NTSB Order No.
EM-82

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 19th day of September 1980

JOHN B. HAYES, Commandant, United States Coast Guard,

v.

HUSSAIN S. DEIBAN, Appellant.

Docket No. ME-79

OPINION AND ORDER

Appellant Hussain S. Deiban has appealed from the decision of the Commandant suspending his merchant mariner's document and all other seaman's documents for misconduct aboard ship. The Commandant's decision (Appeal No. 2171) affirmed the initial decision of Administrative Law Judge Albert S. Frevola, rendered following a full evidentiary hearing.[1] Although appellant appeared personally only at the first hearing session, he has been represented by counsel throughout these proceedings.

The law judge found that on August 5, 1976, while serving as a wiper on board the SS MARINE EAGLE, appellant committed both assault and battery and assault with a dangerous weapon on a ship's officer, First Assistant Engineer Arthur T. Rudder. The findings in the initial decision state that on said date, appellant struck Rudder several times with his fist and, after a brief interval, attacked Rudder with a dangerous weapon, to wit, a foxtail brush.[2] Appellant denied the charges and claimed that he was acting in self-defense, or, in the alternative, that there was sufficient provocation to justify his actions. Nevertheless, after considering the evidence presented, the law judge found both charges proved and imposed a 9-month suspension of appellant's merchant mariner's documents in addition to a 3-month suspension on

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[1] Copies of the decisions of the Vice Commandant (acting by delegation) and the law judge are attached.

[2] The foxtail brush involved in the incident was described as a solid oak brush approximately 14 to 18 inches long and weighing about three pounds.

probation for 12 months.

Appellant has filed a brief wherein he seeks to have the charges against him dismissed, contending, inter alia, that the findings of fact in the initial decision, affirmed by the Commandant, are not supported by substantial, reliable, and probative evidence. Appellant again asserts the defenses of self-defense and provocation. The Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the record as a whole, we conclude that while the acts alleged were committed by appellant, it is evident that his defenses were not adequately considered by either the law judge or the Commandant. Based on our own review of the record, we find that the facts support appellant's defenses in the first incident. Also, we believe the severity of the second offense was exaggerated by the law judge. Accordingly, we find that a modification of the sanction is warranted.

The evidence submitted in this case consisted of the deposition testimony of Rudder and James W. Bell, Second Assistant Engineer, and appellant's unsigned unsworn statement giving his version of the incidents. It is undisputed that at approximately 10:15 a.m., August 5, 1976, a fire and boat drill was conducted on board the SS MARINE EAGLE. Both appellant and Bell were assigned to the same boat. Bell ordered appellant to help start the lifeboat engine, but appellant refused, claiming that the Second Mate, appellant's superior officer during the drill, had taken him and the other crewmembers off their stations. Bell insisted that he help, until appellant finally complained to the Second Mate about Bell's orders. The Second Mate reprimanded Bell for his behavior. Rudder overheard the reprimand. When Rudder later asked Bell about the incident, Bell explained how appellant had refused to help. Rudder, who was appellant's supervisor at times other than during fire and boat drills, reported the incident to the Chief Engineer, and then decided to "go down and get [appellant] straightened out".[3] Rudder proceeded immediately to the machine shop, where appellant had returned to his assigned duties. Rudder entered the shop and approached appellant until the two were standing within a few feet of each other. Rudder began berating appellant, using profanity, all the while shaking and pointing his finger. Appellant thought he smelled beer on Rudder's breath. At that moment, Bell entered the shop and approached the scene. Rudder announced, "This is the man that you're complaining about,

[3] I.O. Ex. 3, p.5.

now let's get it straightened out".[4] Appellant reacted by striking Rudder on the face several times. We consider the blows relatively minor, even though they knocked Rudder's glasses off and cut him above the left eye,[5] because Rudder immediately lunged forward and grabbed appellant by the throat while Bell grabbed him from behind. When appellant was subdued, the other two released their grip. Appellant then ran behind the boiler.

Rudder began to leave the room, but appellant reappeared, running toward Rudder, carrying the foxtail brush. Rudder ran to meet him and grabbed appellant in a bear hug as appellant hit Rudder over the head with the brush. Bell intervened for the second time, and after he and Rudder threatened to beat his brains out with a ballpeen hammer, appellant once again became subdued. Rudder suffered a minor cut on the top of his head and broken finger as a result of the second incident. Both events took place within a span of a few minutes.

