

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S LICENSE No. 461 083  
Issued to: Harold Payne

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

2070

Harold Payne

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 24 February 1976, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's license for one month outright upon finding him guilty of misconduct. The specification found proved alleges that while serving as Master on board the M/V MALASPINA under authority of the license above captioned, on or about 21 June 1975, Appellant did violate 33 CFR 80.6 by attempting to overtake and pass the F/V FOREST in Olga Strait, Alaska, without proposing a means to safely do so and without obtaining a prior assent; thus, by failing to make his intentions known, did contribute to a collision with said vessel with resultant loss of life to the operator.

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

The Investigating Officer introduced in evidence a number of exhibits and stipulations, and the testimony of two witnesses.

Following and unsuccessful motion to dismiss the charge, Appellant offered no evidence on the merits. However, after the charge was found proved, Appellant offered evidence in mitigation.

At the end of the hearing, the Judge reserved decision pending submission of written briefs. On 24 February 1976 he rendered a written decision in which he entered the finding of proved and ordered the suspension of all licenses issued to Appellant, for a period of one month outright.

The entire decision and order was served on 1 March 1976. Appeal was timely filed on 15 March 1976.

#### *FINDINGS OF FACT*

On 21 June 1975, Appellant was serving as Master on board the M/V MALASPINA and acting under authority of his license while the ship was underway in the Olga Strait. The M/V MALASPINA is a passenger class ferry, 375.1 feet in length, with a register breadth of 73.5 feet and gross tonnage of 2928. It is the largest ferry of the Alaska Marine Highway System. the F/V FOREST is a wood-hulled vessel 33.5 feet in length with a gross weight of nine tons. Olga Strait, Alaska, is a narrow channel with a total width varying between 500 and 1,000 yards. The deep water portion of the channel is, in places, as narrow as 500-600 feet.

As the MALASPINA approached the southeast entrance to the Olga Strait, Appellant and other witnesses who were on the bridge observed ahead approximately 16 small fishing vessels. Appellant thereupon reduced speed to approximately ten knots and ordered one long blast of the MALASPINA's whistle to be sounded to alert those in the channel of her presence. Those pleasure craft that were not already out of the center of the channel moved to the sides, with two exceptions.

Prior to the MALASPINA's one long blast the F/V FOREST was approximately 400 feet in front of the MALASPINA. At the sound of the blast the FOREST was seen by two of three witnesses who testified, to pull to its port, then resume its original course parallel to the MALASPINA, about 50 or 60 feet to the left of the MALASPINA's projected course. Also, 400 feet in front of the MALASPINA was a small green runabout (16' to 18'). Its position

was approximately 100 feet to the right of the MALASPINA's projected course.

After the one long blast was sounded by the MALASPINA as she entered the channel, a period of time elapsed during which the MALASPINA, proceeding at 10 knots, was in an overtaking situation to the FOREST, proceeding at 8 knots. No further signal was given by either vessel, and no radio contact was made. No passing signal was sounded by the MALASPINA, and accordingly, no assent signal was returned by the FOREST.

Suddenly, the green runabout moved quickly forward across the paths of both the MALASPINA and the FOREST. It had sufficient speed to clear and did clear both vessels. As or soon after the green boat was seen to move from right to left in front of the FOREST, and when the FOREST was approximately 100 feet to the left of the MALASPINA, the FOREST suddenly veered to the right and into the path of the oncoming MALASPINA. Appellant ordered the danger signal to be sounded and ordered the MALASPINA full astern. Although the FOREST made one final turn to the left, it was too late, and the two vessels collided. The FOREST sank with the loss of life of its operator, the sole occupant.

