

In the Matter of Merchant Mariner's Document No. Z-600268-D6 and
all other Seaman Documents
Issued to: WARREN MONTGOMERY

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1474

WARREN MONTGOMERY

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 14 April 1964, an Examiner of the United States Coast Guard at New York, New York, Appellant's seaman documents for four months outright plus four months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a galley utilityman on board the United States SS UNITED STATES under authority of the document above described, on 26 October 1963, Appellant wrongfully struck and cut galley utilityman Hendricks with a dangerous weapon, to wit: an aluminum bar.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification. The Investigating Officer introduced in evidence the testimony of the alleged victim and two other witnesses as well as extracts from the Shipping Articles and an entry in the Official Logbook with attached statements by the three Government witnesses and Appellant.

In defense, Appellant offered in evidence his testimony and that of another crew member. Appellant testified that he had picked up an aluminum bar in self-defense but that he had dropped it and Hendricks was injured while the two seamen struggled for possession of the aluminum bar which Hendricks had gotten before Appellant retaliated.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved.

FINDINGS OF FACT

On 26 October 1963, Appellant was serving as a galley utilityman on board the United States SS UNITED STATES and acting under authority of his document while the ship was at sea.

About 2110 on this date, Appellant and galley utilityman Hendricks engaged in a heated argument when Hendricks accused Appellant of not doing his share of the work. It was the job of these two seamen to clean the cooking pots. Appellant left the pot-washing room and Hendricks followed as the argument continued. When Appellant reached for his back pocket, the only other person present, galley utilityman Boyd, told Appellant not to use a knife. Hendricks observed this movement by Appellant and grabbed one of the aluminum bars from the dish rack and held it in a defensive position in front of him. Appellant then picked up one of the aluminum bars which were approximately 38 inches long, 1 1/2 inches wide and 3/4 of an inch thick.

At this point, Boyd stepped between the other two seamen. Appellant swung his bar and Boyd had to duck in order to avoid being hit. He then left to get help. Hendricks dropped his bar and lunged at Appellant in an attempt to get hold of Appellant's bar, but the latter swung the bar cutting Hendricks' left ear to such an extent that it required eight stitches. The two seamen tussled briefly before other crew members arrived and separated them.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that the Examiner's decision is inconsistent with his finding that Hendricks picked up an aluminum bar first. Appellant was deprived of a key witness since one of the seamen subpoenaed by the defense did not present himself at the hearing.

APPEARANCE ON APPEAL: Zwerling and Zwerling of New York City by
Irving Zwerling, Esquire, of Counsel

OPINION

As a matter of credibility, the Examiner found in favor of Hendricks' version which is presented in the above findings of fact. There is no reason to disturb this determination by the Examiner since it is based on his observation of the witnesses and also a lack of consistency between Appellant's testimony and his statement attached to the logbook entry. In his statement, Appellant did not claim that he dropped his bar while attempting to take away the bar held by Hendricks. But the letter account of the incident appeared in Appellant's testimony.

The evidence is indefinite as to whether or not Appellant first pulled a knife out of his back pocket and then put it away, as Hendricks testified and Appellant completely denied. This issue is immaterial to this decision except that the movement of Appellant's hand to his pocket and Boyd's remark about a knife indicate that apprehension of danger was the reason for Hendricks' act of picking up a bar before Appellant did. Hence, it appears that Hendricks' motive was self-defense rather than aggression.

On the other hand, the Examiner's conclusion that Appellant was the wrongful aggressor is further supported by the testimony of both Hendricks and Boyd that Appellant swung his bar, when Boyd stepped between the other two, and almost struck Boyd. This was found as a fact by the Examiner although directly denied by Appellant. In addition, it is improbable that Hendricks would have

received a cut on the ear requiring eight stitches unless the injury resulted from a blow of the bar when swung by Appellant rather than a struggle for possession of one of the aluminum bars which was held by both of them. Clearly, there was no justification for this conduct by Appellant despite the fact that Hendricks was the first to pick up one of the aluminum bars.

There is no evidence in the record that Appellant was improperly deprived of the testimony of a witness. Counsel obtained subpoenas for two witnesses from the Examiner but only one of them appeared to testify. The other witness was not mentioned subsequent to the time when the subpoenas were obtained at the hearing. After one of the witnesses testified, counsel rested without qualification in this respect.

ORDER

The order of the Examiner dated at New York, New York, on 14 April 1964, is AFFIRMED.

P. E. Trimble
Rear Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D. C., this 6th day of November 1964.

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