IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1227504
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Howard REAGAN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1776

Howard REAGAN

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 24 October 1968, an Examiner of the United States Coast Guard at Cleveland, Ohio, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a watchman on board the SS COL. JAMES M. SCHOONMAKER under authority of the document above captioned, on or about 23 June 1968, while the vessel was underway on Lake Superior, Appellant:

(1) assaulted the master of the vessel;
(2) assaulted the Third Mate;
(3) maliciously destroyed ship's property; and
(4) disobeyed an order of the master by not going to his room.

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

The Investigating Officer introduced in evidence the testimony of six witnesses and voyage records of COL. JAMES M. SCHOONMAKER.

In defense, Appellant offered in evidence his own testimony, and the statements of three other witnesses made before the hearing began.

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 revoking all documents issued to Appellant.

The entire decision was served on 25 October 1968. Appeal was timely filed on 28 October 1968 and perfected on 25 April 1969.

FINDINGS OF FACT

On 23 June 1968, Appellant was serving as a watchman on board SS COL. JAMES M. SCHOONMAKER and acting under authority of his document while the ship was underway in Lake Superior.

After a series of occurrences which have been rendered irrelevant by the Examiner's ultimate findings, Appellant arrived at the master's quarters, for the third time, at about 0025. There were already on the scene the two mates who were off watch and two or three members of the unlicensed crew. Appellant entered the master's office and ripped an electric light fixture off a wall. After disturbing papers on the master's desk and throwing a chair, he forced his way into the master's bedroom by kicking the door. The door was damaged.

The master repeatedly ordered Appellant to go to his quarters but Appellant did not do so.

Back again in the office, Appellant kicked and broke a gyro-repeater on the wall.

Appellant, still holding the light fixture in his hand, stood "chest to chest" with the master, threatening to throw him over the side, challenging him to come on deck and to shoot him, and telling

the master that he was going to kill him that night.

When the others present, at the master's order, tried to restrain Appellant and place him in security, Appellant tried to bite the Third Mate's throat.

Appellant was ultimately restrained and removed from the vessel.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant makes six points on appeal:

(1) "The revocation proceeding lacked jurisdiction since no merchant mariner's document was held by the person charged;"

(2) "The first five specifications, improperly alleging a legal conclusion instead of operative facts, do not identify the nature of the offense sufficiently to prepare a defense;"

(3) "The person charged was improperly and prejudicially denied information to prepare his defense;"

(4) "The findings of fact and the opinion of the hearing examiner on the element of intent are not supported by substantial relevant and probative evidence;"

(5) "The Examiner erred in finding the assaults of the first and fourth specifications proved contrary to the evidence;" and

(6) "The hearing examiner denied the person charged due process by abandoning any independent judicial attitude and assuming participation in the prosecution."

In addition to these six formal "points" Appellant intimates that

his case will be reviewed on appeal by the officer who acted as Investigating Officer at the hearing.

APPEARANCE: Fuller Hopkins Lawton & Taussig, of New York, New York, and S. Eldridge Sampliner, Esq., of Cleveland, Ohio, by William E. Fuller, Esq.

OPINION

I

Appellant's first point deals with a question of jurisdiction. It is asserted that because Appellant's Merchant Mariner's Document was not produced before the Examiner and because Appellant did not have such a document in his possession at the time of the hearing there was a lack of jurisdiction to proceed against such a document under R.S. 4450. The argument is based upon a theory that for jurisdiction to exist, Appellant must have "held" a document, and to be a "holder" of a document he must be shown to have had it in his possession or to have deposited it in some fashion with the Coast Guard such that he had a receipt for it.

Under the circumstances of this case it can be see that misconduct because he did not, at the time of hearing, "hold" a license, but he would still be eligible for renewal of his license with no suspension or revocation action possible.

A person would not be amenable to action for wrongfully pledging his document, since no one could produce it.

A person could frustrate action by throwing his document into the sea when he was given a notice of hearing. He could frustrate action by declaring that his document was lost and by refusing to apply for a duplicate (entitling him to a "receipt" for the application.)

There is no requirement under R.S. 4450 that a person be a "holder" of a document in order that hearing may be held. To act against a document or a right to hold a document, it is enough to show that the acts alleged occurred when the person was serving under authority of a document, whether he had physical possession

of the document (or a token thereof) at the time of the act or the time of hearing.

