IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1103016-D1 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Andrews CASTILLO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1736

Andrews CASTILLO

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 29 December 1967, an Examiner of the United States Coast Guard at New York, N. Y. suspended Appellant's seaman's documents for three months plus three months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as a fireman/watertender on board SS BRITAIN VICTORY under authority of the document above described, on or about 10 December 1966, Appellant wrongfully created a disturbance so as to require restraint by hand cuffing.

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

The Investigating Officer introduced in evidence certain voyage records of BRITAIN VICTORY and the testimony of the master of the vessel.

In defense, Appellant offered in evidence other voyage records of the vessel, his own testimony, and the testimony of three witnesses.

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

The entire decision was served on 3 January 1968. Appeal was timely filed on 12 January 1968 and perfected on 22 April 1968.

FINDINGS OF FACT

On 10 December 1966, Appellant was serving as a fireman/watertender on the SS BRITAIN VICTORY and acting under authority of his document while the ship was at anchor in the port of Qui Nhon, Vietnam.

On the date in question, Appellant returned to the ship from shore via launch, boarded the vessel, was seen by the master on the cap-rail attempting to descent the Jacob's ladder, and was restrained from going down the ladder.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that:

(1) the testimony of the only live witness against Appellant should have been rejected by the Examiner,

(2) the conclusions were erroneous and contrary to the evidence,

(3) "the failure of the Master to read the Official Log Book entries to him [Appellant] did constitute a deprivation of...[Appellant's] Constitutional rights and all charges flowing therefrom must be suppressed."

OPINION

I

It is noted first that in view of the disposition of this case no finding need be made as to the allegation in the specification that the conduct was such "as to require restraint by handcuffing." The nature of the restraint found necessary after a "disturbance" is not an element of the offense of "creating a disturbance." Matters merely in aggravation need not be pleaded although they may be proved.

II

To take Appellant's third point first, it must be said emphatically that a failure to make an official Log Book Entry under 46 U.S.C. 702 does not mean that all proceedings under R. S. 4450 must be "suppressed" because of failure of due process.

It is true that in default of compliance with this section a "court hearing the case may, at its discretion, refuse to receive evidence of the offense." This is, first, a matter of discretion. Second, an examiner under 46 CFR 137 is not a "court."

The rule in these proceedings has been that an Official Log Book entry made in substantial compliance with the statutes constitutes a *prima facie* case as to the offense recorded, and the circumstances thereof. If the entry does not substantially meet the requirements of the law, it is admissible in evidence, even if it does not constitute a *prima facie* case. This rule still obtains.

With or without a log entry, notice and opportunity to be heard constitute "due process" under 5 U.S.C. 551-559.

III

Appellant's first contention is that the Examiner should have rejected the Master's testimony *in toto* because:

(1) it conformed in detail with the entry in the Official Log Book, which was demonstrated to have been false, and

(2) bias and prejudices were proved to have been established on the part of the master.

The Examiner, in effect, accepted the testimony of the master insofar as he was an eyewitness. It is for the trier of facts to determine the credibility of witnesses, and absent a clear showing of arbitrary and capricious action, his determination will not be disturbed.

V

The third contention of Appellant is not merely that the Examiner's findings and conclusions are contrary to the "weight of the evidence" but that they are "erroneous and contrary to the evidence." The detailed assignments of error are considered herewith. The basic questions are whether there is substantial evidence to support findings, and whether the valid findings support the conclusions.

Appellant testified that he had returned to the ship on a launch, found that he had no local currency to pay for his trip, arranged to board the ship to get money and return to the launch to pay its operator, boarded the vessel by an accommodation ladder and got the money, returned on deck to find that only a Jacob's ladder was available, and attempted to go down the ladder when he was restrained by the seaman on watch.

