UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 368 552
Issued to: Julio Rivera

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2030

Julio Rivera

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 30 December 1974, an Administrative Law Judge of the United States Coast Guard at Jacksonville, Florida, suspended Appellant's seaman's documents for two months on twelve months' probation upon finding him guilty of negligence. The specifications found proved allege that while serving as a Pilot on board the SS DELAWARE GETTY under authority of the license above captioned, on or about 29 August 1973, Appellant

(1) Did imprudently navigate said vessel into Army Terminal Channel, Bahia de San Juan, Puerto Rico, under adverse conditions of trim and wind; and did fail to maintain control of said vessel which resulted in grounding; and

(2) Did neglect and fail to navigate said vessel in a prudent manner which resulted in the sinking of Army Terminal Channel Light Buoy No. 6.

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

specification.

The Investigating Officer introduced in evidence the testimony of seven witness and a number of documentary exhibits.

In defense, Appellant offered in evidence the testimony of six witnesses, depositions of five other and a number of documentary exhibits.

The Judge rendered a written in which he concluded that the charge and two specifications had been proved. He entered an order suspending all documents issued to Appellant for a period of two months on twelve months' probation.

The entire decision and order was served on 14 January 1975. Appeal was timely filed on 13 February 1975.

FINDINGS OF FACT

On 29 August 1973, Appellant was serving as a Pilot on board the SS DELAWARE GETTY and acting under authority of his license while the ship was entering the port of San Juan, Puerto Rico.

The GETTY is a tank vessel of 17,054 gross tons, with a length of 602 feet and a beam of 87.7 feet. She has a single screw driven by a 12,500 horsepower steam engine. At all relevant times her draft was zero feet forward (the forefoot of the vessel was out of the water for five or six feet aft of the stem) and 18 feet 10 inches aft.

At 1244 on 29 August 1973, Appellant assumed the conn to bring the vessel through San Juan Harbor to the Army Terminal. At this and all relevant times, visibility was 15 miles and winds were ENE at 15 knots with gusts to 21 knots, not unusual conditions for that area.

The vessel proceeded along the southern or starboard side of the 1200 foot wide Anegado Channel in a southeasterly direction to the entrance to Army Terminal Channel. She then turned some 55 degrees to proceed south through the 300 foot wide Army Terminal Channel.

Prior to the execution of this turn, a number of small boats was observed underway in or near the Army Terminal Channel toward its southern end. Also prior to the turn, the tug EL MORRO made up to the GETTY's port bow and the CABO ROJO made up to the starboard bow. A third tug, the FAJARDO, which had been requested by Appellant, was ordered to stand by on the starboard quarter. At 1313 Appellant ordered full ahead and proceeded to make the turn into Army Terminal Channel. In so doing Appellant brought the GETTY too close to Buoy No. 2 at the entrance to the Channel to allow the two tugs to starboard to clear the buoy. He, therefore, ordered the CABO ROJO to let go and back clear. Seeing the small boats ahead some 700 yards in the channel, Appellant at 1314 1/2 blew the danger signal and ordered dead slow ahead. The FAJARDO was made up on the port quarter and the EL MORRO remained made up to the port bow. At 1316 Appellant ordered half ahead. The wind, however, set the GETTY to starboard and at 1318 she ran aground.

From that time until 1553, efforts to free the GETTY continued. As she came clear, one tug, the PETER B. McAllister, capsized and sank. The GETTY proceeded south down the Channel in a crab-wise fashion. As she approached Buoy No. 6, the Tug PUERTO NUEVO, made up to the starboard bow, and pushing at a 90 degree angle, had to stop engines and swing alongside the GETTY in order to avoid colliding with the buoy. T[he buoy was passed outboard of the PUERTO NUEVO at a distance of some 21 feet (considering the tug's 19 foot beam). Due to the crab-wise angle of the GETTY, her stern passed over Buoy No. 6 and caused it to sink.

BASES OF APPEAL

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

(1) The Judge erred in finding Appellant responsible for the grounding of the vessel, and

(2) The Investigating Officer failed to meet his burden of proof with respect to the sinking of the buoy.

APPEARANCE: Harry A. Ezratty, San Juan

OPINION

I

As stated in Appellant's brief, the Judge declares at page 23 of his decision that it was not negligent to bring the GETTY into San Juan Harbor under the circumstances. It was, however, clearly negligent to do so without taking appropriate measures to account for those circumstances. The wind and trim conditions, while admittedly not unusual, were certainly adverse. This is obvious in light of the large sail area created by the vessel's draft, which allowed the heavy prevailing winds to drive her aground.

Expert testimony on the record established the customary and appropriate practice necessary to bring a vessel under the existing circumstances into the Army Terminal Channel. These include a wide swing in the Anegado Channel to permit entry of the Army Terminal Channel enough toward the center to permit the passage of tugs made up on the starboard side of the vessel past the buoys. Only through the proper utilization of tugs could the necessary compensation be made for the heavy winds' effect upon a vessel trimmed as the GETTY was. Proper positioning of the tugs in attendance would have allowed the GETTY to remain free of shoals while taking action necessary to avoid the small craft observed down the Channel. Appellant, whose failure to execute a proper turn past Buoy No. 2 prevented the proper use of the tugs, cannot exculpate himself or claim unavoidable accident on the basis of the lack of tug operating space caused thereby. His failure to make a proper turn constituted imprudent navigation under adverse conditions of trim and wind resulting in his failure to maintain control of the vessel, thus causing the grounding.

As Appellant points out, there is testimony on the record by an expert defense witness, Luis Rivera, (unrelated to Appellant), to the effect that he would have acted as did Appellant. It is unclear, however, that he was referring to the tight turn around Buoy No. 2 rather than to the release of the tugs so that they could clear the buoy. That he was referring to the latter is indicated by the wide turn he plotted on the chart entered in evidence to show he would approach the Army Terminal Channel and by his testimony to the effect that he had navigated numerous vessels into the Channel under similar conditions without ever running

aground.