Under the circumstances of the instant case, irrespective of general principles, it can be seen that Appellant's argument is without merit.

Although Appellant urges that he turned over his document, under duress, to Coast Guard authorities, who held possession while he did not, his own testimony shows that he was interviewed and told that he could avoid hearing if he surrendered his document for that purpose. The pertinent dialogue between Appellant and his counsel follows:

"Q. Did Mr. Fournier make a demand for your document?

"A. Mr. Fournier explained the procedure of giving him my document a sign of good faith and it would be produced at a hearing.

"Q. Did he tell you that it was a voluntary surrender to avoid a hearing?

"A. Yes, sir.

"Q. Would you tell what happened after that?

"A. I told him I didn't have the document so he didn't talk too much about it anymore. Things got pretty heated and I started to leave and he asked if I would stay long enough to have some papers typed up for me to sign. I told him no.

"Q. What did he say?

"A. He told his secretary to call the FBI.

"Q. Did you leave?

"A. Yes, I went out to the parking lot to get the document

> out of the car. My wife was in the car; I brought it back and threw it on Mr. Fournier's desk and told him to keep it." R-110,111.

Appellant has specifically referred to this dialogue as proof of "duress". His own testimony shows that the throwing of his document on the desk of the Investigating Officer was a deliberate, uncoerced act. Had Appellant signed the documents prepared he would have waived hearing and surrendered his document. He did not do so. But he cannot argue now that his voluntary obtaining of the document, throwing it on the Investigating Officer's desk, and departing from the scene ousted the agency from authority to proceed to suspend or revoke the document.

The view expressed here is supported by Appellant's argument at the hearing, that he had "voluntarily given it [the document] to Mr. Fournier [The Investigating Officer]." R-4.

Appellant cannot be heard to assert at the same time that he had "voluntarily" given his document to a Coast Guard official, as he did on the record of hearing before the Examiner, and that he gave up possession of the document under duress, as he urges on appeal.

When contradictory theories of an appellant are argued on appeal neither carries much weight.

II

It may also be noted that Appellant's argument on this point is actually against his own interest. If there was no jurisdiction to conduct this hearing under R.S. 4450 because Appellant held no seaman's document, then he was not entitled to a document, to a hearing, or to review. It is inconsistent for Appellant to ask for dismissal on the merits, with consequent restoration of his document, and at the same time declare that he had no document at all to be the subject of suspension and revocation proceedings and to be subject to possible restoration to him.

III

Appellant's second point attacks the validity of the first five of the original seven specifications as being "factually inadequate and defective." Since the Examiner dismissed the original second, third, and fifth specifications, Appellant cannot now have a complaint as to them.

Of the two specifications found proved from this group, the first alleged that Appellant had assaulted and battered the master of the ship on 23 June 1968 while the vessel was proceeding on Lake Superior. Appellant complains that this did not sufficiently apprize him of the misconduct alleged, so that he could prepare a defense, because it stated merely a conclusion of law and not "operative facts" as to how he committed the assault and battery.

Whatever the rules of pleading may be in civil suits under State laws, it is enough in a proceeding such as this to plead acts of misconduct in terms easily understandable and well understood. Appellant does not claim that the meanings of "assault" and of "batter" were not understandable. While it is true that specifics of an assault and of a battery may be spelled out in a pleading, for one reason or another, one cannot complain that notice that he is charged with assault and battery upon a named person on a named ship on a stated date does not sufficiently inform him of what he may be expected to defend against.

The fifth item among seamen's offenses enumerated in 46 U. S. C. 701 reads thus:

> "For assaulting any master, mate, pilot, Engineer, or staff officer, by imprisonment for not more than two years."

As originally alleged, the specification with respect to the master of the ship was more detailed than the statute; it alleged assault and battery. As found proved, the specification alleges only assault on the master. When a specification of misconduct under R.S. 4450 is couched in the language of a statute and is tied to a time and place sufficiently identified, it cannot be held sufficient.

If a specification, under R.S. 4450, alleging assault upon a master, is fatally defective then the statute is fatally defective.

