

In the Matter of Merchant Mariner's Document No. Z-1003396
Issued to: RAMON RODRIGUEZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1370

RAMON RODRIGUEZ

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 17 August 1962, an Examiner of the United States Coast Guard at New York suspended Appellant's seaman documents upon finding him guilty of misconduct. Two specifications alleged that while serving as glory hole steward on board the United States SS INDEPENDENCE under authority of the document above described, on or about 4 December 1960, Appellant wrongfully pinched a female passenger and wrongfully pulled her hair.

Appellant, represented by counsel at the hearing, entered a plea of not guilty to each specification.

The Investigating Officer introduced in evidence the testimony of Ladd, assistant purser, and Gallagher, junior assistant purser, as well as an entry in the Official Logbook.

In defense, Appellant introduced in evidence the testimony of Nieves, assistant cook tourist class, and his own testimony. In

addition, the defense offered several exhibits and the deposition of Maria Mas. The latter was taken by the American Consul at Barcelona, Spain.

At the end of the hearing, the Examiner rendered the decision in which he concluded that the charge and the specification alleging the pinching had been proved. The other specification was found not proved. The Examiner then entered an order suspending Appellant's document for one month outright plus five months' suspension on twelve months' probation.

FINDINGS OF FACT

On 4 December 1960 Appellant was serving as glory hole steward on board the United States SS INDEPENDENCE and acting under the authority of his document while the vessel was anchored at Palma, Mallorca, off the coast of Spain. Ladd, the assistant purser, was boat officer in charge of the last passenger launch from the port to the vessel. Since the last crew launch was crowded, Appellant, Maria Mas (who accompanied Appellant), and three other crew members including one Torres (who was highly intoxicated and had a bottle of cognac in his hand) were ordered to board the passenger launch. Torres resembles Appellant physically. The crew members stood near the stern of the launch in a semicircle with Maria Mas in the center of the group. Ladd and Gallagher stood in the stern of the launch. Appellant was facing forward and had his back to Ladd. There were several persons between Ladd and Appellant. At this time a female passenger, followed by her escort, boarded the launch near the stern. As she passed the group of crew members a hand reached out and pinched her buttock and then pulled her hair. She turned and asked who had pinched her but received no reply. An argument, in Spanish, between the woman's escort and Appellant followed. After the launch reached the vessel the intoxicated crew member, Torres, became involved in an altercation with the officers of the deck. Ladd and Appellant were the last persons to leave the launch and board the vessel.

Although there was no subsequent confrontation by the female passenger or her escort, Appellant was logged as having pinched her and pulled her hair. He consistently denied having done either.

Appellant has no prior record.

BASES OF APPEAL

Appellant argues that the evidence does not support a suspension of his document, and that he was not confronted by the molested woman or her escort when the charge was entered in the Official Logbook.

APPEARANCE: Bernard Rolnick, Esquire, of New York City, of Counsel.

OPINION

Molesting a passenger is one of the most serious offenses of moral turpitude arising on passenger vessels. Therefore, it has been held that passengers on vessels are entitled to protection against the invasion of their privacy as well as protection against all personal rudeness. See *Chamberlain v. Chandler*, (1823) Fed. Cas. No. 2575; *Nieto v. Clark* (1858) Fed. Cas. No. 10,262. Because of the seriousness of the offense, proof of physical molestation must be clear and convincing.

The charge of misconduct lodged against Appellant consists of two specifications. The first alleges that he pinched the buttock of a female passenger while on board the launch en route to the vessel. The other specification charges that Appellant pulled her hair. The Government's case depends on the testimony of its two witnesses, Ladd and Gallagher.

The Examiner in his decision dismissed the specification charging Appellant with the hair-pulling incident on grounds that there was an "original hesitancy" in Ladd's testimony identifying Appellant and also because the other witness, Gallagher, identified the drunken crew member with the cognac as the culprit who pulled the passenger's hair. The Examiner's conclusion concerning what Ladd said is drawn from the following excerpt from his testimony (R. 22):

"As the two people turned to go down into the body of the launch, the housing of the launch, Rodriguez * * * reached up and pulled her hair, made a motion * * * it looked to me as

though he had pulled her hair. He touched her on the side of the head at least. *I was positive he pulled her hair * * *.*" (emphasis added).

