

In the Matter of Merchant Mariner's Document Z-491282 and all other
Seaman Documents

Issued to: FREDERICK J. SMITH

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1466

FREDERICK J. SMITH

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-19

By order dated 27 March 1964, an Examiner of the United States Coast Guard at Philadelphia, Pennsylvania, revoked Appellant's seaman's documents upon finding him guilty of misconduct and incompetent. The specifications found proved allege that while serving as engine utility on the United States SS DEL VALLE under authority of the document above described, on or about 2 December 1962, Appellant, at Matadi, Republic of the Congo (Leopoldville),

- (1) killed another member of the crew; and
- (2) by killing the other, during a period of mental insanity, demonstrated a propensity to endanger the safety of other personnel aboard the vessel.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of guilty to the charge and specification of misconduct and not guilty to incompetence. The guilty plea was

later changed to "not guilty."

The Investigating Officer introduced in evidence entries in the Official Log Book and shipping articles of DEL VALLE, and a record and judgment of a Congolese court (in French and in translation) certified under the seal of a U.S. Vice-Consul. Two other State Department communications of no relevance to this proceeding were also introduced, but they had no effect on the decision.

In defense, Appellant made an unsworn statement.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charges and specifications had been proved. The decision was served on 1 April 1964. Appeal was timely filed on 22 April 1964.

FINDINGS OF FACT

On 2 December 1962, Appellant was serving as engine utility on the United States SS DEL VALLE and acting under authority of his document while the ship was in the port of Matadi, Republic of the Congo (Leopoldville).

On 7 June 1963, the Court of First Instance of Leopoldville, sitting in first degree criminal jurisdiction, pronounced the following final judgment in a case in which Appellant was accused of a premeditated murder:

WHEREAS the accused appears in person, assisted by his Defense Counsellor OSSEMERCT Alphonse, lawyer at Leopoldville;

WHEREAS it is not disputed that the accused who was under the influence of alcoholic drink, delivered a blow with a knife to Robert HAMPTON KLINE on December 2, 1962, at Matadi, and that this blow caused the death of the victim.

WHEREAS it is established by the expert medical testimony delivered by the psychiatrist, designated by the Court, that the accused, who underwent an operation for a brain fracture at the end of 1959, was at the moment of the crime not

responsible psychologically for his acts and his action; that the expert also notes that the accused is an individual dangerous to society and that his internment in a centre specializing in the treatment of psychically insane persons for a long period of time is necessary;

WHEREAS, according to the general principles of the penal code, penal judgment can be exercised only against those persons responsible for their acts and, consequently, the accused having been declared not responsible at the moment of the offensive deed should be acquitted of the deed with which he is charged:

WHEREAS the Court cannot order the internment of the accused, a dangerous individual, since this measure is not within its jurisdiction but that of the medical service;

FOR THESE REASONS

IN VIEW OF the articles of the Penal Code Book I, the Code of organization and judiciary powers and penal procedure;

THE COURT, RULING AFTER FULL HEARING

STATES as law that the accused FREDERICK SMITH John is not penally responsible for his acts;

ACQUITS him of the offense with which he is charged and discharges him...

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

- (1) The charge of misconduct was not sustained by substantial evidence;
- (2) The charge of incompetence was not sustained by

substantial evidence;

- (3) The proceeding was not within the policy and purpose set forth in the regulations;
- (4) Appellant was prejudiced by lack of counsel at the hearing.

The specific assignments of insubstantiality in the evidence of misconduct will not be reviewed here because of the disposition to be made of that charge.

As to the evidence of incompetence, it is urged specifically that:

- (1) There is no evidence of incompetence to perform duties aboard ship;
- (2) The evidence adduced at the criminal trial established incompetence only at the time of commission of the homicide, not a year and a half at the time of hearing;
- (3) There was no evidence of a propensity to endanger other personnel aboard the vessel.

On the question of policy and purpose of proceedings under 46 CFR 137 it is said:

- (1) Acts of misconduct or incompetence committed as here must have some relation to the document holder's duties;
- (2) There is no evidence that any conduct in this case constituted a danger at sea.

In addition to a well prepared brief, Counsel has provided a psychiatric report made on Appellant about five weeks after the hearing.

APPEARANCE: Stanford Shmukler, Esquire, Philadelphia, Pennsylvania

OPINION

I

To dispose of the misconduct first, I hold that the findings of the Examiner as to misconduct and incompetence are inconsistent and the first must yield to the second. It was specifically found by the Examiner that the homicide was committed "during a period of mental insanity."

It is true that in proceedings looking to the preservation of safety at sea the test of incompetence is not such as is required to establish a defense to a criminal charge. In many instances one act may be an act of misconduct for which the party is responsible and may also demonstrate a degree of incompetence for sea service. But the degree of incompetency found here is such as to negative responsibility for an act of misconduct.

