

In the Matter of Merchant Mariner's Document No. Z-593486 and all  
other Licenses, Certificates and Documents  
Issued to: GERARDO BORIA

DECISION AND FINAL ORDER OF THE COMMANDANT  
UNITED STATES COAST GUARD

827

GERARDO BORIA

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 26 April 1955, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-593486 issued to Gerardo Boria upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as a utilityman on board the American SS EXCALIBUR under authority of the document above described, on or about 7 February 1955, while said vessel was at sea, he wrongfully had in his possession a narcotic substance; to wit, marijuana.

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 specification proffered against him.

Thereupon, the Investigating Officer and counsel for Appellant made their opening statements. The Investigating Officer then

introduced in evidence the testimony of the Chief Mate, Third Mate and a Customs Agent. Several exhibits were also placed in evidence by the Investigating Officer.

In defense, Appellant offered in evidence his sworn testimony. He stated that he went to the ship's doctor because of severe back and shoulder pains; the treatment prescribed by the doctor caused Appellant to have an unfavorable reaction; he obtained a package of what he thought were "tintillo" leaves from a woman acquaintance in Barcelona since he felt sick; he did not look at or use the "tintillo" leaves after leaving Barcelona on 5 February although he was still in pain; and the package of "tintillo" leaves were taken away from Appellant during an inspection of the ship on 7 February. Appellant also testified that he had never used marijuana or previously seen it; and he denied having knowledge that the substance in the package was marijuana. A sample of so-called "tintillo" leaves was received in evidence as a defense exhibit.

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 specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-593486 and all other licenses, certificates 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:

POINT 1. The evidence that the ship's doctor suspected Appellant of using marijuana was contrary Appellant's rights because it was hearsay evidence unsupported by evidence that Appellant used marijuana.

POINT 2. No evidence was produced to show that Appellant knew the cigarette contained marijuana. Appellant's reference to the container of seeds indicates that he did not know about the cigarette. The other contents of the locker should have been analyzed.

POINT 3. Appellant's claim that he thought he had obtained "tintillo" leaves to relieve his pain is supported by his prior visit to the ship's doctor. This explanation placed the burden upon the Investigating Officer to prove guilty knowledge beyond a reasonable doubt.

POINT 4. Since it is uncontroverted that the "tintillo" was found in Appellant's locker, his rights were prejudiced when the Examiner stated that his story was "incredible." The search of Appellant's locker was not legal because the Master of the ship was not present.

In conclusion, it is respectfully submitted that the conclusions and findings of the Examiner should be reversed.

APPEARANCES: Oscar Gonzales-Suarez, Esquire, of New York City, of Counsel.

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

#### *FINDINGS OF FACT*

On a foreign voyage including the date of 7 February 1955, Appellant was serving as a utilityman on board the American SS EXCALIBUR and acting under authority of his Merchant Mariner's Document No. Z-593486. The ship departed from Barcelona, Spain, on 5 February, for the return trip to the United States.

While the ship was at sea on 7 February 1955, a search of portions of the ship was instituted because the ship's doctor suspected Appellant of smoking marijuana. Appellant's locker was searched in his presence after he had unlocked it at the request of the Third Mate. In a pocket of a coat in the locker, the Third Mate found a hand-rolled cigarette which was about three inches long and had twisted ends. The Third Mate opened the cigarettes and saw a greenish substance similar to tobacco. When the Third Mate asked Appellant what this substance was, Appellant seemed nervous and he did not answer the question but kept referring to an open container of seeds on a table or desk to the right of his locker. (This lack of responsiveness may have been due to Appellant's poor command of the English language.) The substance

in the open container was different than that which was in the cigarette. Hence, the container was not taken into custody by the Third Mate.

The hand-rolled cigarette was given to the Chief Mate by the Third Mate. After showing it to the Master, the Chief Mate place it in an envelope in his desk until turning it over to the Customs authorities upon arrival at the Port of New York. Analysis at the U. S. Customs Laboratory in New York City disclosed that the contents of the cigarette were marijuana residue and weeds. The total weight was nine grains including the cigarette paper.

#### OPINION

Appellant does not contest the evidence that marijuana was found in the pocket of a coat in his locker. Appellant admits that he knew some substance was in his coat but claims that he thought it was "tintillo" and not marijuana. These facts alone are sufficient to make out a prima facie case of wrongful possession by the rebuttable presumption of fact of conscious and knowing possession arising from the proof of physical possession of the marijuana cigarette. *Yes Hem v. U.S.* (1925), 268 U.S. 178, 185, 46 CFR 137.21-10. This presumption can only be rebutted by evidence which must, if believed by the trier of facts, establish facts from which reasonable minds can draw but one inference. *Wolfgang v. Burrows* (C.A.D.C., 1950), 181 F2d 630. In other words, the countervailing evidence must constitute substantial evidence to overcome the presumption. But Appellant's version as to how the marijuana got in his coat did not constitute substantial evidence because the Examiner, as the trier of the facts who was in the best position to judge the credibility of the witnesses, specifically stated that he thought Appellant's story was incredible.

The finding of incredibility as to Appellant's testimony is supported by several factors:

1. The ship's medical log shows that Appellant visited the doctor only once despite claims of severe pains.
2. The so-called package of "tintillo" was in the usual form

of a marijuana cigarette and this would be a most peculiar way to wrap a herb to be used for medication.

3. Appellant did not attempt to make any use of the "tintillo" although his pains continued after the ship departed from Barcelona.
4. Upon careful examination, the Examiner determined that the "tintillo" definitely differed in appearance from the marijuana which was found in Appellant's locker.

Thus, the Examiner's rejection of Appellant's testimony is well supported and the prima facie presumption of knowledge of possession has not been rebutted by Appellant's improbable story. Since the specification alleges wrongful possession and not use, the hearsay evidence as to the suspicion of the ship's doctor merely corroborates the prima facie case against Appellant. In the face of this adequate proof of the specification it would have served no purpose to analyze additional contents of the locker which were not under suspicion of containing marijuana. In this connection, it is also noted that the quantum of proof required in these remedial administrative proceedings is substantial evidence rather than proof beyond a reasonable doubt as contended on appeal. And it is well known that reasonable searches are permissible on board ships by the delegated authority of the Master and in his absence from the scene of the search.

Since the presence of narcotics on board ships is considered to be such a serious threat to lives and property, the order of revocation must be sustained in accordance with the requirement of 46 CFR 137.03-1.

*ORDER*

The order of the Examiner dated at New York, New York, on 26 April 1955 is AFFIRMED.

A. C. Richmond  
Vice Admiral, United States Coast Guard  
Commandant

Dated at Washington, D. C., this 11th day of August, 1955.

\*\*\*\*\* END OF DECISION NO. 827 \*\*\*\*\*

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