

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT Z-299-50-0041  
Issued to: Hussain S. DEIBAN

DECISION OF THE VICE COMMANDANT  
UNITED STATES COAST GUARD

2171

Hussain S. DEIBAN

This appeal has been taken in accordance with 46 U.S.C. 239 (g) and 46 CFR 5.30-1.

By order dated 21 December 1977, an Administrative Law Judge of the United States Coast Guard at New York, New York, after a hearing at New York, suspended Appellant's Merchant Mariner's Document for a period of nine months and further suspended his document for an additional period of three months on probation for twelve months upon finding him guilty of misconduct. The specifications found proved allege that while serving as a wiper on board SS MARINE EAGLE, under authority of the above captioned document, Appellant on or about 5 August 1976 wrongfully assaulted and battered Arthur T. Rudder, the Assistant Engineer, and that Appellant wrongfully assaulted and battered Arthur T. Rudder with a dangerous weapon.

Appellant was represented by professional counsel at the hearing. The proceedings were interpreted from English to Appellant's native language, Arabic, for Appellant's benefit. Appellant entered a plea of not guilty to the charge and specifications.

The Investigating Officer introduced into evidence the depositions of the victim and another eyewitness to the alleged incident.

In defense, Appellant introduced into evidence an undated statement of the Chief Officer of MARINE EAGLE which purports to reflect the oral unsworn statement of Appellant with respect to the alleged incidents.

Subsequent to the hearing the Administrative Law Judge entered a written decision in which he concluded that the charge and specifications as alleged had been proved. He then entered an order of suspension for nine months and in addition suspension of three months probation.

The entire decision was served on the Appellant on 5 January

1978. Appeal was timely filed and perfected on 6 November 1978.

#### FINDING OF FACT

On all relevant dates, Appellant was serving under authority of his U.S. Merchant Mariner's Document as a wiper aboard SS MARINE EAGLE, a merchant vessel of the United States.

On the morning of 5 August 1976, while the Marine EAGLE was at sea, a fire and boat drill was conducted. During the course of the drill, a disagreement arose between Appellant and the Second Assistant Engineer, James W. Bell. The officer in charge of Appellant's assigned boat, the second mate, settled the disagreement. The First Assistant Engineer, Arthur T. Rudder, overheard part of this conversation and discerned that the Second Mate was reprimanding the Second Assistant Engineer.

Shortly after the drill Rudder met with Bell and the latter gave him an account of the events that had occurred during the drill. Rudder then made a brief report of the incident to the Chief Engineer. Rudder informed the Chief Engineer that it was his intention to go below to Appellant "and get him straightened out now."

Rudder then proceeded to the machine shop where he located Appellant who was sweeping the floor. Rudder, while plainly disturbed and with the use of some profanity, advised Appellant to straighten out or he would run him off. Appellant responded that he did not understand. As Appellant and Rudder were thus engaged, Bell approached the door of the machine shop. Appellant and Rudder were standing within three feet of one another and Rudder was wagging his index finger at Appellant. Rudder then addressed Bell and advised him: "This is the man you're complaining about now lets get it straightened out", or words to this effect. Appellant saw Bell and then quickly struck Rudder three quick blows on the head and face with his fist. Rudder was staggered by the blows but remained standing; his glasses were knocked off and he sustained a bleeding cut above his left eye. Bell quickly separated the men and restrained Appellant from further action. After advising Deiban against further violence Bell released Appellant. Rudder had started to leave the area to get medical attention when Deiban ran from view around the adjacent boiler. Within thirty seconds Appellant returned to the area and ran at Rudder holding a fox tail or counter brush. The brush was made of oak, weighed about 3 pounds and was approximately sixteen inches long.

Rudder ran to meet Deiban and grabbed him around the body with both arms. Appellant grabbed Rudder around the neck and proceeded

to strike him several times on the head with the brush. Rudder raised his hand to protect his head and Appellant struck and broke Rudder's finger.

Bell again restrained Deiban, forcing him back against the boiler and removing the brush from his grasp. Shortly thereafter Appellant calmed down and was allowed to leave.

