

In the Matter of Merchant Mariner's Document No. Z-197988-D1(R) and
all other Licenses, Certificates and Documents
Issued to: RANDOLPH McCANTS

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

821

RANDOLPH McCANTS

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 28 October 1954, an Examiner of the United States Coast Guard at New Orleans, Louisiana, revoked Merchant Mariner's Document No. Z-197988-D1(R) issued to Randolph McCants upon finding him guilty of misconduct based upon a specification alleging in substance with that while serving as a wiper on board the American SS MASON LYKES under authority of the document above described, at about 0230 on 9 September 1954, while ashore at Jagan, Philippine Islands, he assaulted and battered a member of the crew, ordinary seaman Raymond J. Kimball, with a dangerous weapon; to wit, an ice pick. During the course of Appellant's testimony, the specification was amended, at the suggestion of the Examiner, to read while Appellant was "in the service of" the MASON LYKES rather than while "on board" the ship.

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. After being advised that he would be given additional time to obtain a lawyer if he so desired,

Appellant voluntarily elected to be represented by nonprofessional counsel in the person of the Second Assistant Engineer of the MASON LYKES who also appeared as a character witness for Appellant. Appellant then entered a plea of "not guilty" to the charge and specification proffered against him.

The Investigating Officer and counsel for Appellant made their opening statements and the Investigating Officer introduced in evidence the testimony of Deck Maintencenceman Thompson who witnessed the incident and Third Mate Stuntz who was on watch at the time of the alleged offense. The Investigating Officer also introduced the Official Logbook to show that Kimball had not been logged at any time during the voyage. The Third Mate described Appellant as a very respectful and dependable seaman.

In defense, Appellant offered in evidence his sworn testimony. Appellant stated that he had an argument with Kimball in a barroom at about midnight; Kimball used obscene language and took a knife out of his pocket; Appellant returned to the ship and got an ice pick to defend himself; Appellant went back to the barroom at 0230 to get some phonograph records which he had forgotten; Kimball put a hand in his pocket as he turned towards Appellant; and Appellant stabbed Kimball before he could take out his knife. Counsel for Appellant testified that Appellant was respected on the ship and that he was a very competent, hard worker in his job as a wiper. It was stipulated that the other three engineering officers on the ship would testify to the same effect if they appeared as witnesses.

At the conclusion of the hearing, having heard the argument of the Investigating Officer 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-197988-D1(R) 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 there is no evidence that Appellant was given written notice of the time and place of the hearing or of the offense with which he was charge; Appellant was not represented by legal counsel; the

Examiner permitted leading questions and hearsay evidence; the Examiner improperly suggested that the specification be amended to read "in the service of" rather than "on board" the ship; no evidence was offered in support of the amended specification; the Examiner did not find the charge and specification proved before revoking Appellant's document; the Examiner erroneously found that Appellant testified he went to the ship "to get an ice pick" and that Kimball was on the floor when stabbed the second and third times; Appellant should be given the benefit of the reasonable doubt created by the failure of local authorities to arrest Appellant, the fact that Kimball had a knife in his possession and the evidence as to Appellant's good character and reputation.

It is further contended that the following factors support the proposition that Appellant did not provoke the argument and acted solely in self-defense: Appellant retreated from the scene of the argument after Kimball drew a knife; Thompson testified that, while Appellant was gone from the barroom, Kimball showed Thompson a six-inch knife and said, "I'm going to work him (Appellant) over with it"; Appellant later returned to the barroom only to get the recordings which he had forgotten; Appellant took the ice pick to use in self-defense if necessary; Kimball reached in his pocket for his knife in an attempt to carry out his earlier threat against Appellant; and Kimball had a reputation of provoking fights while Appellant is a model seaman.

In conclusion, it is respectfully submitted that the charges should be dismissed; or, in the alternative, a rehearing should be granted in order to give Appellant an opportunity to present evidence to prove his complete innocence.

APPEARANCES: George J. Moore, Esquire, of Mobile, Alabama, 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 9 September 1954, Appellant was in the service of the American SS MASON LYKES as a wiper acting under authority of his Merchant Mariner's Document No.

Z-197988-D1(R). On 9 September 1954, the ship was at Jagna, Bohol Island, Philippine Islands.

At some time after 2400 on 8 September 1954, Appellant and ordinary seaman Raymond J. Kimball became involved in an argument at a barroom in Jagna. Kimball directed obscene and insulting language towards Appellant. The latter ended the argument by leaving the barroom and going back to the ship where he obtained an ice pick before returning to the barroom at about 0230 on 9 September.

