

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-1267 445
Issued to: Joseph M. English

DECISION OF THE VICE COMMANDANT
UNITED STATES COAST GUARD

2149

Joseph M. English

This appeal has been taken in accordance with 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 12 June 1978, an Administrative Law Judge of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for one month, plus four months on twelve months' probation, upon finding him guilty of misconduct. The specification preferred alleged that while serving as crew pantryman on board the United States SS MANHATTAN under authority of the document above captioned, on or about 5 June 1978, Appellant wrongfully did assault and batter by beating with his fists a member of the crew, one Younis A. Khan.

The hearing was held at Long Beach, California, on 7 June 1978.

At the hearing, Appellant elected to act as his own counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of two witnesses and Appellant testified in his own behalf.

When both sides had rested, the Administrative Law Judge, on his own motion, amended the specification by substituting the words "engage in mutual combat" for the words "assault and batter".

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification, as amended by him, had been proved. He then entered an order suspending all documents issued to Appellant for a period of one month plus four months on twelve months' probation.

The entire decision was served on 15 June 1978. Appeal was timely filed.

FINDINGS OF FACT

On 5 June 1978, Appellant was serving as crew pantryman on board the United States SS MANHATTAN and acting under authority of his document while the vessel was at anchorage "B", Redondo Beach, California.

While Appellant was at work in the galley at about 0810, Younis A. Khan, a bedroom utility, entered the galley and put his dish down in the wrong place. After remonstrating with Khan, Appellant shoved Khan against another crewmember in the doorway and then shoved him again. When Khan shoved back, Appellant began punching him.

After an attempt made by others to restrain both, the disorder continued with each throwing kitchen utensils at the other until Khan fell and suffered a slight injury.

Khan was sent ashore from the vessel at 0940.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that Appellant acted in self-defense and that a change of venue should have been given from Long Beach to San Francisco.

APPEARANCE: Edward Skorupski, Esq., San Francisco, California.

OPINION

I

Appellant urges for the first time that he would have preferred to have his hearing at San Francisco. A motion for change of venue must, of course, be timely, and even when timely made must be supported by a showing of good cause.

Appellant gave absolutely no indication of even inconvenience to himself at the time and, indeed, expressed an interest in expediting the proceeding. Witnesses from the ship were available, who presumably would not have been so readily available elsewhere. Further, even now Appellant asserts no prejudice to any interest he might have had.

There are no flaws in the proceedings in this respect.

II

Although Appellant stated at hearing and urges again on appeal that he acted in self-defense, the issue was not reasonably raised by the evidence. Appellant admitted, after confronting one witness who so testified, that the altercation commenced by his pushing Khan in an attempt to force him out of the galley. The use of force was initiated by him on the occasion of what had been a minor verbal altercation. This matter would have required no comment had it not been for the unexplained amendment of the specification by the Administrative Law Judge.

The findings made in the initial decision clearly reflect, on a predicate of incontestable evidence, that Appellant twice shoved Khan before retaliatory action was taken.

III

The concept of "wrongful engagement in mutual combat", properly applicable, it may be hazarded, only on few occasions, has at times been resorted to when there appeared to be too much

trouble to sift evidence or an inclination not to disbelieve one version of contradictory evidence. It also gives the appearance of obviating the weighing of degrees of force, which might transform an initial action of self-defense into assault and battery. While niceties like this are often annoying and sometimes superfluous, they must not be avoided when serious judgment is in order, but on the findings in this case the difficulty did not seem to arise.

I can only speculate, since the Administrative Law Judge at the hearing pronounced Khan, who was not before him, "Equally guilty", that he was troubled by the fact that the "beating with fists" could be said to have been a later development after the initial shoving. If this was so the amendment would correctly have been to reflect that the assault and battery was "by shoving" (with possible aggravation) rather than changing the situation to that which it clearly was not, considering the facts found.

While the rules of procedure adopted for these proceedings provide no cure for an error of this sort, Appellant earns no unjust advantage on purely technical grounds. To the thought that "mutuality" cannot be supported on the evidence, it could be replied that this would be for Khan only to complain of; Appellant could have no standing to object since any failure of "mutuality" was not on his side. In the result, however, the ultimate findings can be reconciled with a finding of misconduct by the simple elimination of the word "mutual" from the specification as amended by the Administrative Law Judge.

IV

I find also that, while it was alleged and found proved that the occurrence happened "at sea," the non-critical correction might as well be made, based upon the vessel's log, that the vessel had arrived in port before the episode took place. Similarly, I find that, contrary to the findings in the initial decision, there is no evidence that Khan was hospitalized, even for emergency treatment, as a result of the fray.

CONCLUSION

Constrained as I am by the amendment made at hearing, I conclude that Appellant, at the time and under the conditions alleged, except that the vessel was in port and not at sea, wrongfully engaged in combat by beating with his fists a member of the crew, Younis A. Khan. Since the misconduct so stated is not markedly different from that initially found proved, the order remains appropriate.

The order of the Administrative Law Judge dated at Long Beach, California, on 12 June 1978, is AFFIRMED.

J. B. HAYES
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this eighth day of March 1979.

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