

In the Matter of Merchant Mariner's Document No. Z-593749-D1
Issued to: SAMUEL ROSARIO

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

707

SAMUEL ROSARIO

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 27 July, 1953, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-593749-D1 issued to Samuel Rosario upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as an ordinary seaman on board the American SS ARGENTINA under authority of the document above described, between on or about 1 January, 1949, and 2 February, 1950, he conspired with certain persons to wrongfully possess a narcotic substance, cocaine.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled, the seriousness of the alleged offense, and the possible results of the hearing. Appellant's sister acted as an interpreter for him. Although advised of his right to be represented by counsel of his own choice, Appellant voluntarily elected to be assisted only by his sister. When Appellant failed to plead to the charge and specification, the Examiner entered a plea of "not guilty" on

behalf of Appellant.

Thereupon, the Investigating Officer made his opening statement and introduced in evidence certified copies of Appellant's indictment and conviction before the United States District Court for the Southern District of New York. It was stipulated that Appellant had served on the ARGENTINA continuously, on four successive voyages, from 23 August, 1949, to 6 February, 1950. The Investigating Officer then retested his case.

In defense, Appellant offered in evidence his sworn testimony through his interpreter. Appellant stated that he was convicted in the Federal court because after following the instructions of his brother, Israel Medina, to obtain a package of "stuff" from a man on 2 June, 1949, to hold for Medina, Appellant was apprehended by the police when the package was found in Appellant's house. Appellant also claimed that he did not know anything about the narcotics and that he was not involved in importing it.

At the conclusion of the hearing, having given both parties an opportunity to submit argument and proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved in part by proof of the specification as to the dates between 23 August, 1949, and 2 February, 1950. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-593749-D1 and all other valid licenses, certificates and documents issued to Appellant.

From that order, this appeal has been taken, and it is urged that Appellant's act of misconduct was committed when he held a package for his brother at a time which was two months prior to the commencement of his service on the ARGENTINA. Appellant also contends that he has never before been in any trouble; he was sentenced to a year in jail for this offense although he was innocent; and he suffered other serious consequences as a result of his mistake. In conclusion, Appellant requests reconsideration of the decision for the benefit of his dependent wife and children; and that the order be mitigated to a probationary suspension.

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

FINDINGS OF FACT

Between the dates of 23 August, 1949, and 6 February, 1950, Appellant was serving as an ordinary seaman on board the American SS ARGENTINA and acting under authority of his Merchant Mariner's Document No. Z-593749. (M.M.D. No. Z-593749-D1 was issued to Appellant at a later date.)

On 2 February, 1950, an indictment was filed in the United States District Court for the Southern District of New York charging that on or about 1 January, 1949, and continuously thereafter up to the date of the filing of the indictment, Appellant and other persons". . . . unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together and with each other to import contrary to law a quantity of cocaine hydrochloride, [and] receive, possess, conceal and facilitate the transportation and concealment after the said cocaine hydrochloride had been imported and brought into the United States contrary to law, knowing that the said cocaine hydrochloride had theretofore been imported and brought into the United States contrary to law " The indictment also cites three acts in pursuance of, and to effect the objects of, the conspiracy. All of these acts took place prior to the time of Appellant's service on the ARGENTINA.

On 6 February, 1950, Appellant was arraigned under this indictment but the pleading was adjourned to a future date and Appellant was released on \$500 bail.

On 5 March, 1951, Appellant appeared in person and by counsel before the United States District Court for the Southern District of New York and was convicted upon his plea of guilty of the offense, as charged in the indictment, of "unlawfully, wilfully and knowingly conspire to receive, possess, conceal and facilitate the transportation and concealment of a quantity of narcotics after said narcotics had been imported and brought into the United States, contrary to law." Thereupon, Appellant was sentenced to imprisonment for a period of one year and one day.

There is no record of prior disciplinary action having been taken against Appellant since he began to go to sea in 1945.

OPINION

The specification alleges that while Appellant was serving on the SS ARGENTINA, he conspired with other persons to wrongfully possess narcotics. A conspiracy consists of a combination or agreement of two or more persons who have a common design and purpose to accomplish, by concerted action an unlawful purpose or a lawful purpose by unlawful means. Hence, a conspiracy is an offense in itself which is separated and distinct from that which is the object of the conspiracy. The logical conclusion is that Appellant was guilty of conspiring to wrongfully possess narcotics, as alleged in the specification, insofar as the period of time when Appellant was serving on the ARGENTINA coincided with the dates covered by the indictment under which Appellant was convicted, in the Federal court, of unlawfully, wilfully and knowingly conspiring to possess narcotics after the unlawful importation of the narcotics. This mutual period of time was from 23 August, 1949, to 2 February, 1950, inclusive.

In accordance with 46 Code of Federal Regulations 137.15-5(a), the Examiner ruled that the judgment of conviction by the Federal court was *res judicata* as to the determination of Appellant's guilt under the specification being considered at the hearing. I agree with this conclusion of the Examiner because, as required by the above regulation, the "issue decided" and "acts forming the basis of the charges" before the Federal court were the same as the issues and acts involved in this proceeding. The mutual "issue" to be decided was whether Appellant was guilty of conspiracy to possess narcotics; and the "act," common to both cases, was the fact that Appellant continued to be a participant in this conspiracy during the period of time when he was in the service of the ARGENTINA. Appellant did not satisfy the Examiner by affirmative proof that he, Appellant, had withdrawn from the conspiracy prior to the commencement of his service on the ARGENTINA. In fact he submitted no evidence of his withdrawal from the conspiracy. Although in a criminal indictment the accuracy of allegation as to time is not of the essence of the offense in charging conspiracy (*Pearlman V. United States (C.C.A. 9, 1927)*, 20 F2d 113), the necessity for affirmative proof of withdrawal applies even though no evidence shows the connection of the person with the conspiracy at a later date. *United States V. Compagna et al. (C.C.A. 2, 1944)*, 146 F2d 524, 527, cert. den.

324 U.S. 867.

In view of the fact that Appellant was guilty of the offense of conspiracy while he was in the service of the ship and since the conspiracy, not possession, is the offense alleged in the specification, it is immaterial when - or whether - Appellant actually had any narcotics in his possession. And it would be grossly inconsistent to hold that Appellant was guilty of conspiracy until 2 February, 1950, as determined by the Federal court as a result of Appellant's plea of guilty; but that, for the purpose of this administrative proceeding, Appellant was not guilty of the identical offense until the same date simply because the overt acts cited in the indictment and the single act of possession admitted by Appellant, all occurred prior to the time when Appellant was on the ARGENTINA. In further support of this proposition, it is noted that an overt act by one of the conspirators was required to obtain a conviction in the Federal court for violation of a statute; but the specification herein does not alleged a statutory violation and, at common law, no overt act is necessary to constitute the offense of conspiracy. For this additional reason, the relationship, in time, between the overt acts and Appellant's service on the vessel are completely immaterial.

Appellant's other contentions do not persuade me to mitigate the order of revocation. Such orders are the strict policy of the Coast Guard in cases of proven narcotics offenders. This applies, regardless of prior penal action for the same offense and other personal hardships resulting therefrom, because of the statutory duty to utilize these remedial proceedings to protect lives and property at sea.

ORDER

The Order of the Examiner dated at New York, New York, on 27 July, 1953, is AFFIRMED.

A. C. Richmond
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D.C., this 30th day of November, 1953.

***** END OF DECISION NO. 707 *****

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