When Appellant entered the barroom, he held the ice pick in his hand as he walked up to Kimball at the bar and stabbed him in the left arm. Kimball fell face down on the floor and Appellant stabbed him two more times in the back with the ice pick although Kimball offered no resistance. The witness Thompson prevented further injury by holding Appellant's arm. Kimball was carrying a knife but it was in his pocket at the time of the attack on him by Appellant. Appellant was sober but Kimball had been drinking heavily. Kimball was hospitalized and did not return to the United States on the MASON LYKES. The record is void as to whether any action was taken by the local authorities in this matter.

There is no record of prior disciplinary action having been taken against Appellant during approximately 14 years at sea.

OPINION

The contentions raised on appeal are considered to be without merit.

The charge and specifications sheet contained in the record shows that Appellant was served the written charge and specification on 25 October 1954 with notice to appear for a hearing at the New Orleans Custom House on 27 October 1954. The reverse side of the yellow copy of the charge and specification sheet contains Appellant's signature acknowledging receipt of the charge and specification.

The above mentioned signature also acknowledged that Appellant's right to be represented by counsel was fully explained to him on 25 October 1954. In addition, when the hearing was

convened on 27 October, the Examiner specifically informed Appellant of his right to be represented by a lawyer and advised Appellant that he would be given more time if he wanted to retain the service of a lawyer during the hearing. Since Appellant voluntarily declined this further opportunity to obtain a lawyer, it cannot be said that his rights were not fully protected in this respect.

Although improper leading questions and the answers appear in the record, it does not appear that they were prejudicial to Appellant's cause. Hearsay evidence is admissible in these administrative proceedings.

The specification was amended in accordance with 46 CFR 137.09-28(b) which provides for the correction of harmless errors by deletion or substitution of words. The change of the words "on board" to "in the service of" does not constitute reversible error since it was the correction of an error of form and not of substance. This is made perfectly clear by the allegation in the specification that the incident occurred "ashore." Hence, the evidence introduced in support of the original specification was equally applicable to the amended specification.

The Examiner found the specification and charge proved before adjourning the hearing on 27 October and he did not order Appellant's document revoked until after the opinion was announced on 28 October. The record also shows that the entire written decision of the Examiner was delivered to Appellant at the conclusion of the hearing on 28 October.

The Examiner did err in stating that Appellant testified he went to the ship "to get an ice pick." Nevertheless, that is the most reasonable conclusion to be drawn from Appellant's conduct. The record also reasonably indicates that Kimball was on the floor when he was stabbed the second and third times. In this connection, it is noted that the degree of proof required in these remedial proceedings is substantial evidence rather than proof beyond a reasonable doubt as is required in criminal cases.

Appellant's defense on the merits of the case is based on the claim that he acted in self-defense after Kimball had drawn a knife during their earlier argument. But Thompson testified that no

dangerous weapon was displayed at this time; and Appellant could not have known what was said to Thompson by Kimball while Appellant was absent from the barroom. Appellant's testimony that his only purpose in returning to the barroom was to get his phonograph recordings is not corroborated by other evidence. If Kimball had reached for his knife, with intention of attacking Appellant, as Appellant entered the barroom, it is very, improbable that Kimball would not have had time to get his knife out before he was stabbed with the ice pick the first time; and it seems that Kimball still would have been in a position to get his knife out if he had been standing after the first blow. It is established by Appellant's own testimony that he did not give Kimball a chance to get his knife out. This testimony is supported by the absence of any evidence that Appellant received so much as a scratch in the encounter. The Third Mate on watch did not see any blood on Appellant when he returned to the ship. If Kimball did not have time to get his knife out of his pocket, Appellant must have had the ice pick in his hand when he entered the barroom and approached Kimball. This definitely stamps Appellant as the aggressor.

Hence, the premeditated nature of the attack by Appellant is indicated by the logical inference that after the argument, Appellant retreated from the scene and later returned with an ice pick to attack Kimball. In addition to the fact that there was a lapse of time between when the provocative language was used by Kimball and when Appellant returned to the barroom, mere words do not justify assault and battery no matter how abusive and insulting they are. Appellant retaliated after deliberation and reflection by returning and assaulting Kimball by way of revenge at a time when Appellant had no reasonable basis for apprehension of immediate danger to his person. Under these circumstances, the evidence as to the respective characters of the two seamen is not sufficient to permit Appellant's claim of self-defense to prevail. This was a serious offense which might have resulted in fatal consequences to Kimball.

Since Appellant was afforded full opportunity to present evidence at the hearing, the request for a rehearing is denied.

ORDER

The order of the Examiner dated at New Orleans, Louisiana, on

28 October 1954 is

AFFIRMED.

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

Dated at Washington, D.C., this 1st day of July, 1955.

***** END OF DECISION NO. 821 *****

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