#### *BASES OF APPEAL*

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that the Narrow Channel Rule of Article 25, Inland Rules of the road, gave the M/V MALASPINA the privilege to proceed through the Olga Strait without proposing to pass and receiving an assent to that proposal. In the alternative, it is contended that the situation at the time of the collision is governed by the special circumstances rule, that the Investigating Officer did not meet the burden of proof in supporting the charge, and that the sole cause of the collision was the fault of the F/V FOREST. appellant contends, further, that the charge, to be valid, should have read "violation of regulation" rather than misconduct.

APPEARANCE: Jacob Mikkeltorg, Esq., of Moriarty, Long, Mikkeltorg & Broz.

#### *OPINION*

I

Appellant's first contention is that no duty existed on the part of the MALASPINA to sound a passing signal and to receive an assent from the FOREST. Appellant contends that the effect of the 1966 Amendment to 33 U.S.C. 210 (Article 25, Inland Rules of the road) was to dispense with the requirement of sounding a passing signal by "burdened" vessels navigating narrow channels. The Amendment states:

"In narrow channels a steam vessel of less than sixty-five feet in length shall not hamper the safe passage of a vessel which can navigate only inside that channel."

The legislative history of this amendment sets forth the various reasons for establishing the right of way of burdened vessels, but it does not state that establishing the right of way thereby dispenses with the signals required by Rule 24, and I am unwilling to conclude that this intent was implied. (See 1966 U.S. code, Cong. & Adm. News, p. 4130.)

II

Appellant next contends that no passing signal need have been sounded by the MALASPINA because the special circumstances rule permitted a departure from the ordinary rules of the road. The special circumstances rule, however, has been construed as arising only in those dire situations when adherence to the ordinary rules would place the vessels in certain danger. The rule as set forth in 33 U.S.C. 212, Article 7, Inland Rules, states as follows:

"In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid *immediate danger*." (emphasis added)

It is Appellant's theory that the rule applies to this case because as many as 16 small pleasure boats were present in Olga Strait when

the MALASPINA approached the southeast entrance. After the MALASPINA sounded one long blast, however, her projected course was cleared by all but two of the small vessels. As already set forth in the findings of fact, there then followed a period of time during which the MALASPINA was in an overtaking situation to the FOREST. It was at this point that the proposal to pass ought to have been sounded, and the special circumstances rule cannot be held to apply since, at this point, there was no evidence of immediate danger to justify a departure from the established rules. Furthermore, there was no evidence that Appellant did not have time to give the required signal and wait for an assent. In *The MAGGIE J. SMITH*, 123 U.S. 349 (1987) the Supreme Court held that the special circumstances rule does not apply to vessels in ordinary navigation which sight each other at an ample distance. In *Griffin on Collision*, 228, p. 516, the author states that the special circumstances rule "is not to be treated as a license to disobey the ordinary rule when the navigator takes it in his head to do so. There must be a *sudden danger* or an *unexpected development*." (emphasis added) When the proposal to pass should have been sounded, the FOREST was one of only two small vessels in the channel. She was sighted from an ample distance, and I can find no reason which would justify application of the special circumstances exception.

Appellant cites *The PAVONIA*, 26 Fed. 106 (1885) for the proposition that the special circumstances rule does apply to this case. However, the court in *The PAVONIA* held only that if two ferryboats which often pass each other, having adopted a method of doing so understood and acted upon by both navigator, it may be considered a special circumstance. There is no evidence that the MALASPINA and the FOREST had adopted a passing agreement to this effect. Therefore, the holding in *The PAVONIA* is not relevant to Appellant's case.

### III

Appellant also contends that the prescribed rule need not have been adhered to since it was his experience that small fishing vessels rarely, if ever, responded to whistle signals. He states that even if a proper passing signal had been sounded, the FOREST would not have given and assent. This theory has previously been

addressed by the Commandant, who held in Decision on Appeal, CHOTIN, 782, that the fact that a small vessel rarely answers signals does not excuse a Respondent from carrying out his obligations under the Pilot rules. Although other cases have excused a Respondent from *liability* for collisions occurring when attempting to overtake a vessel which as not given an assent to pass, in every one of these case the pass was not attempted unless and until the overtaking vessel first sounded the signal mandated by the rules, and in most cases, repeated that signal or attempted to make radio contact with the overtaken vessel. (*The NORTH STAR*, C.C.A. 2, 151 Fed. 168 (1907); *The OCEANUS*, 12 Blatchf. 430 (1875); *Long Island Railroad v. Killien*, C.C.A. 2, 67 Fed. 365 (1895); and, more recently, *Commandant's Decision on Appeal*, 2045 (ROWLAND).)