The only probative evidence of a wrongful homicide in this case is contained in the judgment of the Congolese court, under the seal of the U.S. Vice-Consul, admitted into evidence pursuant to 28 U.S.C. 1740. This judgment of a foreign court is, of course, not binding on the Examiner. Had there been independent eyewitness testimony before the Examiner as to the circumstances and the condition of Appellant he would have been free to reject the finding of incompetence by the foreign court. But the judgment of the court, standing alone, as I see it, is indivisible. Insofar as it proves a homicide, it proves a homicide excusable by reason of insanity.

On this record, the only finding that can be made is of incompetence.

II

It is beyond question, and it appears to be conceded by Counsel, That there is substantial evidence of incompetence at the time of the criminal trial. The question then is whether there is substantial evidence of incompetence at the time of hearing. The

record indicates a brain injury to Appellant in 1959, and there is an implication in the Leopoldville judgment of causal connection between that and the irresponsibility of 2 December 1962. A condition existing that long can be presumed to continue. That it has continued is supported by the testimony of the psychiatrist, recounted in the judgment, that Appellant required internment in a center specializing in the treatment of psychically insane persons for a long period of time thereafter.

This is sufficient for the Examiner to have concluded that on the date of hearing Appellant's condition rendered him unfit for service at sea.

As to whether this incompetence is of the nature contemplated in 46 CFR 136.05-20(a)(3), it is not enough to say that there must be proof of an inability to do work of one sort or another. The performance of required duties must be in a manner conducive to safety at sea. Appellant may be an expert engine utilityman, but if in the performance of his duties he may endanger others he is not competent for such service.

The act establishing incompetence need not be one directly involved in the performance of duty. It is enough that the conduct be of the sort that would, if carried over to shipboard, endanger life or property. The killing of another is such an act.

It is urged that a killing such as proved here cannot lead to a finding of a dangerous propensity. One act can lead to such a finding. In *Boudoin v. Lykes Bros. S.S. Co.* (112 F. Supp. 177, affirmed 348 U.S. 336) a finding was made that a certain seaman "was a person of dangerous propensities and proclivities" such as to render the vessel on which he served unseaworthy, yet the assault and battery in that case was the first recorded act of misconduct on the part of the seaman and the only one involving actual violence. If a propensity was established in that case, it certainly is in this. Even apart from the original record, in the psychiatric report filed by Counsel is found this language:

"However by this one act he has shown that when provoked to an extreme degree he is capable of reacting with force, a reaction not unusual for many people under certain extreme conditions of stress and also under the influence of alcohol.

Of the seaman's life, the Supreme Court has said:

"From the earliest times, maritime nations have recognized that unique hazards, emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements, and the limitations of human adaptability to work at sea, enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with constant shuttling between unfamiliar ports to deprive the seaman of the comforts and opportunities for leisure, essential for living and working, that accompany most land occupations. Furthermore, the seaman's unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life." *Aguilar v. Standard Oil Co.*, 318 U. S. 724, 727.

So considered, the seagoing life is seen as one precisely apt to stimulate Appellant's propensities.

III

The only question remaining is whether Appellant was prejudiced by his failure to have counsel at the hearing.

Appellant was advised of his right to counsel by the Investigating Officer four days before the hearing. R-3. He was advised of this right by the Examiner on several occasions and even urged to exercise it. R-1, 2; R-8; R-9; R-10 (three times). The record is clear that Appellant understood his right.

His conduct on the record was rational. His statements were lucid, they conformed to those of a person who understood the proceeding. He made a decision to change a plea of guilty to one of not guilty. He persuaded the Examiner to strike an allegation of "malice aforethought" from the misconduct specification.

It cannot be said from this that he was prejudiced by his

voluntary and informed waiver of counsel.

I will point out also that counsel at the hearing could have done only two things which were not done. The evidence against Appellant could not have been excluded and it is substantial. But counsel might have persuaded the Examiner to dismiss the misconduct charge. This is being done now. Second, he might have introduced additional evidence of present psychiatric condition. Counsel has done this on appeal and I have given it full consideration, finding in it additional support to the Examiner's decision.

CONCLUSION

I conclude that the charge of misconduct in this case was not proved, but that the charge of incompetence was proved by reliable, probative and substantial evidence.

ORDER

The findings of the Examiner on the charge of misconduct are SET ASIDE. The findings of the Examiner on the charge of incompetence, and his order, dated at Philadelphia, Pennsylvania, on 27 March 1964, are AFFIRMED.

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

Signed at Washington, D.C., this 11th day of August 1964.

***** END OF DECISION NO. 1466 *****

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