In finding the specification proved the Examiner was moved to reject Appellant's testimony. The rejection is partly based on his opinion (D-5) that "there was nothing in the master's testimony about the launch standing by to be paid." There could not be. If the master truly thought as he said that Appellant had just left the engineroom he could not even guess that there was a launch "standing by to be paid." But there is testimony by the master to support a finding that there was a launch present. He stated that Appellant, when he personally observed him, made an attempt to get off the ship "to get in the launch." R-12. On cross-examination the master was asked, "Captain, was there a launch alongside?" He

answered, "There were several launches close by." R-38.

The negative interpretation placed upon the master's testimony by the Examiner does not see warranted.

A second reason for rejecting Appellant's testimony is given in the opinion. (D-5). "I am sure that if all he wanted to do was pay the launch that Risso, the gangway able seaman, would have run the money down to the boatswain." This is speculation not supported by evidence. If Appellant were going to pay the launch operator, there is no evidence in the record tending to show that he could or should have called on any other person to "run the money down." Of course, if Appellant were so intoxicated that he could not descend the ladder it might have been reasonable that he ask someone else to pay the launch operator, but the fact that someone else was available to have "run the money down" is not by itself a reason to reject Appellant's testimony.

The question of intoxication will be dealt with later.

In my view of this case, the ultimate decision does not turn on whether the Examiner was right or wrong in rejecting Appellant's testimony, but whether the evidence, apart from Appellant's testimony,is sufficiently substantial to support the findings made and the conclusion s derived therefrom.

VI

The only voyage record introduced in evidence against Appellant was an official log book entry which was found by the Examiner not to have been made in substantial compliance with the statutes. This entry recounted that at 2215 on 10 December 1966, Appellant, who had the 1600 to midnight watch, was sent up from the engineroom "apparently under the influence of alcohol," that he tried to get down the pilot ladder, and even tried to jump overboard. In material part, this record was contradicted by deck and engineroom log entries introduced by Appellant which showed that it had been on the evening of 9 December that he had been sent from his duty station, that he had stood no duty on the tenth, and that he arrived a the ship from shore at 2215.

The testimony of the master of the ship was the only evidence adduced against Appellant in support of the entry in the Official

Log Book. As a witness, a master has no greater impact than that of any other witness. His entries in the Official Log Book, properly made, establish *prima facie* cases as to the factual statements therein of offenses committed by seamen. When he testifies as to what he observed and did he is like any other witness. (This must not be construed as intimating that a master may not act upon reliable reports to preserve order aboard his ship). Here, the master testified that on the basis of a report he had received he ordered Appellant restrained. His testimony is clear (R-11) that it was reported to him by the second mate that Appellant had been sent up from the engineroom, that he was unfit for duty, and he was trying to go back ashore.

It cannot be overlooked here that the engineroom logs previously referred to show that Appellant never appeared in the engineroom that night but had been dismissed from duty the night before.

The log entry made by the second mate who was reported to have given the information in the first report to the master appears in defense Exhibit "2" and reads as follows:

> "2255 CASTILLO came aboard APPARENTLY with a great amount of alcohol. When he was told by me that he could not go ashore again because he would fall down the Jacob's ladder he tried to jump over the side."

At this point it is clear that someone is mistaken. If the mate who made this entry made the report that the master said he made, either the entry was wrong or the report was wrong. If the entry was correct and a report to that effect was made to the master, then the master was wrong.

The mate did not testify in person.

VII

As to whether Appellant committed a disturbance aboard the vessel 2215 on 10 December 1966, there is, in the case in chief against Appellant only the eyewitness testimony of the master. The master first testified on this point, "My orders were not to let Mr. Castillo back ashore, and to keep him from going down, we were

using a pilot ladder...and I did see Mr. Castillo after he couldn't get on the gangway, get upon the catrail [cap rail?] to get in the launch to get ashore or at least that was what I saw." R-12.

The master went on to testify that, after he saw this, the second mate "came back the second time, I gave him the handcuffs...."

This eyewitness testimony implies only that when Appellant "couldn't get on the gangway" [was there a "gangway" or "accommodation ladder" there or not?] he tried to use the Jacob's ladder to go over the side. This testimony does not identify the location of the "pilot ladder" in use.

