

In the Matter of License No. 141597
Issued to: PHILIP M. MOHUN Z 73340-D1

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1472

PHILIP M. MOHUN Z 73340-D1

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 15 November 1963, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for six months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as master on board the United States SS AZALEA CITY under authority of the license above described, on or about 3 August 1963, Appellant, upon leaving the port of Ponce, Puerto Rico, negligently failed to determine adequately the vessel's course made good, thereby contributing to her grounding on Bajo Cayo Cardona.

A second specification alleged failure to proceed at moderate speed in reduced visibility. This was finally dismissed.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the testimony of three deck officers of AZALEA CITY and, by stipulation with counsel, a precis of the testimony of a fourth deck officer.

In defense, Appellant offered in evidence his own testimony and the stipulated testimony of a local pilot at Ponce.

Both sides entered documentary evidence in the form of charts, log records, and the like.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and one specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant, for a period of six months on twelve months' probation.

The entire decision was served on 20 November 1963. Appeal was timely filed on 11 December 1963.

FINDINGS OF FACT

On 3 August 1963, Appellant was serving as master of the United States SS AZALEA CITY and acting under authority of his license while the ship was in port of Ponce, Puerto Rico. AZALEA CITY, a "container ship" with a large "sail area," was loading for a voyage to New York. Draft on sailing was 19' forward and 25' aft.

There had been intermittent rain squalls the previous night and in the early hours of 3 August. At about 0355, with no rain, the vessel unmoored under broken clouds from Berth #3, Municipal Pier.

Appellant, who holds a pilot's endorsement for Ponce harbor, was acting as his own pilot. At all times material he held in his hand the chart for the area, C. & G.S. 927 (Bahia de Ponce and Approaches).

The chief mate was on the bow; the third mate was astern. Each had orders to watch out for certain aids to navigation to insure that the vessel kept clear of the shoal water to the north.

To assist the chief mate in estimating the distance off the "finger pier" projecting southwest from the main Municipal Pier, Appellant arranged to have an automobile with lighted headlights on the end of it.

The second mate was on the bridge with Appellant, manning the telephone, in direct communication with the mates forward and aft. The fourth mate alternately observed the radar and looked out from the flying bridge.

Both radar and fathometer were in operation.

The Captania range determines a course of 195° true for outbound ships. A flashing green buoy is located about 125 yards east of the range line and about 250 yards north of the corner of the Municipal Pier. About 400 yards east of the range line and about 650 yards south of the end of the Finger Pier is flashing red Buoy "4".

About one mile down the range from the pier, can buoy "1A" marks the edge of Bajo Cayo Cardona, a shoal extending out from Cayo Cardona. The buoy is about 250 yards west of the range line. About 1400 yards further south, Buoy "2A", about 300 yards east of the range line, marks the western end of Bajo Tasmanian.

The lighted entrance buoys, "1" and "2" marking the fifty foot curve, on each side of the range line, are about half a mile south of "2A".

AZALEA CITY was successfully maneuvered onto the range off the Pier. During this activity rain began again and visibility became variable.

At 0415, with the vessel on 190° true, five degrees leeway being allowed to offset the easterly winds, AZALEA CITY came slow ahead. Half ahead was rung up; then, at 0415 there was an increase to full maneuvering speed, 60 R.P.M.

The Finger Pier was passed about 1000 feet off.

Just before 0418 Appellant saw Cayo Cardona light. The

bearing, taken from radar, was 235° true. Almost simultaneously Buoy "4" was dimly sighted in the rain, abeam to port. A heavy squall with gusts up to force 7 came from the east. Revolutions were increased to 80, full sea speed. The time was 0418.

The green lighted buoy and the automobile on the pier were still visible astern although the range could not be made out.

At about 0420 or 0421 the entrance buoys were sighted. The vessel was headed squarely between them. At 0423 the vessel grounded.

Buoy "1A" was seen ten feet off on the port beam.

Because of the nature of the appeal, certain procedural facts must be noted.

The hearing opened on 3 September 1963. In all, there were eight sessions.

After having heard closing arguments, the Examiner advised Appellant that "the hearing is complete in all particulars except for the decision and the decision is reserved and will be sent to you in writing. . . ." (R172-173). It was then agreed that service would be made on counsel.

The Examiner invited Appellant to deposit his license so that if an outright suspension were ordered it could be made effective as of the date of deposit. He stated however, that if no outright suspension were ordered or if the charge were dismissed the license would be returned by mail on the same day that the decision would be mailed. Appellant retained his license.