The emphasized sentence was repeated in the next verbal exchange between counsel and Ladd. If there were an "original hesitancy" in the language used by Ladd, the later statements that he was positive Appellant pulled the passenger's hair certainly dispelled it. Hence, this specification was really dismissed because Gallagher's testimony as to who pulled the woman's hair did not fit the description of Appellant who was sober and had no bottle. Gallagher's testimony described Torres and the only way Gallagher connected Appellant's name with this incident was through Ladd.

Generally, Ladd's testimony indicates that he was "positive" Appellant was the person guilty of both offenses. Gallagher seemed equally certain that the drunken person with a bottle of cognac, identified as Torres at the hearing, pulled the passenger's hair, and Gallagher testified that he did not see the pinching incident. Since one specification was dismissed because of this conflict in the testimony of the only two Government witnesses and the same confusion exists with respect to the pinching incident if Ladd's testimony is accepted to the extent of logically concluding that the same person was guilty of both offenses, it is my opinion that there is not reliable and substantial evidence to prove that Appellant pinched the passenger. Ladd's testimony that he saw Appellant do it is not corroborated by the testimony of any other person on the launch while Appellant's denial of guilt is directly supported by the testimony of his other two witnesses and indirectly by Gallagher's testimony that the hair pulling was done by Torres.

There is other evidence of this confusion of identification in the record. There is no evidence that Appellant was intoxicated or behaving in a boisterous manner while on the launch. But there is evidence in the record to the effect that Torres and Appellant had very similar physical characteristics. They were both of the same stature and complexion and both wore mustaches at the time. (R. 199). A hand-drawn sketch by Nieves of the launch and positions of the parties involved suggests that Torres was the person closest to Ladd when the female passenger boarded the launch (Def. Exh. 3). Ladd, himself, testified that he was an arm's length from the person

who pinched and pulled her hair. (R. 22). Ladd also admitted that he was nearsighted. (R. 56). It is, therefore, quite possible that he confused Appellant with Torres.

This confusion is further bolstered by the manner in which Ladd identified Appellant as the man who pinched the passenger. He testified that he could only see Appellant's back (R. 51) and the side of his face (R. 52). Maria Mas testified that when the female passenger boarded the launch Appellant had his back to her and did not see her arrive aboard the launch (Interrogatories 30, 31). Ladd never faced Appellant directly. All he saw was a hand reach out and pinch the woman's buttock. Since this whole event could not have taken more than a few seconds, Ladd's insistence that Appellant was the culprit cannot be given much force.

Another peculiar aspect of this case concerns the disturbance created by crew member Torres while boarding the SS INDEPENDENCE. The log entry states that Torres refused to surrender his pass to the gangway officer, was loud and every abusive, and struck one of the ship's officers (Def. Exh. 2). Ladd testified that he and Appellant were the last persons to board the ship (R. 40). Appellant testified that he was in the "back" of the launch and that the passengers were getting off in the "front" of the launch (R. 146). It is reasonable to infer that since the group of the crew members were in the "back" of the launch, that Torres was one of the last persons to board the SS INDEPENDENCE. Appellant testified that he observed the disturbance created by Torres at the gangway (R. 153), but Ladd, who admits being about two steps behind the Appellant, insists that he saw nothing of the disturbance (R. 39,45). This lack of observation is very inconsistent with Ladd's "positive" identification of Appellant as the person who misbehaved on the launch in a comparatively subdued manner.

The record indicated that the Government made no attempt to locate the female passenger or her escort in order to obtain their depositions. (They departed the ship in Europe). Since apparently the woman did not see who molested her, testimony by her escort presumably would have been most important in determining the issue since he was directly behind his companion as they boarded the launch. The possible significance of such testimony in a case where there is a serious question of mistaken identification is obvious.

CONCLUSION

It is my opinion that the Government did not carry its burden of proof by substantial, probative and reliable evidence. There is no clear or convincing proof of the alleged molestation by Appellant. In reaching this conclusion, I have not overlooked the fact that the Examiner was in a better position to observe the credibility of the witnesses. However, since almost one year passed between the completion of the testimony at the hearing and the rendition of the decision, the usual weight has not been given to the Examiner's evaluations on this matter.

The finding that the specification was proved is reversed; the charge and specification are dismissed.

ORDER

The order of the Examiner dated at New York, New York, on 17 August 1962, is VACATED.

D. McG. Morrison
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 1st day of March 1963.

***** END OF DECISION NO. 1370 *****

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