IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-271622 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Michael J. RAFANELLI

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1761

Michael J. RAFANELLI

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

By order dated 31 July 1968, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as carpenter on board SS WINTHROP VICTORY under authority of the document above captioned, on or about 23 January 1968, at Pusan, Korea, Appellant:

(1) assaulted and battered another crew member, one Jacovis Biskinis, with a piece of pipe;

(2) assaulted and battered Biskinis with a hammer;

(3) threatened bodily harm to Biskinis;

(4) assaulted and battered another crew member, one Dallas Wenn, with fists;

(5) assaulted and battered Dallas Wenn with a hammer; and

(6) on 24 January 1968, at Pusan, Korea, threatened the life of Biskinis.

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

The Investigating Officer introduced in evidence the testimony of four witnesses, a voyage record of WINTHROP VICTORY, and a sketch showing a partial deck plan on which witnesses located events testified to.

In defense, Appellant offered in evidence his own testimony.

The Examiner caused to be entered in evidence Official Log Book records including two sworn statements made by witnesses who were not present at the hearing.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specifications had been proved. The Examiner then entered an order revoking all documents issued to Appellant.

The entire decision was served on 5 August 1968. Appeal was timely filed on 8 August 1968. After delivery of the transcript of proceedings to Appellants, he had until 2 January to file further appellate documents. Although he was so specifically advised on 5 November 1968, no further material has been received.

FINDINGS OF FACT

On 23 and 24 January 1968, Appellant was serving as carpenter on board SS WINTHROP VICTORY and acting under authority of his document while the ship was in the port of Pusan, Korea.

At about 1000 on 23 January 1968, Jacovis Biskinis, an AB

seaman, was carrying his mattress down the passageway from his quarters toward the watertight door leading outside. He asked Appellant to open the watertight door for him. Verbal abuses was exchanged. Appellant took the dogging wrench, a length of pipe about 18 inches long, which was readily available at the watertight door, and hit Biskinis on the head with it. A scuffle followed, with Biskinis able to restrain Appellant. Biskinis returned to his room. A roommate, Dallas Wenn, also an AB seaman was there.

Appellant went to his room, nearby, and obtained a wedge hammer. He proceeded to Biskinis's room, the door of which was partially open. Appellant directed obscenities at Biskinis, threatened to kill him, and tried to force his way into the room. Wenn resisted the entry, and then came out to struggle with Appellant. Appellant struck Wenn with his fists and with the hammer. Wenn's lower front teeth were loosened by one of the blows. Wenn subdued Appellant, while calling for ship's officers. Arrival of officers quelled the disturbance.

On the next day, when several crew members, including Appellant Biskinis, Wenn, and two others, were on their way to a hospital ashore, Appellant threatened Biskinis, telling him that he would "get him", and that he would never get off the ship alive.

BASES OF APPEAL

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

(1) certain purported eyewitnesses were not on board the vessel at the time of the incidents of 23 January 1968;

(2) Appellant did not tell all at the hearing about an episode involving the master and the chief mate on an earlier occasion;and

(3) the master and the chief mate were really the "key witnesses" in this case. [It is noted that neither the master nor the chief mate testified at the hearing.]

APPEARANCE: Appellant, *pro se*.

OPINION

I

Appellant's asserted grounds for appeal could be rejected as not stating recognized grounds, but since Appellant represented himself both at hearing and on appeal some comment may be appropriate to show why the appeal must be rejected. Brief review of the proceeding may be exemplary.

II

When Appellant's hearing began on 14 February 1968, he had already, five days earlier, been advised of his right to counsel. When he appeared for hearing without counsel, the Examiner on his own motion, and despite the facts that the Investigating Officer had live witnesses waiting, and that Appellant had been evasive and misleading abut his future hospital commitments, adjourned the hearing to the next day so that Appellant could obtain counsel. The next day, Appellant declared that he could not obtain satisfactory local representation and asked for two weeks to obtain a lawyer from New York. The Examiner denied a two week delay but consented to a one week delay, on condition that two witnesses who appeared to be unavailable a week later would be heard four days later. He declared that if Appellant were not represented by counsel by that time Appellant would have, if he wished cross-examination of those witnesses, to undertake it on his own and leave it to counsel to attempt their recall. In fact, when the hearing resumed, it had been learned that one of the two "going" witnesses would still be available, and only the other was heard.

Appellant then decided to proceed without counsel.

Appellant had three times been advised of his right to subpoena witnesses and had twice been told of his right to take testimony from absent witnesses by deposition.

Ultimately Appellant, despite statements on the record as to what he wanted to prove and could prove, proceeded, as noted above, without counsel, did not ask to have any witness placed under

subpoena, and did not ask for depositions to be taken.

When the Examiner noted that there was already available an affidavit of a person whom Appellant had identified as a desirable witness, he made it part of the record on his own motion. (The affidavit is not too helpful to Appellant.)

This recital must not be construed as setting a standard of proceeding which examiners must follow. It is given more as a sample of how far an examiner can go in humoring an obfuscatory person charged without losing his temper. One specific incident may be signaled out. On the first day of hearing, when the Examiner proposed an adjournment to 0930 the next day for Appellant's benefit (to obtain counsel), Appellant declared that he had to be at the U.S.P.H.S. Hospital at 0900 the next day, and could not appear. This obstruction eventually boiled down to an admission that he had no appointment at the Hospital the next day at any time, but wished to be at Bakerfield, California (not his home address) the next afternoon.

As stated before, the Examiner leaned over backwards to accommodate this Appellant, before he firmly placed proceedings under control. It is stressed here that examiners need not yield to dilatory claims which lack merit. Due process does not include the right to frustrate proceedings on meretricious grounds.

