

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT NO. Z-1191538-D2
Issued to: Otmar Wilfried WIJNGAARDE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2050

Otmar Wilfried WIJNGAARDE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 30 May 1975, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman documents for 12 months outright upon finding him guilty of misconduct. The specifications found proved allege that while serving as Electrician on board the SS SHIRLEY LYKES under authority of the document above captioned, Appellant did

FIRST, on or about 15 August 1974, wrongfully fail to perform his duties while in a foreign port;

SECOND, on or about 29 August 1974, while in a foreign port, wrongfully assault with a dangerous weapon, to wit, a knife, a member of the crew, Luis Cortes;

THIRD, on or about 29 August 1974, while in a foreign port, wrongfully assault a member of the crew, Willie Lewis.

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

The Investigating Officer introduced in evidence the testimony of two witnesses, pertinent entries from the official log book of the SS SHIRLEY LYKES, and the depositions of three witnesses.

In defense, Appellant offered no evidence.

At the end of the hearing, the Judge rendered an oral decision in which he concluded that the charge and three specifications had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of 12 months outright.

The order was served on 19 May 1975. The decision was served on or about 30 May 1975. Appeal was timely filed on 29 May 1975.

FINDINGS OF FACT

On 15 August 1974, Appellant was serving as Electrician on board the SS SHIRLEY LYKES and acting under authority of his document while the ship was in the port of Iskenderon, Turkey. At approximately 1400 Appellant was relieved of his duties after being found by the Chief Engineer on deck in an intoxicated condition. As a result, Appellant failed to perform his lawful duties from 1400 until 1700.

On 29 August 1974, Appellant was serving in a similar capacity while the ship was in the port of Barcelona, Spain. At approximately 0845, he held Luis Cortes, then serving as crew utility aboard the SS SHIRLEY LYKES, against a corridor wall and held a knife near his throat while threatening him and shouting about a missing tape recorder.

Appellant also grabbed the arm of Willie Lewis, then serving as wiper aboard the SS SHIRLEY LYKES, and threateningly asked Lewis where his tape recorder was.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the evidence presented by the Coast Guard was not substantial, reliable, and probative to find the third specification proved. It is further contended that the Coast Guard failed to prove any of the elements of the alleged assault to support the finding.

APPEARANCE: Kierr, Gainsburgh, Benjamin, Fallon, and Lewis, New Orleans, Louisiana; by Geroge S. Meyer, Esq.

OPINION

I

Evidence that Appellant did, in fact, assault Willie Lewis, as alleged in the third specification, includes the testimony of the Master and the log entry for 29 August 1974. Although the testimony of the Master as to what occurred between Appellant and Willie Lewis on 29 August 1974 merely heresay, it is admissible evidence within the provisions of 46 CFR 5.20-95. Furthermore, the logbook entry, which was made in substantial compliance with 46 U.S.C. 702, is admissible and constitutes prima facie evidence of

the facts there in recited. 46 CFR 5.20-107(b). This evidence introduced by the Coast Guard is substantial, reliable, and probative to establish that Appellant grabbed the arm of and talked threateningly to Willie Lewis.

II

Contrary to the contentions of Appellant, all necessary elements of assault are proved by the evidence. An attempt to commit a battery is an assault. Appeal Decision 1932 (KEATING), "A battery requires an unauthorized touching of one by another." Appeal Decision 1965 (BATISTA). Thus, an attempt to commit an unauthorized touching of another constitutes an assault. The grabbing of Willie Lewis's arm by Appellant was the successful consummation of an assault. It is not necessary that Appellant used words sufficient to put his victim in apprehension of immediate fear of harm, as argued by Appellant.

ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 19 May 1975, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D. C., this 18th day of March 1976.

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