not only expect those seamen to respect the laws of the host country but we must accord a decent respect to the judgments of the courts of that country.

There is no permissible subjective suspicion that the courts of nations X, Y, and Z should be treated in a hierarchy of reliability. Only probative evidence of a high order should produce a finding that a judgment of foreign court does not establish the facts recited therein. Such a finding should obviously be based upon the evidence in the case before the administrative law judge.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 11 May 1970, is AFFIRMED.

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

Signed at Washington, D.C., this 26 day of December 1972.

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