

In the Matter of Merchant Mariner's Document No. Z-622140
Issued to: ERIC H. CALEB

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

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ERIC H. CALEB

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

On 12 September, 1952, an Examiner of the United States Coast Guard at New York City revoked Merchant Mariner's Document No. Z-622140 issued to Eric H. Caleb upon finding him guilty of misconduct based upon two specifications alleging in substance that while serving as a wiper on board the American SS SANTA ROSA under authority of the document above described, at about 0100 on 23 July, 1952, while said vessel was in the port of La Guaira, Venezuela, he did "wrongfully enter a passenger area" and "wrongfully proposition two female passengers, a Mrs. Schwartz and her daughter."

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by an attorney of his own selection and he entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer made his opening

statement and introduced in evidence the testimony of the Chief Mate and the Master, and a certified copy of an entry in the Official Log Book of the SANTA ROSA.

In defense, counsel for Appellant made an opening statement before offering in evidence the sworn testimony of Appellant and two other members of the crew who stated that they had seen Appellant ashore at a bar, which was about seven minutes walking distance from the ship, as late as 0115 on 23 July, 1952. Appellant testified that he returned on board about 0130, was awakened later by the Chief Mate, and identified by Mrs. Schwartz the next morning when he had in his hand his white sport shirt with blue vertical stripes which he had worn the night before.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specifications. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-622140 and all other licenses, certificates of and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that the introduction of the log entry was entirely improper; the findings were against the weight of the evidence; and the order is too severe. Numerous exceptions are taken to the findings of the Examiner and it is contended that Appellant was improperly deprived of the rights to cross-examine the complaining party, Mrs. Schwartz, and to be confronted by her. Therefore, Appellant claims that since the decision is not supported by reliable, probative and substantial evidence, it should be reversed and set aside.

APPEARANCES: Herman E. Cooper, Esq., of New York
City by Lawrence P. Ashley, Esq.,
of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 22 and 23 July, 1952, Appellant was serving as a wiper on board the American SS SANTA ROSA and acting under authority of his Merchant Mariner's Document No. Z-622140 while the ship was alongside a dock at La Guaira, Venezuela.

On the evening of 22 July, 1952, Appellant went ashore wearing a white sport shirt with vertical blue stripes. He returned on board the following morning prior to 0120. Before retiring in his forecastle on "C" deck, Appellant and the ship's third electrician saw each other on "B" deck which is between "C" deck and the promenade deck where the only gangway was located.

"B" deck is a passenger area and the stateroom of a passenger named Mrs. Schwartz was on this deck. Accompanied by her husband, daughter and son, she had boarded the ship at La Guaira for passage to New York City.

At some time after 0100 on 23 July, 1952, the Chief Mate went to Mrs. Schwartz stateroom to investigate a report that a man had entered her room. Mrs. Schwartz told the Chief Mate that a colored man wearing a white sport shirt with blue vertical stripes had entered her room, propositioned her, and offered her twenty dollars. After having been told by the gangway watch that a man fitting this description had come on board shortly before, the Chief Mate found a white sport shirt with blue vertical stripes in Appellant's locker. This was about ten to fifteen minutes after the Chief Mate had first received the report. Appellant could not be awakened and the Chief Mate did not keep the shirt.

At about 0800, the Chief Mate told Appellant that he was suspected of having entered the room of a woman passenger and that he was to get the shirt he had worn the night before and appear before the woman. Appellant made no objection to this but stated that he wanted to have witnesses. Appellant got the shirt with the blue stripes and appeared, with the department delegate and the ship's chairman as his witnesses, before Mrs. Schwartz, her daughter and the Chief Mate. Mrs. Schwartz identified Appellant as the man who had entered her room and the shirt as the one he had been wearing. At this time, Appellant told Mrs. Schwartz that she was mistaken.

The incident was logged at 1300 on 23 July, 1952, but Appellant was not informed of this nor was he ever questioned by the Master in connection with this incident.

Appellant is forty years of age, married, and has been going to sea for thirteen years without prior disciplinary action having been taken against him.

