

In the Matter of Merchant Mariner's Document no. Z-102241-D1
Issued to: Embree B. Johnson

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1392

Embree B. Johnson

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 16 November 1962, an Examiner of the United States Coast Guard at Savannah, Georgia revoked Appellant's seaman documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as an Able Seaman on board the United States SS SOUTHLAND under authority of the document above described, on 23 March 1961, Appellant assaulted another crew member with a knife.

Appellant was represented by professional counsel at the hearing and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the oral testimonies of five witnesses and a sworn statement of a sixth witness.

In defense, Appellant offered in evidence the oral testimonies of four witnesses and his own testimony.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved.

FINDINGS OF FACT

ON 23 March 1961, Appellant was serving as an Able Seaman on board the United States SS SOUTHLAND and acting under authority of his document while the ship was in the port of Savannah, Georgia.

During the afternoon of that day Appellant and another crew member by the name of Bogucki became involved in an argument on board ship. This argument terminated when Bogucki and Appellant scuffled on the deck. After the fight was stopped by other crew members, both left the vessel and went their separate ways. They returned shortly before 2000 and met in the crew's messroom where they renewed their argument. Then both agreed to leave the vessel and settle their differences on the deck. In leaving the vessel Bogucki preceded Appellant by approximately five or six feet. Upon reaching the deck, the men walked some thirty feet away from the feet of the gangway, and commenced to fight. The Chief Mate and Williams, the gangway watchman, observed them exchanging blows for several minutes. The Chief Mate called to both men to stop fighting. They broke apart momentarily, and then mutually engaged each other again. The Mate called a second time and threatened to call the police unless the fight was stopped, whereupon both men stopped fighting and returned to the ship.

During the course of the struggle on the deck Appellant stabbed and cut Bogucki, who was not armed, with a two-blade pocketknife (longest blade about two and three-quarter inches). As a result of this Bogucki was severely injured and required several surgical operations during three months of hospitalization. Appellant was arrested by local police and removed from the vessel. PRIOR RECORD: Suspended two (2) months on twelve (12) months probation from 8 January 1951 at San Francisco for refusal to obey a lawful command to turn to aboard the SS PIERRE VICTORY.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Among the numerous grounds urged by counsel for Appellant are these:

1. Since the Examiner used in support of his opinion Georgia State Court decisions, he should have also applied Georgia criminal law standards such as proof beyond a reasonable doubt; and under certain circumstances a person is absolved from responsibility by a Georgia statute for stabbing another while acting in self-defense. Appellant contends that he stabbed Bogucki in self defense and circumstances existed justifying Appellant's action.

2. The next several grounds deal with alleged impeachments of several witnesses by Appellant, the failure of the Examiner to rely on certain testimony, and error in relying on other testimony.

3. The order of the Examiner was too severe under the circumstances. Other grounds for reversal, dealing chiefly with evidentiary matters concerning the affray in the afternoon between Appellant and Bogucki, are not material to the disposition of the case.

APPEARANCE: Shelby Myrick; Myrick, Myrick and Richardson, Savannah, Georgia, on the brief for Appellant.

OPINION

It may be noted from the outset that the suspension and revocation proceedings against merchant marine documents are remedial and not penal in nature. They are intended to promote the safety of life and property at sea by insuring that licensed and certificated persons continue to be qualified to carry out the duties and responsibilities. 46 C.F.R. 137.01-20. It follows that criminal law standards are not applicable in these proceedings. The fact that the Examiner cited Georgia cases, among other authorities, in his decision does not require the application of that state's criminal statutes or the criminal standard of proof beyond a reasonable doubt. The test as to the burden of proof is contained in the regulations which state that "findings must be supported by substantial evidence of a reliable and probative character". 46 C.F.R. 137.20-95(b). See also *Commandant's*

Appeal Decisions Nos. [1380](#), [1376](#), [1346](#), [104](#) and [1011](#).

Appellant's other assignments of error deal predominantly with the Examiner's evaluation of evidence. It is well settled that the matter of credibility and weight to be given to the testimony of witnesses is within the province of the trier of fact. 88 C.J.S. *Trial* 208(a), 214. See also *Commandant's Appeal Decisions* Nos. [1376](#), [1368](#), and [1328](#). It is also true that where the facts in a case are disputed, and the evidence is such that reasonable men may differ as to the ultimate facts, conclusions and inferences, the question is for the trier of the facts, considering the evidence as a whole, to decide where the preponderance of the evidence lies. 88 C.J.S. *Trial* 209.