Without admitting that the statute is even needed in this case, it is obvious that an Act of Congress cannot be declared defective in an administrative proceeding authorized and directed by Congress. If a statement by Congress is sufficient to notify a seaman that "assault" on a master is punishable as a crime, an allegation that a seaman has "assaulted" and "battered" a master is sufficient notice as to what is being litigated in an action against the seaman's document.

The frivolous nature of Appellant's claim in this respect may be seen when the matters actually litigated are looked at. *Kuhn v.C.A.B.*, CA D.C. Cir. (1950) 183 F. 2nd 839. Despite Appellant's assertion even now that the allegation was defective, the Examiner was able to scrutinize the record and hold that the alleged battery did not take place while the assault did. With allegations and record so clear that the Examiner could find the alleged assault without the alleged battery, it is obvious that Appellant's claim has no foundation.

IV

Appellant's complaint as to the original fourth specification, the second of those found proved by the Examiner, is twofold.

One part is that an allegation of assault on the Third Mate, R. J. Graham, failed for lack of specificity. What has been said above with respect to the assault on the master applies equally here.

The other part is that Appellant was originally charged with two specifications alleging assault on the Third Mate on the same date, and so could not properly defend because he could not distinguish between the allegations. When this point was made before the Examiner, he denied a motion to dismiss when he was advised by the Investigating Officer that the intent was to prove two different assaults, not far enough apart to identify by precise time in hour and minutes but separable in fact in relation to other actions.

After hearing, the Examiner, if not Appellant, was able to distinguish between the two incidents. He was able to find one not proved while finding the other proved.

The Examiner's original ruling is agreed with in that the offer of proof of two separate assaults on the same person on the same date was enough to allow proceedings on both allegations. Appellant's argument disintegrates on appeal when it is observed that the Examiner not only distinguished between the two separate occurrences but found one of the two specifications of misconduct involved not proved.

If pleadings are well enough stated that an examiner can, on the record, distinguish between them to the point where he can, with support in the record, find one of them proved and the other not proved, it cannot be seriously claimed after the initial decision that the party involved was inadequately informed from the outset to initial decision as to what was alleged as his misconduct.

Actually, therefore, Appellant's contention on appeal must be rejected because any possible confusion of allegations was resolved by the Examiner's findings, and a confusion that might have, but did not, exist at the beginning of the hearing no longer exists at the appellate level.

V

Appellant states that he was "improperly and prejudicially denied information to prepare his defense". In support of this Appellant points out that on 19 September 1968, more than three weeks after the notice of hearing was served upon him, and within four days of the scheduled date of hearing, he demanded, by telegrams, copies of statements of witnesses and of log entries that might be used at the hearing. By return telegram, the Investigating Officer stated that the "demands" would not be complied with.

Appellant complains that the Investigating Officer thus "usurped the judicial function of the Hearing Examiner." Since the Investigating Officer was addressed by name in Appellant's telegram, there can be no complaint that he usurped anybody's functions.

The demand was timely and properly made to the Examiner at the

hearing. The Examiner directed the Investigating Officer to deliver to Appellant copies of any statements which he might have, made by witnesses whom he did not intend to call. He also advised Appellant that if there were prior recorded statements of witnesses whom the Investigating Officer were to call a statement of such a witness would be provided to Appellant when the witness was called.

18 U.S.C. 3500 requires that in a Federal criminal trial a defendant will be afforded an opportunity to have access to any prior recorded statement of that witness, when the witness is called but not before.This permits a defendant to conduct intelligent cross-examination of the witness in the event that discrepancies can be found between the earlier statement and the testimony given at trial. Appellant in this proceeding is entitled to no more.

When the Examiner ordered production of recorded statements of witnesses who had been interviewed but were not to be called, he went further than the criminal evidence rule requires and insured that Appellant would have access to information available to the Investigating Officer which might lead Appellant to call other witnesses for his own benefit.

It was acknowledged on the record that Appellant had been provided with copies of statements of all witnesses who appeared against him, plus the statements of three witnesses who were not called. Appellant himself placed these three statements in evidence, and correctly points out on appeal that they were mislabeled in the list of exhibits as "Coast Guard" exhibits, not as his exhibits. The fact that these statements were furnished to Appellant and entered by him into evidence belies his present assertion, unsupported by any specifics," that there was an attempt to "suppress" evidence favorable to him. It must be noted that Appellant made no attempt to seek the presence of these three witnesses by subpoena, or to take their testimony by deposition. Appellant made no request for a continuance of the hearing for any purpose, although he had been carefully advised of his rights.