Appellant cites two cases for the proposition that a pilot should not be found negligent "merely because a different course of action would have avoided an accident". However, these involve situations where the person responsible for the vessel's navigation acted prudently and could not have known of the existence of facts calling for a different course of action. In *American Zinc Co. v. Foster*, 313 F. Supp. 671 (S.D. Miss 1970), the vessel collided with an unlawful obstruction "marked" by an unlit, off-station buoy which was properly used as the main navigation guide due to the absence of other aids. In *Universe Tankership, Inc*. v. *United States*, 336 F. Supp. 282 (E.D. Pa. 1972), the vessel met with calamity because of proper reliance on a misplaced buoy during absolutely unforeseeable adverse weather. In the instant case, however, Appellant knew or should have known that a tight turn past Buoy No. 2 could result in the loss of the tug power so essential to a safe transit of the Army Terminal Channel.

II

Appellant's complaint with regard to the second specification found proved relates mainly to the somewhat conflicting testimony of the various witnesses, which may be summarized as follows. Jose Belardo of the tug EL MORRO stated that he saw the GETTY's propeller strike Buoy No. 6 and that the latter sank some two to three minutes thereafter. Eladio Noriega, also of the EL MORRO, stated that he saw some part of the stern section of the vessel strike the buoy and that it sank some 5 to 20 seconds later. Anibal Perez, a line handler on a launch, testified that he saw no collision and that he observed the buoy on station some 20 or 30 feet aft of the GETTY. George Wendleburg of Getty tankers stated that his inspection of the GETTY revealed absolutely no damage. Photographic evidence showed a large gash in the side of the buoy. Appellant's brief mentions a report of an independent survey company stating no damage to the GETTY. However, no such report was entered into evidence.

The Judge, in exercising his responsibility to weigh the credibility of witnesses, chose to accept the disinterested statements of Belardo and Noriega to the effect that they saw the GETTY strike the buoy and that the latter sank shortly thereafter.

There is no basis for a conclusion that the Judge's findings were arbitrary in this regard. Appellant states that the testimony of these two witnesses is in conflict as to what part of the GETTY struck the buoy and as to the time elapsed prior to its sinking. He cites *Jackson* v. *Lenox Hotel Co.*, 79 F. Supp. 969 (D.C. Minn. 1948) for the proposition that this conflict requires resolution of doubt in Appellant's favor. The case is not apposite, however, in that it involved absolute contradictions by opposing interested parties as to the basic facts at issue. Such is not the case here, where the real question is "did the GETTY strike the buoy?" Furthermore as to the part of the GETTY which struck the buoy, Noriega's testimony was simply less specific than Belardo's. There was no conflict except as to the time it took the buoy to sink, a matter of little importance.

It is Appellant's further contention that the testimony that the GETTY struck the buoy is balanced by the testimony that there was no damage to the vessel. He cites *District of Columbia* v. *Vignau*, 144 F.2d 641, *Koppers United Co*. v. *S.E.C.*, 138 F.2d 577, and *Kehoe* v. *Commissioner*, 105 F.2d 552, for the proposition that, if the facts equally support two inconsistent inferences, judgment must be rendered against the party having the burden of proof. These cases rely upon *Pennsylvania Railroad Co* v. *Chamberlain*, 288 U.S. 333 (1933), which makes it clear that the rule applies, to cases involving inferences from established facts rather than to situations where the facts are in dispute. This rule is not meant as an interference with the exercise of the responsibilities of the trier of facts as to the credibility of witnesses. In the instant case, the Judge by no means accepted the testimony to the effect that the GETTY suffered no damage as a result of the collision with the buoy, and this was well within his authority.

Appellant states that the Judge indulged in an unfavorable presumption with respect to the testimony of Wendelburg and the master of the GETTY on the basis of their employment. This is untrue, as the Judge merely weighed this credibility factor along with the other testimony bearing on the issue of the buoy's sinking. While he ultimately chose to discount the testimony of Appellant's witnesses as to the damage to the GETTY, it cannot be said that he "presumed" this testimony, standing alone, to be incredible.

Appellant states that Wendelburg was an expert witness and that his testimony cannot, therefore, be arbitrarily denied. He cites *Cullers* v. *Commissioner*, 237 F.2d 611 (9TH Cir. 1956), to support this contention, but his reliance thereon is misplaced. The ruling in that case makes it clear that, even if the expert witness' testimony is uncontradicted, it may be disregarded on the basis of improbability or the interest of the witness. In the instant case, Wendelburg's testimony was contradicted by eye witnesses to the collision and the Judge found him, as an official of Getty Tankers, interested in the case, and his testimony, on the basis of the entire record, improbable.

Appellant contends further that the evidence of the collision is contrary to the laws of physics and can, therefore, not support the findings. This argument, however, assumes that the trier of fact accepts Appellant's evidence that there was no damage to the GETTY. Since the Judge did not accept this testimony as conclusive on the question of damage, the rule of *Kansas City Public Service Co.* v. *Shephard*, 184 F.2d 945 (10TH Cir. 1950), is inapplicable. Note also that court's statement (at 947) that "a court should bear in mind that frequently unlooked for results attend the meeting of interacting forces or circumstances, and that oftentimes imponderables and variables difficult of solution present themselves."

ORDER

The order of the Administrative Law Judge dated at Jacksonville, Florida, on 30 December 1974, is AFFIRMED.

E. L. PERRY
Vice Admiral, U. S. Coast Guard
Vice Commandant

Signed at Washington, D.C., this 21st day of August, 1975

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