III

Insofar as Appellant's specific statements on appeal can be accepted as grounds for appeal, they are resolvable into two frames:

(1) the Examiner's findings are not based on substantial evidence,because the Examiner accepted as basis for his findings testimony which was in conflict with that of Appellant's, and

(2) evidence was somehow suppressed at the hearing which should have been presented, thus resulting in denial of due process.

IV

To look to this second item first, it is seen that the evidence claimed to have been suppressed at the hearing falls into two classes:

(1) evidence which Appellant himself failed to give, and

(2) evidence which "key witnesses" might have given, except that they were not called.

These two classes actually coalesce into one. Appellant darkly intimates that he could have said more about an episode involving himself, the master, and the chief mate, which occurred when the voyage first started. Appellant gives no reason why he failed to give this evidence, and even if he had, its relevancy is nowhere shown.

In the same way, the statement that the master and chief mate were "key witnesses" is meaningless.

It is true that the unsupported statements on appeal show no relevancy to the instant case. More important, the assertion does not pertain to a position taken before the Examiner. In the absence of any showing of "newly discovered evidence," there is nothing to be considered on appeal other than matters raised before an examiner on the record at the hearing.

An examiner's findings cannot be attacked on grounds of issues available at the time of hearing but not raised at hearing.

In this connection it is noted that at the hearing Appellant cross-examined and argued with one witness seeking to obtain an admission that the witness had not been present aboard the ship at the time of the actions which he had testified to have observed. The witness remained unshaken both by cross-examination and by argument.

When the Appellant testified himself he presented no evidence tending to prove that witness had not been aboard the ship as he said he had. In two documents filed on appeal Appellant still asserts that the witness was not on the ship.

In this instance, Appellant opened the question by his treatment of the witness, but did not raise an issue because he offered no evidence before the Examiner which would tend to prove that the witness had been aboard the ship at the time he said he was. Even a reiterated naked statement on appeal that the witness was not present at the time of the event is of no value. The principle stated above still applies.

Appellant attacked the credibility of a witness before the Examiner. He intimated by tactics on cross-examination the he intended to show that the witness had not been aboard. He offered no evidence on the matter, however, and thus did not raise an issue before the Examiner. His repetition of assertions, on appeal, that the purported eyewitness was not aboard avails nothing. Here again, it is emphasized that even if evidence tending to prove the assertion were offered on appeal, it would not be "newly discovered" evidence.

Except in the case of clear error or newly discovered evidence, it is not the function of appellate action under 46 CFR 137 to review matters that were not of record before the examiner at hearing.

V

With respect to the argument reducible to a claim that the evidence accepted by the Examiner was insufficient to support findings, it is first observed that the Examiner's "Opinion" shows careful examination of the conflicts which appeared in the testimony. He noted the basic consistency of the testimony of the witnesses produced by the Investigating Officer. In the two affidavits he saw a similar basic consistency, and with respect to that of the man whose testimony Appellant had declared would be especially favorable to him, he noted a failure to contradict and critical evidence of the other witnesses and a lack of strength in any corroboration of Appellant's own version. As to Appellant's own testimony, the Examiner perceived, in effect, that many details served as partial admissions that were consistent with the testimony of the witnesses against him, and that other details were just not persuasive.

One instance in Appellant's testimony may be cited, not referred to by the Examiner in his "Opinion," which indicates the quality of the explanations which he gave to refute the testimony of others. There was testimony from two witnesses, partially corroborated by that of a third, that on the occasion of entering a motor vehicle to return to the ship from the hospital, Appellant threatened to throw acid in Biskinis's face.

Appellant "explained" the remark by stating that it was made on another occasion when he was walking down a street in Pusan with a shipmate, and passed a Korean who had severe burns or scars on his face. The remark was made about the Korean, Appellant asserted. He asserted also that he said nothing about "acid" in the face, but about "ashes" in the face.

Testimony like this can be seen as justifying, if such justification is needed, an examiner's granting little credence to what he has heard.

At any rate, from the evaluation given to the evidence by the Examiner, it can be seen that he did not assign or deny weight to the evidence without deliberation and consideration.

VI

The Examiner is the trier of facts. As such he is the judge of the credibility of witnesses. This function is of especial importance when there are several witnesses whose testimony may result in minor discrepancies arising from the fact that the witnesses are testifying from physically different points of view and with varying degrees of interest in or attention to an event. When an examiner has decided what weight to give to the evidence and has made his findings accordingly, the sole test on review is whether the evidence upon which he based his findings is "substantial."

"Substantial" evidence is, admitted, of a quality such that reasonable men might disagree in evaluation as against other evidence. There can thus be substantial evidence on both sides of a controverted issue. When the Examiner has assayed the materials presented to him, the test then is not whether a reviewer would have made the same findings had he been the trier of facts.

O'Kon v Roland, DC SD NY (1965), 247 F. Supp. 743.

It follows from this that the function of the reviewer is not to reassay as between two bodies of conflicting evidence, but to assay only that accepted by the trier of facts to see whether it is "substantial." To say that the evidence is not "substantial" requires that the evidence be found to be so intrinsically unreliable and unbelievable that no reasonable man could accept it as the basis for findings.

It is obvious that the test is met in this case, and it may be said, *obiter*, that any other findings by the Examiner might have verged on the opposite form of error.

CONCLUSION

There is no reason to disturb the findings or order of the Examiner. The order of revocation is appropriate because of the nature of the violence of Appellant's conduct.

ORDER

The order of the Examiner date at San Francisco on 31 July 1968, is AFFIRMED.

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

Signed at Washington, D.C., this 1st day of May 1969.

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