It appears in this case that Appellant is not really arguing that he was denied the opportunity to prepare his defense but is complaining that no one prepared his defense for him.

VI

Appellant's next point is somewhat difficult to follow. He argues that there was a failure to prove a necessary "intent" for the misconduct found proved and complains that the Examiner went out of his way to negative intoxication as a defense while appellant had not argued intoxication as a defense such as to negative intent.

There is no doubt that the Examiner had ample evidence of Appellant's drinking before the acts of misconduct found proved. If the Examiner perceived a possible defense which Appellant had not raised, and rejected it, Appellant cannot object that the Examiner went further than he had to in exploring possible excuses for Appellant's acts.

But Appellant also seeks to impugn the Examiner's treatment of evidence that appellant had struck his head in a fall. The Examiner, noting that there was no medical evidence that Appellant was not legally responsible for his acts, gave an opinion that the fall was the result of Appellant's own fault.

It does not matter that Appellant's intoxication might not have been "misconduct" as defined in the first item enumerated under 46 C.F.R. 137.05 20(a).

Appellant argues that intoxication is not "misconduct" in this case because there was no proof that drinking off duty was prohibited on this ship. The argument is ingenious but inapplicable. The concept of "intoxication" as a defense in certain actions involving intent is a common one. This is true whether intoxication is unlawful or not. The Examiner's exploration of the question of intoxication in this case was not to determine whether that condition might have been "misconduct" under 46 C.F.R. 137.05-20(a) but whether it might have been a defense under common law principles under which voluntary intoxication is often found to be no defense.

For the purpose of this appeal, it can be assumed, however, that "intoxication" can be omitted as a factor, as Appellant urges that it should be. The question then can be reduced to whether a needed "intent" was proved. "Intent" is not a piece of real

evidence; it is a condition which is inferred from the nature of the acts performed. The nature and effect of the acts performed in this case lead to the inference that Appellant, even absent the question of intoxication, intended the natural and probable consequences of his acts.

VII

Appellant has another complaint on this score, that the Investigating Officer and the Examiner deliberately "tried to make this medical case into a wrongful intoxication-misconduct case".

Appellant made no contention at the hearing that he was legally incompetent. He makes no such contention on appeal. If he wished, even at this date, to argue that newly discovered evidence rendered him incompetent he had a remedy. He could have applied for reopening of the hearing, with a satisfactory offer of proof, under 46 C.F.R. 137.25-1. He has not done so, for understandable reasons. He is now precluded from doing so.

VIII

Appellant's last point is that the two assaults found proved were not established by substantial evidence.

As to the alleged assault on the master, the Examiner, found, on credible evidence, that Appellant stood before the master in a threatening manner, holding a light fixture in his hand and making threatening remarks about doing physical harm to the master.

This is not the place for a collection of decisions, often confused, on the law of criminal or merely tortious assault, but to avoid misunderstanding one argument of Appellant must be specifically rejected.

He says that because the master did not fear bodily harm to himself, but rather feared harm to appellant, there was no assault. If an assault is to be found not proved here it cannot be on the grounds urged by Appellant.

Assuming proof of certain facts it may be that a person who

points a loaded pistol at a sleeping victim would not be liable in damages because the victim did not suffer legal injury, but on the same set of facts the pistol holder could be found guilty of criminal assault if the jury found that he had an actual intent to injure, even if he was frustrated and even if the victim was unaware of the attempt. (In the one case apparently contra this belief, *State v. Barry*, Mont. (1912), 45 Mont. 598, 124 Pac. 775, it was not established that the rifle was loaded.)

"Fear" in the victim is a consideration only when the means available to the threatener are only apparent, e.g. an unloaded pistol presented with a threat to shoot. There is no doubt that an unloaded pistol presented as a means of battery by striking on the head would not be "apparent means" but would be real, and the "fear" element would be irrelevant.

Here the weapon available was not only an "apparent" means of doing harm; it was real; it was a light fixture held in Appellant's hand. Thus, "fear" in the master would not be a factor at all if the assault were with the weapon at hand.

On the facts found by the Examiner, I cannot agree that an "assault"on the master was established. The Examiner did find a battery proved as a fact but chose to dismiss that part of the allegation because the master was apparently unaware of the battery. There is left to consider, then, only the "assault".

