IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-753971-D9 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Theodore T. CREER

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1831

Theodore T. CREER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulation 137.30-1.

By order dated 10 March 1970, an Examiner of the United States Coast Guard at New York, N.Y., suspended Appellant's seaman's documents for nine months plus three months on eighteen months's probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as an AB seaman on board SS OCEANIC TIDE under authority of the document above captioned, Appellant:

(1) on 8 June 1967, wrongfully and without consent touched the private parts of another crewmember, one McQueeney, while the vessel was at Cam Ranh Bay, RVN;

(2) on 3 August 1967, wrongfully threatened to kill McQueeney, at Kobe, Japan;

(3) on 3 August 1967, wrongfully engaged in mutual combat with McQueeney at Kobe, Japan;

(4) on 3 August 1967, assaulted and battered McQueeney with his hands at Kobe, Japan; and

(5) on 3 August 1967, assaulted and battered McQueeney by choking him at Kobe, Japan.

The ordinary statement of procedure of the hearing is not appropriate here since Appellant, who was not represented by counsel, was present for some sessions of the hearing and was not present for others. The important point is that Appellant, although on proper notice, was not present when the testimony of McQueeney was taken, after a plea of not guilty to the charge and specifications had been entered. Appellant did produce a witness and testified in his own behalf but in view of the sole ground for appeal urged the procedure need not be set out in full.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of nine months plus three months on eighteen months' probation.

The entire decision was served on 18 March 1970. Appeal was timely filed on 20 March 1970. Although Appellant had until 18 May 1970 to add to his original statement he has not done so.

FINDINGS OF FACT

On both dates in question, Appellant was serving as an AB seaman on board SS OCEANIC TIDE and acting under authority of his document.

On both dates in question Appellant committed the acts alleged in the specifications found proved, except as to the third specification mentioned above. (This matter will be discussed in the OPINION below.)

BASES OF APPEAL

This appeal has been taken from the order imposed by the

Examiner. It is contended that the Examiner's decision is based on the lying testimony of the witness McQueeney.

APPEARANCE: Appellant, *pro se.*

OPINION

I

By failure to appear for hearing when the testimony of McQueeney was taken, Appellant waived his to cross-examine that witness for the purpose of testing his credibility. Appellant challenged the credibility of McQueeney before the Examiner when he testified in his own behalf.

If remains true that the examiner hearing a case is the judge of credibility and his findings will be set aside if the evidence is of such a character that the Examiner's reliance on the evidence is arbitrary and capricious.

The testimony of McQueeney in this case was not of such character that it must be rejected by every reasonable person so as to require that the Examiner's findings be set aside as a matter of law. In fact, the testimony of McQueeney is so persuasive that some attention might have to be given to the Examiner's decision if he had found otherwise than he did.

The statement of error by Appellant must be rejected summarily.

II

The Examiner in this case correctly found that all the allegations in this case relative to the events of 3 August 1967 were one transaction, which convinces me that the Examiner considered this fact in the formulation if his order.

I note with satisfaction that the Examiner did not order all the specifications "merged" and then dismiss some of them as "not proved." A question remains, however, whether "mutual combat" was actually and separately established apart form the allegations of assault and battery. It is perceivable that "mutual combat" can

grow to "assault and battery" on the part of one participant or the other. It is obvious, also, that "mutual combat' may be found as a lesser included offense of an allegation of assault and battery when the record so establishes.

A record may establish that what began as "mutual combat" developed into an assault and battery by one party upon the other. The record in this case does not support a finding of mutual combat between McQueeney and Appellant. Such a finding imports mutuality of fault; McQueeney would also have been guilty of misconduct. Nothing in this record indicates other than that Appellant committed assault and battery on McQueeney by two different methods, by striking him with hands and by choking him. The question of "mutual combat," implying fault on the part of McQueeney, did not arise, because McQueeney did nothing but defend himself until he caused Appellant to desist from his attack.

CONCLUSION

I conclude that the specification found proved alleging mutual combat on 3 August 1967 should be dismissed for the reasons stated. Since the Examiner did not consider this as a separate offense for purposes of deciding an appropriate order, his order need not be disturbed.

ORDER

The findings of the Examiner made at New York, N. Y., on 10 March 1970 are AFFIRMED, except as MODIFIED herein. The third specification found proved by the Examiner is DISMISSED, in accordance with the OPINION set out above. The order of the Examiner, entered at New York, N. Y. on 10 March 1970, is AFFIRMED.

T. R. SARGENT
Vice Admiral, U. S. Coast Guard
Acting Commandant

Signed at Washington, D. C., this 26th day of January 1971.

INDEX

Witnesses
credibility of, judged by Examiner

Assault (including battery)
Mutual combat distinguished
Mutual combat, not proved
Mutual combat

***** END OF DECISION NO. 1831 *****

Top