

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-760394 AND
ALL OTHER SEAMAN DOCUMENTS
Issued to: Jesus A. Alfonso

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1516

Jesus A. Alfonso

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 24 November 1964, an Examiner of the United States Coast Guard at New York, New York suspended Appellant's seaman documents for three months outright plus six months on twelve months' probation upon finding him guilty of misconduct. The specifications found proved alleges that while serving as a steward on board the United States SS SANTA MARGARITA under authority of the document above described, on 31 August 1964, Appellant assaulted and battered utilityman Zappi with a toilet brush.

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

The Investigating Officer introduced in evidence documentary exhibits as well as the testimony of the alleged victim Zappi and utilityman Figueroa.

In defense, Appellant offered in evidence his own testimony and that of two other seamen, utilityman Franco and messman Gonzalez. Appellant testified that Zappi went into the middle of the three stalls in the toilet and locked the door; Appellant then talked to Zappi but never touched him; when Appellant was leaving to join Franco, Zappi assumed a fighting pose and "he fell down the toilet because the toilet was wet." (R 100).

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner then entered the order of suspension mentioned above.

On 31 August 1964, Appellant was serving as a steward on board the United States SS SANTA MARGARITA and acting under authority of his document while the ship was at sea.

Appellant, Zappi and Franco were roommates. Appellant and Zappi did not get along very well while Appellant and Franco were friends. Appellant became abusive toward Zappi, on 30 August, after he had thrown overboard some fish heads which he found in their room. (Appellant and Franco had intended to use the fish heads for fishing.) Zappi complained to union delegate Gonzalez about Appellant's conduct and told the delegate that he intended writing to the Coas Guard about it. The delegate passed this information on to Appellant on the afternoon of 31 August.

About 1830 on 31 August, Appellant Franco and Franco saw Zappi go to the toilet and followed him. Zappi entered the middle of the toilet stalls and locked the door. Appellant stood outside the stall as he threatened Zappi and berated him for having told delegate Gonzalez that he was going to write to the Coast Guard about Appellant. Since he could not reach Zappi in the locked stall, Appellant went into one of the adjoining stalls with a thirty-inch long toilet brush, stood on the bowl, and proceeded to beat Zappi on the head with the brush. Zappi suffered a 1 1/4 inch long cut on the head which required three stitches. He received medical treatment aboard from the surgeon and later ashore at a Public Health Service hospital.

Appellant has no prior record.

BASES OF APPEAL

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

1. The Examiner's decision, based on the testimony of Zappi and Figueroa, is contrary to the weight of the probative evidence. The testimony of Figueroa, who claims to have been in the third toilet stall at the time of this incident, contradicts Zappi testimony in several respects and is not worthy of belief. Nevertheless, it impeaches the testimony of Zappi. It is submitted that the entire incident is a fabrication and the result of a conspiracy between Zappi and Figueroa.

2. The manner in which Zappi claims to have been injured is not corroborated and is purely speculative. It was physically impossible for Appellant to have reached over the top of the stall and injure Zappi as he claims.

3. It is submitted that this appeal should be sustained by reversing the Examiner's decision. Alternatively, the order should be modified due to Appellant's prior clear record and the necessity for him to work in order to support his family.

APPEARANCE: Arthur S. Schapira, Esquire, of New York City, of Counsel.

OPINION

The above findings of fact substantially represent the version accepted as true by the Examiner, as testified to by Zappi and corroborated, to some extent, by Figueroa. The latter testified that he saw Zappi leave the toilet stall while bleeding and saying Appellant had hit him.