#### BASES OF APPEAL

It is urged that the findings and order of the Administrative Law Judge be set aside because:

1) The findings of the Administrative Law Judge were not supported by substantial evidence of a reliable and probative character. Appellant made timely submission of findings of fact, conclusion of law and supporting memoranda which reflect an accurate characterization of the evidence and should be accepted in their entirety;

2) The Government failed to meet the burden of proof required;

3) The findings of fact do not support the conclusion of law;

4) The actions of Appellant were justified on the basis of self-defense.

5) There was no evidence that the First Assistant Engineer was placed in fear, therefore the specification of assault must be dismissed; and

6) The Order of the Administrative Law Judge is too severe for the offense proven.

APPEARANCE: Adler, Barish, Daniels, Levin and Creskoff,  
Philadelphia, Pa, by Phillip L. Blackman, Esq.

#### OPINION

##### I

The first issue of Appeal may be quickly disposed of. There is ample evidence to conclude that Appellant, without justification or excuse, wrongfully assaulted and battered a fellow crew member with his fists and thereafter struck the same individual with a brush wielded as a dangerous weapon. To disapprove such findings it must be found that they are not based on substantial evidence or that the evidence is so inherently unreliable, incredible, of irrelevant that no reasonable man would find support for the

findings. The specific evidence relied upon was that of eyewitnesses supplied by sworn deposition with the right of cross examination. The testimony of the witness was in substantial agreement and any minor discrepancy may be explained by imprecision of response or may be attributed to human error in recalling what happened at a disorderly scene or when the witness was excited. See Decisions on Appeal Nos. 1532, 1516, 1437. The only evidence in rebuttal was an unsworn statement made to the Chief Officer which the trier of fact found not worthy of belief. Where there is conflicting evidence, it is the function of the trier of fact, the Administrative Law Judge, to assign weight to the evidence and to resolve conflicts. The evidence produced was substantial and of such reliable and probative character as to support the findings of the judge, and therefore these findings will not be disturbed on appeal.

## II

Appellant asserts that he was justified in his conduct on the basis of self-defense. The only plausible support for this contention would be an unreasonable fear in the mind of Appellant as he saw Bell approach while Rudder was reprimanding Appellant. It was clear that Rudder was using profanity, but verbal abuse does not justify or excuse a battery. Decision on Appeal Nos. 1930, 1791, 1760. A fear or apprehension of imminent harm even though honestly held by the individual does not establish the justification of force. Earlier decisions have referred to the fact that the only real provocation which justifies the use of force is an actual attack. Decision on Appeal Nos. 1975 and 1803. This expression may be overly broad. While the actuality of imminent danger is not the precise issue, it is required that the individual seeking to justify the use of force be in reasonable apprehension thereof. The facts as recited do not establish a circumstances which would create a reasonable fear in Appellant upon the approach of Bell and therefore the argument must be rejected.

It should be noted that the subsequent attack upon Rudder with a counter brush was long after any possible provocation and after the individuals had been separated. The fact that Appellant returned to the scene and acted as an aggressor removes any capability of the use of doctrine of self defense to establish justification for the subsequent assault and battery.

## III

Appellant has an apparent misconception as to the elements of the charge of misconduct wherein the specification alleges assault and battery. If a specification alleges and assault consummated by a battery, fear or apprehension within the victim is irrelevant.

See Decision on Appeal No. 1845.

IV

The order of the Administrative Law Judge was neither excessive nor disproportionate to the offenses proved. Assault and battery, coupled with the use of a dangerous weapon, is an offense of such violent nature that it is totally incompatible with the requirements of shipboard life and cannot be condoned. I view the order of the judge as appropriate to the circumstances of the case.

ORDER

The order of the Administrative Law Judge, dated at New York, New York, on 21 December 1977, is AFFIRMED.

R.H. SCARBOROUGH  
VICE ADMIRAL, U. S. COAST GUARD  
Vice Commandant

Dated at Washington, D.C., this 6th day of Nov 1979.

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