A review of the record shows that evidence given by three witnesses (Mathiason, Williams and Dean) corroborates the testimony given by Bogucki. Mathiason and Dean both testified that Appellant and Bogucki voluntarily agreed to settle their differences on the dock (R. 132,120). Both also testified that Bogucki preceded Appellant when they left the crew's messroom. The sworn statement of Williams, which was admitted in evidence with Appellant's consent, clearly states that Bogucki descended the gangplank leading to the dock with Appellant five or six feet behind; Appellant paused momentarily, looked up and down the dock, and then proceeded to engage with Bogucki in a fight (R. 20,21).

Appellant, on the other hand, testified that he never agreed to go on the dock with Bogucki and that the latter lay wait for him and assaulted him on the dock when Appellant left the ship to telephone his wife. But Appellant also stated that he saw Bogucki leaving the ship about 15 feet ahead of Appellant. He further testified that Bogucki "jumped on me, locked his arm around me...he was pounding on my face with his left...I got my knife out and started fighting to get away him..." (R. 101,102,113). The Examiner, concerning whether Appellant agreed to go on the dock to fight, states that "the testimony of the three witnesses (Mathiason, Williams and Dean) in general corroborates and confirms the pertinent and important part of the testimony given by Bogucki, and I have elected to accept this version of what occurred as being the more credible and reliable recounting of the occurrence. Conversely, I find that the testimony of these three witnesses so flatly contradicts and refutes the testimony given by Johnson, that

I consider it discredited and incredible". No reason appears from the record why the Examiner's determination of credibility should be rejected.

The credible evidence in this case discloses that Appellant and Bogucki engaged in mutual combat. The law is well settled that if a person voluntarily agrees to participate with another in a contest or mutual combat, he can not justify or excuse the killing of or inflicting great harm on his adversary on the ground of self-defense. *Laney v. United States*, 294 Fed. 412, 413, (1923), 6 C.J.S. *Assault and Battery* 92, 40 C.J.S. *Homicide* 122. In view of Appellant's voluntary participation in the fight and the fact that Bogucki was unarmed, Appellant's plea of self-defense cannot be sustained.

Even if this were not a case of mutual combat and Bogucki had assaulted Appellant without provocation, a plea of self-defense under the facts of this case could not be maintained. The rule is settled that "in order to constitute a legal excuse of justification or justify the use of a dangerous weapon in protecting one's self, the assault must be so fierce and so violent that the person assaulted, as a reasonable man, actually believes it is necessary to use a dangerous weapon to repel the assault and...safeguard his own life" *Lujan v. United States*, 209 F. 2d 190, 193 (1953). There is nothing in the record, aside from Appellant's own testimony, which would indicate that Appellant feared for his own safety at the hands of Bogucki. Williams, the gangway watchman, stated Appellant followed Bogucki to the dock and they were swinging at each other for 2 or 3 minutes. The chief Mate of the vessel testified that he observed the men exchanging blows and called to them to stop fighting; they broke apart momentarily and then renewed the fight. Two of Appellant's own witnesses testified that following the fight they observed superficial bruises and scratches under one of Appellant's eyes. All of this evidence tends to discredit Appellant's alleged fear for his own life and the alleged violent attack by Bogucki on Appellant. It certainly seems reasonable to infer that if Appellant feared Bogucki, he would not have followed him to the dock. Therefore, it may be stated that there was no excuse or justification for the use of a dangerous weapon by Appellant. See generally 6 C.J.S. *Assault and Battery supra* and 4 Am. Jur. *Assault and Battery* 51. The inescapable conclusion is that

the Examiner did not err in finding Appellant guilty as charged.

In view of the seriousness of the injuries sustained by Bogucki, the order of the Examiner is not deemed to be excessive.

The order of the Examiner dated at Savannah, Georgia, on 16 November 1962, is AFFIRMED.

D. McG. MORRISON
Vice Admiral, U.S.Coast Guard
Acting Commandant

Signed at Washington, D. C., this 24th day of May 1963.

***** END OF DECISION NO. 1392 *****

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