

In the Matter of Merchant Mariner's Document No. Z-59417-D1 and all other Licenses, Certificates and Documents.

Issued to: JOSEPH N. CONTE

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

829

JOSEPH N. CONTE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 20 May 1955, an Examiner of the United States Coast Guard at New York, New York, revoked Merchant Mariner's Document No. Z-59417-D1 issued to Joseph N. Conte upon finding him guilty of misconduct based upon one specification alleging in substance that while serving as Master-at-Arms on board the American SS AMERICA under authority of the document above described, on or about 3 April 1955, while said vessel was at sea, he wrongfully molested a Tourist Class passenger, Miss Erna Derricott.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by an attorney of his own selection and he entered a plea of "not guilty" to the charge and specification proffered against him. The Examiner then granted the Investigating Officer's application to take Miss Derricott's deposition at Bremerhaven, Germany.

Thereupon, the Investigating Officer made his opening statement and two of Appellant's witnesses were called out of turn to testify that they saw Miss Derricott accompanied by a bellboy in a restaurant at Bremerhaven later on the day of the incident in issue. This testimony was confirmed by the Tourist Class bellboy who stated that he took Miss Derricott to get something to eat and then took her back to the pier where she had been waiting for her sister.

The Tourist Class Purser, Mr. Malone, testified that at about 1200 on 3 April, Miss Derricott complained to him that she had been approached on deck at 0230 on the same day by a man wearing a blue uniform; and that in the late afternoon of 3 April, Miss Derricott identified Appellant as the man by means of recognizing his voice when he was brought into the Chief Purser's room and also by the word "Master" which was embroidered on his blue uniform. No one else was brought before Miss Derricott for possible identification. After an entry from the Official Logbook was introduced in evidence and the parties entered into a stipulation as to the time of the ship's clocks at the time of the alleged incident, the Investigating Officer rested his case subject to the return of Miss Derricott's deposition.

Three witnesses then testified that they had seen Appellant almost continuously at various time between 0205 and 0300 on 3 April. On the basis of the prior stipulation, this corresponded to 0235 until 0330 Central European Time.

Appellant testified under oath in his behalf. He stated that on the day in question he had the 0000 to 0400 Master-at-Arms watch; he saw various members of the crew while making his rounds on deck but did not see Miss Derricott at any time; he was in the mess hall from 0205 to 0235 ship's time; he had never seen Miss Derricott before being called before her on the afternoon of 3 April; and, at the latter time, Miss Derricott said Appellant was the person who had put his arms around her and tried to kiss her while she was on the open deck.

At a later date, the deposition of Miss Derricott in the form of interrogatories and cross-interrogatories was received in evidence. Miss Derricott stated that she was standing alone on the

Upper Deck at about 0245 C.E.T. and looking over the rail when somebody came up behind her, put his arms around her and started kissing her when she turned to face him; and that she saw the word "Master" on his uniform or uniform cap although it was too dark to see his face. Miss Derricott also stated that she broke away and ran below to tell her sister about the incident but was too scared to tell anybody else about it until the next morning when she told the Tourist Class Purser; and that later she was placed behind a curtain and identified Appellant as the man when she heard his soft voice and the manner in which he paused between words.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his findings and concluded that the charge had been proved by proof of the specification. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-59417-D1 and all other licenses, certificates and documents issued to this Appellant by the United States Coast Guard or its predecessor authority.

From that order, this appeal has been taken, and it is urged that Appellant was not properly identified as the assailant since he was the only person produced for identification by Miss Derricott; Appellant was identified solely by his voice; Miss Derricott stated that it had been too dark on deck for her to see the person's face; and she only described Appellant's physical characteristics when she saw him after the identification of his voice from behind a curtain. Appellant's other major contention is that the defense of alibi was established by the unrebutted testimony of several disinterested witnesses that Appellant was in the crew's mess hall at the time of the alleged molestation.