In the decision of 15 November 1963, the Examiner wrote (p. 13), "Subsequent to making the above findings, I have ascertained the prior record of the person charged . . ."

BASES OF APPEAL

Five points are raised on appeal.

- I. The Examiner misunderstood the testimony of the chief mate, upon which he placed great reliance in making findings of fact.
- II. The Examiner's opinion that Appellant could have returned to the berth on finding strong winds and heavy seas was (a) improper, in that the issue was not raised on the record, and (b) erroneous, in that there is no evidence in the record to support it.
- III. The Examiner erred in his finding that there was no evidence of observations being made between 0418 and 0423 to determine the course made good, since there is evidence that the entrance buoys were sighted during this time and the vessel appeared to "be in the center of these two buoys."
- IV. Appellant used the "utmost care."
- V. The Examiner erred in not affording Appellant an opportunity to testify about his prior record and to introduce commendatory testimony.

APPEARANCE: Schwartz and O'Connell, New York City, by Marvin Schwartz, Esquire.

OPINION

I

Analysis of the testimony of the chief mate reveals a discrepancy in his location of the vessel at the time of shaping up on channel heading. The mark he placed on the chart during the hearing, to indicate the "general area" of the ship's position, is over 800 yards from the finger pier, while his own testimony and that of others show that his contemporaneous estimate of the greatest distance off was 1200 to 1500 feet. The latter estimate would place the vessel just about on the desired range. The position marked on the chart places it well to the west. The Examiner found that the vessel was at all times to the west of the intended track.

Whether the Examiner erred in predicating his finding on manifestly less reliable evidence I need not decide. For the purpose of this appeal an assumption most favorable to Appellant will be made, that the vessel at the time of starting out of the harbor was on the range.

II

On the second point of the appeal it may be conceded that the issue of whether Appellant should have abandoned his plan to depart when weather conditions deteriorated was not raised on the record. Further, whether a prudent seaman would have got underway is irrelevant to the question whether Appellant failed adequately to determine a course made good. That determination in this decision is made without regard to the question of prudence.

III

On Appellant's third point, there is a great difference between saying that no navigational aids were observed and saying that no observations were made to determine the course made good. Two buoys were sighted between 0418 and 0423, it is true, but the sightings were put to no good use in determining the position of the ship.

IV

The argument that Appellant used "utmost care" must be rejected. He did do many things that a prudent pilot would do. He saw to it that an automobile was stationed on the end of the finger pier, with headlights on, to help the chief mate in obtaining the distance off. He had mates stationed fore and aft in direct telephone communication with a mate on the bridge. He utilized another mate at the radar and at the flying bridge. He held the appropriate chart in his hand. He had radar and fathometer in operation.

Unfortunately the use to which information derived from these sources was put was not such as to negative negligence. To the converse, the failure to use the available information constituted

negligence.

When there exists a known hazard near a vessel's intended track, such as the shoals in this case, it is always desirable to have laid off ahead of time a danger bearing. It is a truism that fixed aids, when available, should be used to fix positions or to determine danger bearings. But this does not mean that buoys should be disregarded.

The entrance buoys in this case were the only aids ahead of the ship in a favorable position for taking danger bearings. The fact that two buoys were available for the purpose increases the reliability of this supplementary method of piloting. When these buoys were first sighted application of predetermined danger bearings would have immediately shown the vessel to be in danger.

While affirmative use could have been made of these buoys, their aspect on sighting should also have given cause for alarm.

Appellant concluded that since the vessel was headed squarely between them she was safely in the channel. The opposite conclusion should have occurred to him, for, on the heading of 190° true, five degrees to the left of channel course, both buoys should have been on his starboard bow at all times until Buoy "1A" should have been abeam.

Other means were at hand to have discovered the set as early as 0418. A range and bearing were obtained on Cayo Cardona light. To obtain a fix by a single radar range and bearing is not a satisfactory method. It must not be overlooked, however, that other prominent objects were available to have been utilized at the same time.

Simultaneously, Appellant had in sight Cayo Cardona, the finger pier, the green buoy, and Buoy "4". He did not use them to establish his position by visual bearings.

Appellant's testimony as to what he did do appears a bit confused. At R-136, after stating that he got a bearing on Cayo Cardona, he testified:

"Q. Is there a line on this chart that indicates that bearing that you got from Cayo Cardona?