OPINION

The evidence is not sufficient to support the allegations contained in either of the two specifications. Concerning the First Specification, there was no evidence that members of the crew were notified that they were not permitted to use the stairway which required a person passing between the promenade deck and "C" deck to pass through about twenty to thirty feet of a passageway on "B" deck. Therefore, proof of the First Specification depends upon proof of the Second Specification and the evidence which is relied upon to support the latter specification is not substantial evidence because it is uncorroborated hearsay which is not supported by other evidence. Consolidated Edison Co. et al. v. N.L.R.B. (1938), 305 U.S. 197. The Attorney General of the United States, in his Manual on the Administrative Procedure Act (1947), states that the requirements of "reliable, probative and substantial evidence" are a restatement of the law as set out in this case.

The proof depends upon the truth or falsity of the statements made by Mrs. Schwartz to the Master and Chief Mate rather than upon the veracity of the testimony by the Master and Chief Mate that Mrs. Schwartz made such statements to them. Since Mrs. Schwartz did not testify at the hearing, Appellant was deprived of his fundamental and important right to cross-examine the complaining party, the trier of the facts did not have an opportunity to hear and observe Mrs. Schwartz in order to judge her credibility, and her statements were not made under oath. These are the main reasons for the exclusionary rule against hearsay evidence.

With respect to the inability to cross-examine Mrs. Schwartz, Appellant could not attempt to ascertain such details as where she was when the man entered, why the door was not locked if she was in bed, and how she could describe the man and his shirt if the lights

were out in her stateroom.

The unreliability of the hearsay evidence concerning such facts is indicated by the three different versions given as to the circumstances at the time when Mrs. Schwartz claimed a man entered her room. The Chief Mate testified that there were two visits to the room of Mrs. Schwartz and that she was propositioned at the time of the second visit after her daughter had left. The Master testified that a man entered the room and propositioned both Mrs. Schwartz and her daughter. The log entry states that a man propositioned Mrs. Schwartz in her room and also entered her daughter's room. The Chief Mate said that the man wanted to know where Mrs. Schwartz' husband was; but the Master's testimony was that the man stated that her husband would not know anything about it. This variety resulted even though based completely upon what Mrs. Schwartz had told the Master and Chief Mate. Hence, her story was not consistent or it was not accurately repeated at the hearing.

The identification by Mrs. Schwartz is not persuasive since it seems to have been based mainly upon the type of sport shirt which Appellant readily testified he had worn ashore the night before. The Chief Mate testified that he was holding the shirt and that Mrs. Schwartz identified Appellant and then the shirt. Appellant testified that he had the shirt in his hand and that his own identification followed the identification of the shirt. The testimony of both the Chief Mate and Appellant agreed that he showed no reluctance in appearing before Mrs. Schwartz and having the sport shirt present; the two men appearing with Appellant before Mrs. Schwartz were obtained by Appellant only to act as his witnesses and not in the nature of a line-up; and Appellant made an immediate denial when Mrs. Schwartz said he was the man.

On the basis of this evidence, a prima facie case was not made out against Appellant and neither his testimony nor that of his two witnesses supplied any evidence which was sufficient to prove the allegations in the second specification. Therefore, any weakness in the alibi testimony of the defense could not possibly supply the evidence to prove the specification. And it served no useful purpose to attempt to establish that Appellant was off the ship at the time of the alleged offense because he admitted that the Chief Mate partially awakened him and looked in his locker. The

discrepancies in the approximate times testified to by the defense witnesses and the Chief Mate were not sufficient to be material or to discredit the testimony of any of the witnesses. Since the specifications were not proved by substantial evidence, the appeal will be sustained.

The Order of the Examiner dated at New York, New York, on 12 September, 1952, is reversed and the case is remanded for further proceedings with instructions that the charge and specifications should be dismissed if additional evidence of a higher quality is not obtained within a reasonable length of time.

REVERSED and REMANDED.

Merlin O'Neill
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 24th day of February, 1953.

***** END OF DECISION NO. 637 *****

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