APPEARANCES: Irving Zwerling, Esquire, of New York City, of Counsel.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On a foreign voyage including the date of 3 April 1955, Appellant was serving as a Master-at-Arms on board the American SS AMERICA and acting under authority of his Merchant Mariner's Document No. Z-59417-D1. From 0000 to 0400 on this date, Appellant was on watch and making his rounds on the various decks of the ship. The Master-at-Arms wore a blue uniform with the words "Master-at-Arms" on it while on duty.

At about 0245 C.E.T. on 3 April 1955, an 18 year old Tourist Class passenger, Miss Erna Derricott, was on the dark, open Upper Deck of the ship when a man in a uniform came up behind her and put his arms around her. When Miss Derricott turned around and faced this person, he started to kiss her and press himself against her. Miss Derricott started to scream but he told her to keep quiet or it would be too bad for her. Then she broke away and started for the door. He grabbed her arm and told her not to tell anybody about what had happened. Miss Derricott ran below and told her sister about the incident.

At about noon on the same day, Miss Derricott related her story to the Tourist Class Purser and then to the Chief Purser and Executive Officer. The latter sent for Appellant and the other two Master-at-Arms on the ship. Miss Derricott was in the inner room of the Chief Purser's quarters and separated by a curtain from the Executive Officer and Appellant while the latter two persons conversed. After Miss Derricott heard Appellant's voice and before she saw him, the Executive Officer asked her if Appellant was the man and she replied in the affirmative. Miss Derricott then came out from behind the curtain and stated that she further identified Appellant by his uniform and cap, by the words "Master-at-Arms" on his uniform, and by the fact that he is a rather stocky person. No one else was brought before Miss Derricott for the purpose of identification. When Appellant was logged for this alleged offense, he stated that it was not true.

Appellant has an unblemished record during approximately 27 years of going to sea on merchant vessels of the United States. He is 48 years of age with a wife and children.

OPINION

Appellant's defense of alibi when considered together with the

poor method of attempting to identify Miss Derricott's assailant, compels me to reach the conclusion that Appellant's guilt has not been established by the required substantial evidence.

The primary issue herein is not one of credibility or of possible fabrication of the incident by Miss Derricott; but it is one of adequate identification of Appellant as the person who molested the passenger. The testimony of Appellant's alibi witnesses is not controverted except by Miss Derricott's identification of Appellant. Since the means of identification was limited to the sound of a man's voice, Miss Derricott could have made an honest mistake in her identification of Appellant. Therefore, she should have been given an opportunity to hear the voices of at least the other two Master-at-Arms and then asked to state which voice it was that she had heard on deck early in the morning. But Miss Derricott was given no opportunity to compare and distinguish Appellant's voice from the voices of other who might have been guilty of the assault upon her. Appellant's contention that his physical characteristics were not described until after Miss Derricott saw him at the time of identifying his voice is supported by the evidence. Also, it seems improbable that Miss Derricott could have read the word "Master" on a uniform if it was too dark to see the person's face. In fact, at one point in her deposition, Miss Derricott incorrectly stated that the words "Master-at-Arms" were on Appellant's cap.

Suspicious circumstances, such as the facts that Appellant was on watch and had the words "Master-at-Arms" on his uniform, do not amount to proof of guilt in the face of the evidence to the contrary.

It is my policy to attach great weight to an Examiner's findings insofar as they are based upon his determinations as to the credibility of the witnesses. However, when the clear preponderance of all the relevant evidence convinces me that the Examiner's findings are incorrect, such findings cannot be left undisturbed. Consequently, the conclusion that the specification was proved must be reversed and the specification dismissed. It would serve no purpose to remand the case for further proceedings since the errors with respect to the manner of identification cannot be corrected at this late date.

CONCLUSION

For these reasons, the conclusion that the specification was proved must be reversed and the specification dismissed.

ORDER

The order of the Examiner dated at New York, New York, on 20 May 1955 is VACATED, SET ASIDE and REVERSED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 8th day of September, 1955.

***** END OF DECISION NO. 829 *****

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