It can be seen that a pilot ladder can be rigged over a bulwark, requiring the user to go up and over, or at a break, requiring the user only to be careful in getting on and descending. To interpret the evidence against Appellant in the manner most favorable to the case against him, it can be concluded that the ladder ran over a bulwark.

Thus, the master's testimony meant that Appellant got on the caprail of the bulwark in order to get on the ladder. This was all the master, as witness, saw; and this was all, in the absence of the testimony of the second mate, there was to see. while the second mate's entry in the deck log introduced by appellant himself, indicates that Appellant was attempting to "jump over board," this entry is not supported by eyewitness testimony.

The Examiner made a finding that Appellant was attempting "to either descent the pilot or Jacob's ladder, or to jump over the side." D-2. To this fact-finding is added: ("The master, who observed the person charged climb up the caprail thought the man was going to jump over the side.)" If this parenthetical statement is a "finding," it is a finding only as to the opinion of a witness. But the master did not testify that he thought Appellant was going to jump overboard. He testified only that he thought the man's position was "dangerous." R-15, 16. It was the deck-log entry of the second mate that spoke of jumping overboard. All the master saw was a man attempting to leave the ship via the Jacob's ladder.

To leave a ship by any intentionally provided means is not of itself a disturbance.

VIII

An attempt by an intoxicated person to leave a ship by a Jacob's ladder could well create a disturbance.

In this condition of the record inquiring into the evidence of intoxication must be made.

The only evidence introduced by the Investigating Officer was the reference in the Official Log Book entry. This reference lost what probative value it might have had by being linked to the asserted report (untrue if made) that Appellant had at about 2215 been dismissed from the engineroom because of intoxication.

The only other evidence of intoxication appears in the deck log entry introduced by Appellant. One of four original specifications, that dealing with failure to perform duties on the night in question, dealt with intoxication. The reference to intoxication is that specification was withdrawn by the Investigating Officer before arraignment. Thus, when the Investigating Officer rested his case, there was no specification as to which a motion to dismiss because of failure to prove intoxication could be directed. The specification as to disturbance, the one found proved, would allow introduction of evidence of intoxication as a condition of the disturbance. The Investigating Officer had, however, offered no such evidence except the erroneous Official Log Book Entry, and no motion to dismiss specification alleging a disturbance could be logged merely because there was no evidence of intoxication, since intoxication is not a necessary element of creating a disturbance.

When Appellant's counsel offered the deck log entry in evidence, it was obviously done to disprove evidence that Appellant had been sent from the engine room that night, by showing (along with other evidence) that Appellant had not been in the engineroom that night at all, but had instead arrived at the ship at 2215. When counsel offered this entry in evidence he specifically desired to object to that part of it which spoke of Appellant's being, "Apparently under a great amount of alcohol." The grounds were, in

effect, that Appellant was forced to enter the log entry but should be excused from offering the quoted words because "intoxication" had been ruled out of the question in the case.

When the Investigating Officer demanded that the entire entry be admitted in evidence the Examiner overruled the objection: "No I will allow it because it is part of the Exhibit, but since the Government saw fit not to charge under it, I am involved in another matter.

What other matter the Examiner was involved in is not specified, but the way is left open for the person charged before him to believe that he need not worry about evidence of intoxications.

When Appellant himself testified, the Investigating Officer attempted to question him on his drinking. Appellant's counsel objected on the grounds that the question of intoxication had been removed from the case. The Investigating Officer argued that intoxication might have been removed from the case as the cause of failure to perform duties under the original first specification, but was still open as to Appellant's condition in the "disturbance" question. Appellant's counsel claimed "surprise", stated that he had already released from subpoena, in the belief that "intoxication" was not longer an issue, a witness that he had been holding, and objected to the line of questioning.

The Examiner said:

> "Do I have all the objection" I have all the argument? The objection is sustained. It's sustained on the grounds that the Government, with its eyes open, took that whole question out of the case. It will only complicate it now." R-126.