The findings as to Appellant's conduct toward the master are unimpeachable, but they do not establish a legal assault. It is true that Appellant had an available weapon in his hand with which to do bodily harm to the master; he held the light fixture. But there is no evidence that he tried to strike a blow with this weapon or that he brandished it in a threatening manner to the accompaniment of threatening words.

It is true that the holding of the potential weapon was accompanied by threats. The threats, however, were to throw the master overboard,an act which could not be accomplished by means of the light fixture, and to kill the master at a later time, clearly not a threat of present harm. (Of course, the remark that they could go out on deck and the master could shoot might be insubordinate but it is not a threat.)

Appellant's words plainly threatened bodily harm to the master, but the words used negatived an intent to use the weapon available and the available weapon was not used in a threatening way. *Tuberville v. Savage*, (1669), 1 Mod. Rep. 3.

To threaten bodily harm, including death, is misconduct lesser than, but perceivable within, "assault".

With respect to the assault on the Third Mate, the Examiner found, on credible evidence, that Appellant tried to bite the Third Mate on the throat. Here, it is true, the Examiner spoke in terms of reasonable "apprehension" of harm by the Third Mate. Consistently with the reasoning just advanced, I do not think that the question of "reasonable apprehension" of harm by the Third Mate need have been explored here. The evidence supports the finding that Appellant did try to bite the Third Mate. He had the actual means of consummating the battery available, his teeth. The fact that he was restrained by other parties need not be considered. He actually made the effort to commit a wrongful battery. This is simple assault whether the victim was apprehensive or not.

IX

Appellant's last point accuses the Examiner of being unfair. Supporting material for this point is either already covered by the rulings on the other points or is non-existent. As a subhead of this point, Appellant also, however, attacks the order as excessive. The conduct proved against a master and a mate is so serious that it cannot be said that the Examiner's order is beyond his discretion.

X

Appellant has raised one other issue, in his appellate documents, not characterized as a "point" but urged to show that due process is denied even on the appeal. Appellant asserts that the Investigating Officer in this case is believed to be now on the staff of the Commandant in an office which "passes on this appeal". Appellant cites 46 C.F.R. 1.20(b) in this connection.

By official notice, I see that the officer in question, named by Appellant, is not now attached to the Office of Merchant Marine

Safety at Coast Guard Headquarters, and has not been since the beginning of the hearing in this case. More importantly, I note that Appellant has misread or misunderstood the regulation he cites. Paragraph (b) specifically excludes from the functions of the Office of Merchant Marine Safety "those dealing with suspension or revocation of licenses, certificates, or documents . . . ." Even if the named officer were in the position where Appellant asserts he is, he would be in no position to review this case.

CONCLUSION

Since the Examiner, although finding a battery on the master proved as a fact, dismissed the "battery" part of that specification, assault and battery on the master cannot be found. Since without a battery no assault can be found on the master, that ultimate finding cannot be supported.

Threatening bodily harm is, however, a lesser offense found included in assault. The Examiner's findings on this specification must be modified, while the other ultimate findings are completely supportable.

ORDER

The order of the Examiner dated at Cleveland, Ohio, on 24 October 1968, is AFFIRMED.

The findings of the Examiner in this case are MODIFIED to reflect that Appellant is found not to have assaulted the master, but to have threatened bodily harm to the master. As MODIFIED, the findings are AFFIRMED.

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

Signed at Washington, D. C., this 2nd day of July 1969.

Assault (no battery)

- Alleging 2 assaults on same person, day
- Apparent intent
- Attempt to commit battery as
- Defined
- Fear of injury
- Intent of party
- Negatived by statement
- Specification naming person, date and ship sufficiently detailed
- Threat as lio
- Threatened means, significance of real or apparent
- Weapon not used threateningly
- Words negative intent to use available weapon

Charges and Specifications

- Alleging two assaults on same person, day
- Assault, naming person, ship and date sufficiently detailed
- Finding only part of specification proved as indicating specification sufficiently detailed
- Notice, sufficiency of
- One specification proved and other not as eliminating confusion of allegation
- Specifications must be in understandable terms
- Statute, couched in terms of

Defenses

- Raised and rejected by examiner

Evidence

- