

In the Matter of Certificate of Registry No. 56548 and  
All Other Seaman's Documents  
Issued to: NORBERT STANLEY O'KON, Z-1040994

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

1485

NORBERT STANLEY O'KON

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 23 June 1964, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The three specifications found proved allege that while serving as a Senior Assistant Purser on board the United States SS AMERICA under authority of the document above described, on or about 13 August 1963, Appellant 1) wrongfully entered a passenger's stateroom, 2) assaulted a passenger, one Frederick M. Stephen, Jr., and 3) wrongfully committed an act of sexual perversion with the said passenger.

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 several witnesses and entries in the Official Log Book and in

the medical records of AMERICA.

In defense, Appellant offered in evidence the testimony of several witnesses his own testimony, and certain documentary evidence in the form of medical records and personnel records.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and first and third specifications had been proved. The second specification was held merged with the third. The Examiner entered an order revoking all documents issued to Appellant.

The entire decision was served on 25 June 1964. Appeal was timely filed on 29 June 1964.

#### *FINDINGS OF FACT*

On 13 August 1963, Appellant was serving as a Senior Assistant Purser on Board the United States SS AMERICA and acting under authority of his certificate of registry while the ship was at sea.

One Frederick Stephen, aged twenty, was a tourist class passenger on the eastbound voyage, sharing cabin U-88 with three friends of about the same age, name Gutierrez, Christensen, and Fechter. Gutierrez wore a beard.

At some time during the voyage Appellant was called to a bar where the Stephen group was having difficulty over a check. Appellant would not permit the charges to be carried on a bill, credit being prohibited by the vessel operators, and one of the young men went to their room to obtain cash.

At dinner on the night of 12 August 1963, Appellant sent champagne to the table of this group who were celebrating Christensen's birthday.

About 3:00 A.M. on 13 August, Appellant went to his room and sent for some ice. The two crewmembers with whom he spoke at this time observed that his face was flushed.

Stephen retired about 4:00 A.M. At about 6:00 A.M. he woke up

and found Appellant kneeling on the deck beside the bed, holding Stephen's penis in his mouth. Stephen struck Appellant forcefully on the left cheek. Appellant ran from the room.

Gutierrez was wakened by the sounds and saw a man in ship's officer's uniform leaving the room.

On complaint to the chief officer of the intrusion by a purser, all four tourist class pursers were sent for. They came to U-88 one at a time. The fourth to arrive, Appellant, was immediately identified by Stephen as the intruder.

Appellant had a bruise on his left cheek. He explained this to the chief officer by saying that he must have fallen down. He had told the ship's doctor that he had fallen downstairs the night before. Subsequently, on an accident report form which he executed, he wrote as the cause of the injury, "unknown."

Appellant has no prior disciplinary record as a merchant seaman.

#### *GROUND'S FOR APPEAL*

Appellant urges four points as grounds for appeal.

*Point I.* The decision was based on grounds which were arbitrary, unreasonable and not supported by the evidence.

- a) The Examiner rejected out of hand Appellant's evidence that sought to attribute to Stephen a motive for making a false accusation.
- b) The Examiner prejudged the issues by giving too much weight to a minor error in Appellant's testimony about time when in fact Appellant had not erred, at the same time dismissing as minor errors in testimony against Appellant.
- c) There was a lack of objectivity in the celerity with which the Examiner dismissed the contention that Appellant's face had been bruised because of an accident in his own room.

*Point II.* The reliance of the Examiner on the testimony of an unqualified expert denied Appellant a fair hearing.

*Point III.* The testimony of the expert witness was unreliable and unqualified.

*Point IV.* The identification of Appellant and corroboration of the accusation are insufficient in law.

APPEARANCE: Zwerling and Zwerling, New York City, by Irving Zwerling, Esquire.

### OPINION

#### I

Appellant's second and third points are discussed first. They deal with the testimony of Dr. Osher, ship's surgeon of AMERICA. For understanding of the effect of his testimony, that of certain other witnesses must also be considered.

The doctor was first called to testify about the events of the morning of 13 August to which he was an eye witness. On cross-examination by Appellant's counsel he then testified that Appellant's reputation for dealing with passengers was excellent.

In defense, Appellant was permitted, without objection, to introduce opinion evidence as to his character. R-188; R-210; R-218. A fourth witness was permitted to testify, over objection, that she did not feel that Appellant was capable of performing the act charged. R-231. Appellant's wife then testified, without objection, as to her opinion of his character and as to whether he would have committed the act charged. R-243 -- R-253.

According to Wigmore (*Evidence*, 1983), in establishing the character of an accused, "*reputation* is in the majority of jurisdictions the *exclusive* mode of proof." In the last paragraph of footnote 2 to this section appears this:

"The question, 'Do you believe that the defendant (or, a man of his character) would be likely to commit an act of the kind here charged?' which was usual in the early orthodox English practice ... would be equally forbidden by the American Opinion rule as above accepted."

The testimony here summarized of the five character witnesses for Appellant was clearly personal opinion evidence and not evidence of reputation. However, except in one instance, no objection was raised. The overruling of the objection was not in accordance with the rule as stated by Wigmore, but, since this is an administrative and remedial proceeding, "strict adherence to the rules of evidence observed in courts is not required." 46 CFR 137.20-95. Further, the admission of the evidence was to Appellant's benefit. (At this point I wish to make it clear that I am not saying that the Opinion rule necessarily holds in these proceedings. Under the circumstances of this case, however, I am willing to apply it vigorously for Appellant's benefit).

Appellant's character as a purser and as a person who might or might not be of the kind to commit the act charged had been put in issue. Three witnesses were therefore called in rebuttal. The first of these the doctor who was recalled. His testimony, which is specifically attacked on appeal, will be considered last.

The second rebuttal witness, the executive officer of AMERICA, was objected to generally by counsel on the grounds that evidence of character may not be rebutted. This is incorrect, and the Examiner properly denied the objection. R-343. It was then established that the witness had knowledge of Appellant's reputation. He was asked to state what that reputation was. He introduced his testimony with a statement that the evidence was based upon conversations with others. Although this is, in fact, the primary way in which one's reputation becomes known to another, the Examiner interrupted the witness. "Can you testify or give any testimony regarding your opinion as to Mr. O'Kon's character? ... On the basis of your conversation with him, or of any incident which involved him during the course of your employment aboard the vessel ..." R-344. There was no objection, and the witness went on to give his personal opinion of Appellant.

This is precisely what is prohibited in the "American Opinion

rule."

The next witness was asked to testify about Appellant's reputation. Again without objection, he too gave his opinion on Appellant's character. It appears that this evidence had no influence upon the Examiner, for when he clearly set forth the bases of his conclusions he made no reference to it. (D-12).

To turn now to the testimony of the doctor we see that he was first asked whether he was familiar with Appellant's "character and reputation." Knowledge having been established, he was asked, "What is that character and reputation?" R-306. The reply could have remained within the bounds of the rule.

It did not. It gave an opinion as to character.

Counsel, objected, "Mr. Examiner, I strongly object not only to the characterization but to the obvious attempt by the Government to take a witness who has been proved to be a liar and try to correct his character now." The first part of the objection was overlooked and the second part led to lengthy argument. After the Examiner had indicated that he believed that evidence such as Appellant had presented as to character (with respect to the act charged) should more properly come from medical sources, he overruled the objection. R-307.

The Investigating Officer then posed questions to the doctor to establish his training in psychiatry. No *voir dire* examination was sought by Appellant's counsel. When the doctor was asked for his opinion "as a medical doctor and psychiatrist as far as your studies have gone," objection was made. The Examiner declared that the question had already been answered. The Investigating Officer pointed out that he had previously examined as to "reputation and character" but was now seeking the doctor's opinion as an expert. Without further objection the opinion was immediately given. R-309.

When asked for the basis of his opinion the doctor stated that another doctor, a passenger, had once told him that Appellant "broke into his room four times during the night after his 13-year-old boy". On another occasion, the doctor testified, he had seen in the hands of a fifteen year old boy an invitation,

signed by Appellant, to a shipboard cocktail party.

On cross-examination on his training in psychiatry, the doctor was asked, "Does that make you an expert?" The reply was, "No." R-320.

The whole of this body of rebuttal evidence raises three questions. First is whether the subject matter is among the exceptions allowing a layman to testify as to opinion. Among these exceptions are some within the medical field. Generally, a layman may give an opinion as to sanity. *Blunt v. United States*, 244 F. 2nd 355, 364 (D.C. Cir. 1957). Intoxication is another condition as to which a lay witness may give opinion. *C.J.S. Evidence* 546 (27). But I think that the condition which the evidence here sought to establish is, viewed as a medical matter, beyond the capacity of the layman. And, of course, viewed as a matter of moral character, it may be limited by the Opinion rule.

Next is the question whether Appellant "opened the door" to such opinion evidence by introducing just such evidence himself. It is plain that Appellant did open his character to attack. But it seems to me that the admission of improper evidence without objection does not mean that further such improper evidence should also be admitted over proper objection. It is true that proper objection was not made in this case, but I am willing to review the matters here as though they had, and I disregard entirely the lay character testimony adverse to Appellant.

Last to be considered is the testimony of the doctor as an expert. "A fact may be testified to by any witness, but, with a few exceptions, an opinion can be given in evidence only by an expert, and the qualifications as an expert and reasons for his opinion are part of the premise for allowing him to testify." *Lyles v. United States*, 254 F. and 725, 731 (D.C. Cir. 1957). Neither of the two essentials is present here. By his own admission the doctor was not an expert in psychiatry. Even if he were, the two facts which he gave as the basis for his opinion are insufficient in law as "reasons for his opinion."

For these reasons all the rebuttal evidence as to moral character is rejected. Insofar as the Opinion of the Examiner (D-19) indicates any reliance on the testimony of the doctor in

reaching findings of fact, I must disagree. On appeal, no consideration is given to this evidence.

## II

It remains then to consider the record apart from the rejected evidence to determine whether the Examiner's findings are adequately supported. It is conceded that in the opinions of five persons Appellant was not the sort of person to perform an act like the one charged. The question is, however, whether the record supports the finding that he did in fact perform the act.

First, I will say that Examiner's Finding of Fact #24 (D-3), that Stephen wore a heavy ring on his hand, has no support in the record and is specifically set aside.

The affirmative evidence against Appellant was primarily the testimony of Stephen who declared that he had recognized the face of the intruder in his room and who identified Appellant before others shortly after the encounter. His testimony is partially supported by that of Gutierrez, his roommate, who saw on the intruder and officer's uniform. There is the additional fact that Appellant had a bruise on his cheek.

The question of the bruise is important for Stephen testified that he had struck the intruder a blow on the face, and in the testimony of the chief officer it appears that Stephen had so stated before the confrontation. R-24.

All this is substantial evidence.

Appellant's denial was coupled with explanations as to the origin of his bruise. The chief officer testified that Appellant had explained the bruise by saying, "I must have fallen." R-32. The doctor testified that on another occasion, Appellant said, "I fell down the stairs last night." R-37.

On an accident report form, identified as filled out in Appellant's own hand, the cause of the injury was given as "unknown."

Appellant's testimony at the hearing was that when he returned to his quarters at about 2:00 A.M. he tripped and struck his face on a chair.

One defense witness who delivered ice to Appellant's room after 3:00 A.M. testified: "I didn't see actually the bruise, but it looked to me it was a little different. I delivered the ice and he had a towel in his hands. I looked up and I know it was a little red." R-179. At another point, this witness said, "I looked in his face, yes ... I would say maybe he was a little red in his face." R-180.

Another defense witness who saw Appellant after the time of the alleged fall testified, "He was kinda flushed a little red." Exhibit A-6.

Appellant did not mention a fall to either of these persons, although he assertedly called for the ice to put it on his face.

From the contradictions in Appellant's versions of his injury, as testified to by several witnesses, and from the testimony that his face was merely flushed after the alleged fall, the Examiner could properly conclude that Appellant's testimony on the essentials should be rejected.

From the affirmative evidence against Appellant, which was probative and substantial, the Examiner could properly conclude that the facts were as he found.

### III

Appellant's Point I on appeal is three-pronged.

First it is asserted, in effect, that the Examiner gave insufficient weight to evidence adduced by Appellant to impugn the motives of Stephen in accusing Appellant. Specific episodes were referred to: trouble over a bar bill, an admonition for wearing inappropriate attire, and a warning that personal whiskey bottles should not be taken into public spaces. If all of these events occurred as Appellant alleged, it would not necessarily follow that the Examiner must believe that Stephen falsely accused Appellant.

But it appears on this record that the allegations were not proved.

The Examiner did accept as true the evidence about the bar bill. He placed it as occurring on the night in question. (D-3, Finding #12), although Appellant's unsupported testimony on the point would seem to place the incident on an earlier occasion (R-256). However, concerning the attire and the bottled whiskey, Appellant called upon another witness to support him, a tourist class steward. His testimony confirms that of Appellant's as to time, place and the substance of the incidents, but it is quite obvious that he is talking about a different group of young men.

According to him the group which gave Appellant trouble that night was a group which he served with drinks in the lounge, on Appellant's account. It was a group that was playing poker, with Appellant watching for some time. The witness even recalled in detail the nature of the hard liquor in the round of drinks. But the group in question was not given hard liquor by Appellant in the lounge; it was given champagne at the dinner table. Also, the group identified by the steward was beardless while one of the group in question wore a beard.

Plainly this evidence is not so persuasive that the Examiner must find that the episode even occurred; much less that it inspired Stephen to testify falsely under oath.

Next it is complained that the Examiner laid too great stress upon a minor error in Appellant's testimony, when in fact it was not even an error. This has to do with the time at which Appellant went to his quarters.

There was some confusion in Appellant's testimony generated by the fact that, unknown to the Examiner up to that stage of the proceedings, the ship's clocks were on that eastbound voyage automatically moved forward one hour every morning at 2:00 A.M.

The confusion may have been compounded by the fact that one of Appellant's own witnesses had earlier testified at five points about events occurring at about 2:30 A.M. R-158; R-162; R-163. No reference was made to the fact that on the morning in question there was no 2:30 A.M.

In any event, while there was difficulty in straightening the matter out during the course of Appellant's testimony, there was obviously no resultant prejudice because the Examiner found, completely in accordance with Appellant's testimony, that Appellant went to his room "about 3:00 A.M." (D-3, Finding #18).

As to the third argument of Point I, that the Examiner was too swift in rejecting Appellant's contention that his face had been injured in a fall in his room, what matters is not the celerity but the finding was well-founded. This has already been discussed.

#### IV

Appellant's fourth point is shortly stated, "IDENTIFICATION AND CORROBORATION FAIL TO MEET THE TESTS OF LAW HEREIN." The brief declares:

"There has never been any substantiation or corroboration of this charge. The evidence clearly shows that the only person that even witnessed the alleged assault was the complainant herein. All other testimony merely *repeats or rephrases* the testimony of statements made by the complainant. There is absolutely no corroboration of this alleged incident ... Corroboration must be from independent sources with independent knowledge."

In support of this argument, three New York cases are cited: *People v. Trowbridge*, 305 N.Y. 471, 113 N.E. 2nd 841 (1953); *People v. De Jesus*, 11 A.D. 2nd 711, 204 N.Y.S. 2nd 607 (1960); *People v. Perment*, 13 A.D. 2nd 842, 216 N.Y.S. 2nd 634 (1961).

First let me say that these cases do not stand for the proposition that testimony of a complaining witness must be corroborated by testimony from independent sources with independent knowledge. What they all say is that under a New York statute (Code of Criminal Procedure, 393-b) which permits a witness who has previously identified a person to testify to such previous identification, it is error to permit another witness, say a police

officer, also to testify to the earlier identification.

The theory is that in a close case where the jury must choose between the testimony of a single complaining witness and the defendant's testimony, to permit repetitive evidence of prior identification might so bolster the complainant's testimony as to influence the jury unduly.

Even in New York, however, admitting such testimony by police officers is not always reversible error. *People v. Alexander*, 212 N.Y.S. 2nd 518.

This New York rule, if applied to the instant case, would not mean that Stephen's testimony required corroboration but rather that the testimony of witnesses who testified that Stephen identified Appellant as his assailant should have been excluded. These proceedings are not bound by New York law. I might add, however, that the New York rule is designed to prevent undue influence on juries, and such rules are inapplicable to administrative proceeding.

Since the cited cases are completely inappropriate, we are left with the naked proposition that corroboration of a complaining witness is essential. While this rule may obtain for some crimes in certain jurisdictions, and Appellant has referred me to none, it does not hold for these administrative proceedings.

In three earlier cases involving molestation of passengers it has been noted; "This would ordinarily be sufficient since corroboration is not essential in such cases and is indeed rarely available" (Appeal Decision No. [1168](#)); "... corroboration is not necessarily required depending on the circumstances of the individual case" (Appeal Decision No. [1185](#)); "... corroboration is not considered to be an essential element to meet the tests of substantial evidence in these proceedings ..." (Appeal Decision No. [1228](#)).

Even so, in this case there is corroboration. The fact of an unexplained bruise on the cheek of a person who, if he had performed the act in question, might well be expected to exhibit such a mark, is evidence from an independent source.

*CONCLUSIONS*

I conclude that there is in this record reliable, probative, and substantial evidence to support the Examiner's findings as to the ultimate facts.

*ORDER*

The order of the Examiner dated at New York, New York, on 23 June 1964, is AFFIRMED.

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

Signed at Washington, D.C., this 7th day of January 1965.

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