In disposing of appellant's claims of provocation and self-defense, the law judge and the Commandant relied upon the principle that "mere words do not justify a resort to violence."[6] However, that rule is not absolute. Where more than mere words are involved, the resulting assault and battery may be excused. It is well established corollary to the "mere words" rules that where the victim's conduct was sufficient to cause the defendant to feel that, unless he took some action, the provocation might go further than words and bodily harm would be intentionally inflicted upon him, the defendant may be justified in using reasonable force. Whether or not the danger of harm actually existed is irrelevant. It is sufficient that the person resorting to the use of force reasonably believed he was in danger of physical harm.[7]

After applying this rule to the facts of the first incident between Rudder and appellant, we find that appellant had reasonable grounds for forming the belief that he was about to be attacked by

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[4] I.O. Ex. 3, p.9.

[5] Although Bell's description of the cut was that it bled "profusely", Rudder testified that he didn't even know he had been bleeding until he started to leave the room after the first confrontation. There was no other testimony as to the extent of the injury or the force of the blows.

[6] I.D. page 17, C.D. page 5.

[7] See 6 Am. Jur. 2d. Assault and Battery, §151, §161 and §158 (1979 Supp.).

Rudder and Bell. More than "mere words" were involved there. Not only were Rudder's words abusive, [Get your f------ a--straightened out or I am going to run you off"],[8] he was agitated and shook his finger in appellant's face while berating him. Rudder was clearly the initial aggressor. Appellant was passively engaged in his duties when he was confronted by Rudder. Moreover, appellant, a native of Yemen, has a limited comprehension of the English language, and was confused as well as threatened by Rudder's outburst and behavior. He had no reason to know the source of Rudder's outburst and behavior. He had no reason to know the source of Rudder's anger until Bell entered the shop. We find it reasonable to believe that when Rudder exclaimed, "Here's the man. . . ", appellant, would have sensed the two-against-one situation, realized that trouble was at hand and struck out in apprehension of an attack by the two other men. It is also significant that appellant thought he smelled beer on Rudder's breath,even if his perception was factually unwarranted, because it is probative of appellant's state of mind, and reinforces his claim that he believed himself imminently threatened. We do not find appellant's reaction to have been unreasonable under the circumstances. Additionally, Rudder suffered only minor injuries as a result of appellant's so-called "attack". Therefore, we regard the first instance of assault and battery sufficiently mitigated to warrant dismissal of the charge.

Appellant's subsequent attack on Rudder with the foxtail brush cannot be justified as either self-defense or the result of provocation, however. provocation no matter how abusive, is not considered justification for assault and battery which takes place after the lapse of a cooling-off period. Likewise, self-defense may justify an assault and battery only where the act was defensive, not retaliatory:

> "As soon as the assailant desists there can be no further need of defense, and if the person defending himself pursues his assailant after the latter has given up the attack, and inflicts injury on him, he is liable therefore."[9]

Those principles clearly apply here. According to uncontroverted testimony, Rudder and appellant were separated from their first altercation, but within less than a minute appellant reappeared with the brush. Although it was only a short period of time, we

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[8] I.O. Ex. 3, page 19.

[9] Id., §§61, 160.

consider it a sufficient cooling-off period to negate appellant's defenses. Additionally, the foxtail brush, while not a dangerous weapon per se, was capable of inflicting serious bodily injury if wielded as appellant did. Therefore, the law judge's findings as to the second offense must be affirmed.

We believe, however, that the circumstances as a whole warrant a modification of the period of suspension. After all, it was Rudder who instigated the entire affair. Even appellant's subsequent attack with the brush appears to have arisen out of the passion of the moment rather than harbored malice. There is no indication that appellant has such a "wicked disposition, a propensity to evil conduct, a savage and vicious nature... as to endanger the others who worked on the ship." He grabbed a foxtail brush, not as inherently dangerous as some common tools which would have been at hand in a machine shop. In fact, prior to this incident, appellant had a good behavior record. Moreover, Rudder suffered only minor cuts and a broken finger -- as a direct result of his own initial provocation. In view of these mitigating circumstances, we conclude that a four month outright suspension of appellant's mariner's documents is sufficient for disciplinary purposes.

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's appeal be and it hereby is granted in part and denied in part as provided for herein; and

2. The order suspending appellant's merchant mariner's documents for nine months and for three additional months on twelve months' probation, affirmed by the Commandant, be and it hereby is vacated and in lieu thereof a four month suspension is hereby entered against appellant's documents for misconduct aboard ship.

KING, Chairman, DRIVER, Vice Chairman, McADAMS, GOLDMAN, and BURSLEY, Members of the Board, concurred in the above opinion and order.