The inconsistencies between the testimony of Zappi and Figueroa are not considered to be significant. Although Zappi testified that Appellant tried to grab his legs under the toilet stall and Figueroa said only that Appellant was berating Zappi, this difference is accounted for by the fact that Figueroa could not see what Appellant was doing if Figueroa was in one of the

toilet stalls. Zappi stated that both he and Franco told Appellant to stop bothering Zappi while Figueroa testified that he heard only Appellant's voice. This discrepancy could have been because Appellant's voice was the loudest and, hence, the only one which made a lasting impression on Figueroa. Zappi's testimony was that he faced Gonzalez upon opening the stall door after he was injured whereas Figueroa testified Gonzalez "came in" the toilet when Zappi left the stall. This indicates a slight variance in the recollection of the two witnesses, or possibly the same meaning expressed differently. Zappi testified he did not see Figueroa in the toilet but the latter stated he was there and Zappi leaving the toilet stall after he had been injured. As stated by the Examiner, it is quite conceivable that, in the excitement and due to his head injury, Zappi did not notice Figueroa.

It is my opinion that these are relatively minor discrepancies concerning details and may be explained as indicated above or may be attributed to human errors in recalling what occurred at a disorderly scene or while the witness was excited. See *Commandant's Appeal Decisions* Nos. [924](#), [1014](#) and [1437](#). In any event, the fact that there were discrepancies in the testimony of these two witnesses militates against the possibility, as claimed on appeal, that the entire incident is a fabrication resulting from a conspiracy between Zappi and Figueroa. Even Appellant's testimony indicates that, in some manner, Zappi cut his head while in the toilet.

The record disclose other more definite conflicts in the testimony. Appellant testified that neither Figueroa nor Gonzalez were in the toilet during the incident and Gonzales agreed, contrary to Zappi's testimony, that he was not there. Franco testified there was no fight since Appellant followed Franco out on deck when the latter asked Appellant to leave Zappi alone after they exchanged words in the toilet. Yet, Zappi was injured. Due to these and other items of directly conflicting testimony, the matter was reduced basically to an issue of credibility to be decided by the Examiner as the trier of the facts who saw and observed the witnesses. The Examiner specifically stated that he accepted the testimony of the two government witnesses and rejected contrary testimony by Appellant, Franco, and Gonzalez.

Having accepted the fact that it was not physically

impossible, as contended, or even implausible for Zappi to have been injured in the manner he states, there is no reason to reject the Examiner's evaluation as to credibility, especially in view of the conflict between Appellant's and Fracno's testimony as to whether there was any semblance of a fight and Appellant's self-contradictory testimony accounting for Zappi's injury in some improbable way. Until Appellant was confronted with a statement (signed by him and witnessed by Franco) which states that Appellant grabbed Zappi's hands when he threatened Appellant, the latter insisted that he had not touched Zappi (R. 100, 102). After the Investigating Officer produced the statement signed by Appellant, he claimed that he took hold of Zappi's hands to avoid a fight (R. 103) and then Zappi fell down because the toilet was wet (R. 105), but Appellant does not know where Zappi hit his head because Appellant was following Franco away from the toilet when Zappi fell (R. 106). Obviously, this is a highly improbable version in several respects too obvious to deserve further comments. According to the signed statement, Zappi fell against the toilet stall when he pulled his hands free of Appellant's hold. This version seems to be slightly less improbable.

CONCLUSION

In view of the propriety of the Examiner's determinations as to credibility, the testimony of Zappi as corroborated by Figueroa constitutes substantial evidence that Appellant is guilty as alleged. It is agreed that Appellant was injured in the toilet and, in my opinion, the Examiner reached the only reasonable conclusion, based on the evidence, as how it happened.

The order is not excessive for this deliberate offense of assault and battery with a weapon against a fellow crew member. As stated by the Examiner, a more severe order would have been appropriate, in the interest of safety at sea, except that Appellant had no prior record of offense during approximately 20 years at sea. The need for Appellant to go to sea to support his family must be considered subservient to the remedial purpose of these proceedings to promote safety at sea.

ORDER

The order of the Examiner dated at New York, New York, on 24

November 1964, is AFFIRMED.

W.D. Shields
Vice Admiral, U.S. Coast Guard
Acting Commandant

Signed at Washington, D.C., this 16th day of August 1965.

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