Similarly, Appellant's argument that it was customary in his locale not to sound passing signals to small vessels must be dismissed. In order to effectively raise this argument, Appellant would have been required to plead and prove the existence of the custom as a fact. This he did not do. (See *The DELAND*, 39 F.2d 926 (1930); *The NEWPORT NEWS*, C.C.A. 4, 105 Fed. 389 (1900); *The JOHN BRADY*, C.C.A. 3, 131 Fed. 235 (1904). Furthermore, even if proved, a custom in violation of law will not be enforced unless it is not "safe and practicable" to act in the way prescribed by law. *LA FRANCE*, C.C.A. 2, 12 F. 2d 337 (1926). I do not believe that Appellant could have successfully proved that it would not have been safe and practicable for him to propose a passing signal to the FOREST as the FOREST was being overtaken.

Appellant also raises the fact that the one long blast sounded by the MALASPINA as she entered the Olga Strait is used by the Coast Guard in the narrow VTS lanes of the Thirteenth Coast Guard District, and, more specifically, in Puget Sound. the use of this substitute, however, is authorized only during certain situations, such as yachting regattas, and only by prearrangement with local yacht clubs, pilots and other user groups. There is no evidence that a similar arrangement had been made between the MALASPINA and other users of the Olga Strait.

It is Appellant's contention that he was inappropriately charged with misconduct since it was alleged that he had violated 33 CFR 80.6 Appellant therefore feels he should have instead been charged with "violation of regulation." However, the term "violation of regulation" can only be used as the basis for a charge when the regulation violated was issued pursuant to a statute found within Title 52 of the Revised Statutes. 33 U.S.C. 80.6 (Rule VIII) is not one of the provision of Title 52. (See *Commandant's Decision on Appeal*, 1986 (WATTS).)

Appellant also contends that "misconduct" is not one of the bases stated in 46 U.S.C. 239 upon which a suspension and revocation proceeding may be brought. The Commandant has addressed this argument in the past (*Commandant's Decision on Appeal*, 1283 (SOLFRANK), and found it to be without merit.

V

Finally, appellant contends that the Investigating Officer failed to meet the burden of proof, and that the charge against Appellant must, therefore, be dismissed. It is Appellant's contention that in order to prove a violation of 33 CFR 80.6 the Investigating Officer must also have proved that the MALASPINA was at fault for causing the collision with the FOREST. Appellant the argues that the MALASPINA was not at fault, and that the sole cause of the collision was the "inexplicable and radical change of course of the FOREST." In response to Appellant's contention, it must be pointed out that the charge in this case is not negligence; therefore, negligence need not be prove. Nor was this proceeding conducted to determine the cause of the collision. The charge against Appellant stated that he attempted to overtake and pass the FOREST without proposing a means to safely do so. the evidence is uncontroverted that Appellant did, in fact, act as charged. It is therefore my opinion that the charge was proved.

#### CONCLUSION

The charge against Appellant is supported by substantial evidence of a reliable and probative character, as required by 46 CFR 5.20-95(b). Appellant was obliged to adhere to the ordinary

rules of the road and cannot be excused for failing to do so in light of the factual circumstances of this case.

*ORDER*

The order of the Administrative Law Judge dated at San Francisco, California, on 24 february 1976, is AFFIRMED.

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

Signed at Washington, D.C., this 1st day of Sept. 1976.

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