A. Yes, sir.

Q. Would you please point it out with the dividers?

A. This is the line. (Indicating)

Q. What kind of bearing is that? Did you get that visually [or?] by radar?

A. Radar.

Later, at R-152, appears:

Q. When did you see Cardona Light?

A. Approximately at the same time that I saw the red buoy or perhaps a second before I saw Cardona Light. When I got squared away I didn't reach it yet. Then I got the report of 4 points on it. It was 2:35." [Sic transcript]

(I note here that the line of bearing from Cayo Cardona referred to at R-136 is one of three appearing on the chart. However, as one of them is labeled "235" and as the other two have no apparent relevance to any testimony or to the navigation of the vessel prior to the casualty, I conclude that "2:35" at R-152 is a bearing, not a time, and that the line labeled "235" is the line identified).

Later, at R-155, Appellant testified:

Q. That would be Cayo Cardona?

A. Yes.

Q. What was the range?

A. I forget. I don't remember that.

Q. Was the range plotted?

A. No, it wasn't plotted.

Q. Was the bearing plotted?

A. In my mind it was plotted. No.

Several things here are worthy of comment.

First, of course, as already noted, there were identifiable points visible to the eye which were not used to obtain a fix by true bearings.

Second, Appellant was satisfied with a radar bearing on Cayo Cardona although he had it visually.

Third, bearings that are plotted only in the mind of the observer are of little use unless significance has already been established, as in a danger bearing, and the same is true of ranges.

Next, there appears here a complete contradiction. There is an unequivocal statement that the bearing on Cayo Cardona was not plotted. But there is the earlier testimony that a line on the chart indicates the bearing and that the bearing was obtained by radar.

This can be resolved, I believe, by reference to earlier testimony. At R-128 appears this:

"Q. Where was this chart when you were leaving Ponce?

A. In my hand.

Q. Where was it from the time that you left the dock until the time that the vessel touched aground?

A. In my hand."

Later, on the same page, is this:

"Q. Are there any bearings on here that were later transferred to the chart on the vessel, that you recall"

A. I believe so, I believe he did."

I conclude, from the fact that the chart in evidence never left Appellant's hand from unmooring to grounding, and from the fact that some bearings were placed on it later for some unspecified reason, that the bearing labeled "235" was one of these and that the bearing of Cayo Cardona was not plotted at the time it was obtained.

Had it been, the fact that Buoy "4" was seen almost simultaneously was enough to show Appellant that his vessel was already some 150-175 yards to the west of the range and that corrective action was necessary as early as 0418.

The fundamental devices of piloting that were available to Appellant were not utilized.

V

Appellant's position on the procedural matter of introduction of prior record and opportunity to be heard thereon is well taken.

46 CFR 137.20-160 declares that the prior record must not be disclosed to the examiner until after conclusions as to each charge and specification have been made. Paragraph (b) of that section speaks of a record unavailable "at the hearing." It contemplates also the presence of the person charged at the time the record is inquired into, unless presence has been waived by his express consent on the record or by his failure to appear after due notice, as in *in absentia* proceedings.

I think also that due process should permit a party to attack a record as erroneous or to submit supplementary matter. In this case, Appellant intimates that he wishes to explain why a former course of conduct has changed and to introduce commendatory matter before the examiner. He should have that opportunity.

On the remand of this case, the Examiner may consider any evidence to be introduced, both pro and con, to determine an appropriate order.

VI

I take note of one other matter not raised on appeal.

The order in this case suspended on probation all documents issued to Appellant.

It seems to me that the order here comes within the exception clause of 46 CFR 137.20-170. Appellant's negligence is peculiarly that of a licensed deck officer. There is no reason why any action should be taken against his Merchant Mariner's Document.

CONCLUSIONS

I conclude that there is substantial evidence that Appellant negligently failed to determine adequately the course that his vessel was making good on departure from Ponce, Puerto Rico on 3 August 1963, with a resultant grounding of the vessel.

I conclude also that the procedure by which Appellant's prior record was made known to the Examiner denied him the opportunity to introduce evidence favorable to himself.

ORDER

The findings of the Examiner that the charge and specification were proved are AFFIRMED.

The order is VACATED and the case is REMANDED to the Examiner for further proceedings consistent with the opinion herein.

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

Signed at Washington, D. C., this 15th day of October 1964.

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