One more reference to intoxication appears in the transcript of hearing. In the Investigating Officer's final argument he made reference to the fact that the deck log reflected that Appellant had returned to the ship "apparently in a great amount of alcohol." When Appellant's counsel interrupted to state that he thought that this question was out of the case, the Examiner achieved

mollification of the parties by saying:

> "He is commenting on part of the evidence, he is not commenting on the charges. Now, he is commenting on the evidence." R-162.

The Investigating Officer then went on to argue that Appellant was "drunk."

The Examiner's findings (No. 5; D2) definitely accept that Appellant had come aboard "in an apparent intoxicated condition."

It may be stated categorically in this case that the Examiner could have ruled that evidence of intoxication was admissible on the issue of "creating a disturbance" even if it were no longer applicable to the specification as to "failure to perform duties." He did not. When he admitted the evidence as to intoxication the Examiner stated that he admitted it only under the rule that when part of a document was used, the rest could be used also. But the Examiner specifically declared that the Investigating Officer had eliminated intoxication as a part of the "case," not with respect to any individual specification but as part of the "case." The Examiner's ruling may have been wrong, but he made it.

He did not permit intoxication to be inquired into on cross-examination of Appellant, on protest of Appellant's counsel that he had released from subpoena a witness who could have testified on the matter.

The comment made when the Investigating Officer's argument about intoxication was interrupted by Appellant's counsel was also cryptic. The distinction between the Investigating Officer's commenting on part of the evidence and commenting on the charges is not clear.

However, the total impression is that the Examiner intended to disregard all evidence of intoxication. On the whole record, Appellant had a right to rely on this belief since he had already announced that he had foregoing part of his defense in that belief.

Nevertheless, the Examiner used the evidence as to

intoxication to support a finding that Appellant had made "an apparent attempt to ...descent the pilot or Jacob's ladder" in such a fashion as to constitute that intrinsically neutral act a "disturbance."

It is possible that the Examiner on reflection decided that evidence as to intoxication was admissible on the question of creating a disturbance even if the matter had been removed from the specification on failure to perform duties. If so, Appellant should have been given notice of this change of opinion so that he could either:

(1) produce evidence to the contrary, or

(2) protest that he had been irremediably prejudiced by his reliance on the earlier erroneous decision.

IX

If the finding of intoxication is eliminated there is left to support the conclusion that Appellant created a disturbance only the finding.

> "The person charged climbed up on the caprail in an apparent attempt to either descent the pilot or Jacob's ladder, or to jump over the side."

It has already been pointed out that the master did not testify that he saw Appellant attempting to jump over the side, but that the only evidence toward that conclusion was in the unsupported record of the second mate in the deck log.

Whether this evidence would be enough to support a finding that Appellant was attempting to jump overboard need not be decided. since the findings of the Examiner are in the alternative, the alternative more favorable to Appellant should be accepted. That alternative is merely that Appellant climbed up on the caprail to descent the Jacob's ladder.

This is not "creating a disturbance."

This case could be remanded so that the Examiner could, in

open hearing, advise Appellant that intoxication was in issue and allow his to present contrary evidence. It is considered further proceedings would serve no useful purpose.

CONCLUSION

It is concluded that no *prima facie* case of "intoxication" in connection with Appellant's effort to leave the ship was made out, and that Appellant's entry of the deck log into evidence did not cure the defect because the Examiner had ruled "intoxication" out of the case. The admissible evidence specified as being considered in the case does not support a finding that Appellant was intoxicated.

Absent the element of intoxication, there is nothing in the finding that Appellant attempted to leave the vessel via a Jacob's ladder to support a conclusion that he created a disturbance.

ORDER

The order of the Examiner dated at New York, N. Y. on 29 December 1967, is VACATED. The findings are MODIFIED, as stated herein, and the charge and specification are DISMISSED.

W. J. SMITH
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 15th day of November 1968.

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