

In the Matter of Merchant Mariner's Document No. Z-1001678-D1 and
All Other Seaman Documents
Issued to: Thomas Powell

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1405

Thomas Powell

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 24 January 1963, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman documents for six months on eighteen months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a porter on board the United States SS INDEPENDENCE under authority of the document above described, on 6 November 1962 Appellant wrongfully struck a fellow crew member, porter Jack Wright, on the head with a bottle.

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

The Investigating Officer introduced in evidence the testimony of porter Jack Wright and that of another eyewitness to the incident, an entry in the ship's Official Logbook, and extracts from the Shipping Articles.

In defense, Appellant offered in evidence his own testimony. He stated that after he had an argument with Wright and was hit in the face by him, Appellant was walking along a passageway with a glass of whisky in his hand when Wright came out of a room, started scuffling with Appellant, and the glass in Appellant's hand accidentally cut Wright on the head.

FINDINGS OF FACT

On 6 November 1962, Appellant was serving as a porter on board the United States SS INDEPENDENCE and acting under authority of his document while the ship was at sea.

About 2100 on this date, Appellant and porter Jack Wright had an argument. Wright struck Appellant in the face and left the scene.

Approximately twenty minutes later, Wright opened a door to leave the room of another seaman, the fish cook Robert Pridgen, when Appellant struck Wright on the forehead with a bottle. Pridgen moved between the two seamen and Wright went to obtain medical attention for his cut forehead.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

1. The decision is contrary to the weight of the evidence.
2. The Examiner rejected Wright's denial that he hit Appellant but accepted Wright's testimony that he was hit with a bottle by Appellant. The refusal of Wright to answer certain questions also reflects unfavorably on his testimony.
3. Appellant was denied a fair hearing because there was no investigation; this was not an offense under 46 U. S.

Code 701; the right to trial by jury was denied; motions at the hearing were unjustly denied; and Appellant was subpoenaed to appear to receive notice of the charges.

4. The notice failed to disclose adequately the nature of the proceedings.
5. Cross-examination concerning Appellant's drinking of intoxicants was improper and prejudicial.

In conclusion, it is respectfully submitted that the decision of the Examiner should be reversed.

APPEARANCE: Vincent A. Schiano, Esquire, of New York City, of
Counsel

OPINION

The decision is not contrary to the testimony accepted by the Examiner as credible. The testimony of Wright that he was struck by Appellant almost as soon as the door was opened is corroborated by fish cook Pridgen who was the only other person present. Since the Examiner, as the trier of facts, determines questions of credibility as do juries, it was proper for the Examiner to reject some of Wright's testimony and accept other parts of it. The courts have stated that a jury may conclude a witness is truthful and accurate as to one point but not telling the truth as to another. *Elwert v. United States* (C. A. 9, 1956) 231 F. 2d 928.

Although there are minor contradictions in the testimony of the two Government witnesses, their versions as to what occurred are substantially in agreement. Wright had the right to refuse to answer certain questions which pertained to his privileged communications with his lawyer. No adverse inference should be drawn from this.

The record does not support any of the numerous claims that Appellant was denied a fair hearing. Although these matters were adequately covered by the Examiner's rulings denying motions by defense counsel at the hearing, it is noted that there was an investigation but a report is not usually required for an

investigation under 46 CFR 137 as distinguished from one under 46 CFR 136; offenses in 46 U. S. Code 701 are not the exclusive bases for these proceedings; and there is no right to a trial by jury in any administrative proceeding of this nature.

A possible innocent misuse of the subpoena power to effect service of the charges is not reversible error. Appellant was served the charges and he signed a statement on the form which includes an acknowledgement that the nature of the proceedings was fully explained to him.

There is no indication in the record that Appellant was prejudiced by questions concerning his drinking. In addition, such questions were perfectly proper as an inquiry into Appellant's pattern of conduct on the date of the incident in question, especially after Appellant had testified that he had a glass of whisky in his hand at the time of the difficulty.

Under all the circumstances, it is apparent that the order of the Examiner was extremely lenient for this type of offense. This is attributable to the facts that Appellant is 61 years old and has sailed many years without previously having been charged for any offense of misconduct.

ORDER

The order of the Examiner dated at New York, New York, on 24 January 1963, is AFFIRMED.

E.J. Roland
Admiral, United States Coast Guard
Commandant

Signed at Washington, D.C., this 18th day of July 1963.

***** END OF DECISION NO. 1405 *****

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