

In the Matter of Merchant Mariner's Document No. Z-117096-D3 and
all other Seaman Documents
Issued to: JOSEPH P. BERTI

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1447

JOSEPH P. BERTI

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 28 August 1963, an Examiner of the United States Coast Guard at Port Arthur, Texas, suspended Appellant's seaman documents for six months upon finding him guilty of misconduct. The specification found proved alleges that while serving as an ordinary seaman on board the United States SS PURE OIL under authority of the document above described, on or about 10 August 1963, Appellant assaulted the Second Assistant Engineer with a dangerous weapon, to wit: a fire ax.

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

The Investigating Officer introduced in evidence the testimony of the alleged victim and another eyewitness to the incident in question.

The defense produced three witnesses who observed only the events leading up to the alleged assault. Appellant then testified that he was close enough to the Second Assistant to have hit him with the ax but did not do so because Appellant simply wanted to scare the Second Assistant after he had threatened to injure Appellant.

FINDINGS OF FACT

On 10 August 1963, Appellant was serving as an ordinary seaman on board the United States SS PURE OIL and acting under authority of his document while the ship was in a domestic port.

When the Second Assistant Engineer and Appellant returned to the ship together on the afternoon of this date, they had an argument concerning a bottle of whisky which had been brought back to the ship. Shortly thereafter, the Second Assistant (a much larger man than Appellant) invited Appellant to go on the dock the next morning in order to fight. The Second Assistant then left to go on watch in the engine room and Appellant followed a few seconds later.

The Second Assistant had descended to the next deck when Appellant came down the same ladder, took a fire ax off a bulkhead in the passageway and approached the Second Assistant. By this time, the Second Assistant had started down the next ladder to the steering engine room. Seeing appellant at or near the top of the ladder with the fire ax, the Second Assistant feared that Appellant would attack with the ax and hurriedly went down to the next deck. Appellant did not attempt to strike the Second Assistant or to follow him down the ladder. After a short time, Appellant replaced the fire ax on the bulkhead. The Second Assistant did not report this incident to the Master until two days later.

Appellant has been going to sea for more than 20 years. His only prior record consists of two admonitions for offenses of failure to join his ship.

BASES OF APPEAL

This appeal has been taken from the order imposed by the

Examiner. It is contended that just before the Second Assistant Engineer invited Appellant to go on the dock, Appellant was not making remarks about the engineers, as found by the Examiner, but he was talking with another seaman.

The Master offered to settle the matter by discharging Appellant by mutual consent but Appellant refused to do this.

The difficulty arose because the Second Assistant associated with the unlicensed crew members and he did not buy his share of the whisky while ashore drinking.

OPINION

The above findings of fact are in agreement with the findings of the Examiner as well as with the testimony of the Second Assistant Engineer and Appellant in all material respects. Whatever words passed between the two seamen before then went down the ladder is not material to the issue of whether or not Appellant assaulted the Second Assistant.

For the purpose of clarification in these proceedings, an assault is not the same as an assault and battery because the latter includes some degree of physical contact. An assault is committed by putting another person in apprehension of harm when there is the apparent present ability to inflict injury whether or not the aggressor actually intends to inflict or is capable of inflicting harm. *Ladner v. United States* (1958), 358 U.S. 169, 177; *Guarro v. United States* (C.A.D.C., 1956), 237 F.2d 578, 580; Commandant's Appeal Decision No. [1218](#). Hence, it is not essential that a person be within actual striking distance since it is sufficient if the other person reasonably fears that the attack can and will be completed. although it is not necessary to intend to injure a person in order to be guilty of the offense, this factor will usually have some bearing on the extent of the order imposed.

Relative to whether the offense was committed, Appellant testified that he intended to scare the Second Assistant and the latter testified that he was scared. Since it was reasonable under the circumstances for the Second Assistant to fear an attack by

Appellant with the ax, Appellant was guilty of the assault alleged.

With respect to the issue of intent to injure, it has been established that Appellant did not pursue the Second Assistant down the second ladder but stopped on the deck where he obtained the fire ax; and that Appellant did not swing the ax at the Second Assistant. These facts are definitely supported by the testimony of the Second Assistant (R. 10, 13) who also stated that he was too far from Appellant to be hit with the ax (R. 14). Appellant testified that if he had wanted to, he could have chopped up the Second Assistant since he was only three feet down the ladder (R. 46).

Regardless of which of these two versions is accepted, the only logical conclusion is that Appellant did not intend to attack the Second Assistant with an ax. Accepting the Second Assistant's testimony that Appellant was not close enough to use the ax, it seems likely that Appellant would have gone down the ladder to the next deck or dropped the ax on the Second Assistant if Appellant had intended to strike him with the ax. If Appellant's version that he was close enough to attack with the ax is true, the fact that he made not attempt to do so conclusively indicates that he did not intend to do so.

Since the evidence is overwhelming in favor of the conclusion that Appellant honestly testified he never intended to hit the Second Assistant with the ax and because Appellant has a negligible prior record, the order will be modified. This is an important factor in determining Appellant's suitability for service as a merchant seaman although the offense of assault with a dangerous weapon is a serious one under any circumstances. See Commandant's Appeal Decision No. [1218](#) for a factually similar case where the order was modified on appeal to a suspension for three months.

The comments submitted on appeal concerning the Master and the Second Assistant indicate improper conduct on their part but do not justify appellant's behavior.

ORDER

The order of the Examiner dated at Port Arthur, Texas, on 28

August 1963, is modified to provide for a suspension of three months.

As so MODIFIED, the order is AFFIRMED.

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

Signed at Washington, D. C., this 20th day of February 1964.

***** END OF DECISION NO. 1447 *****

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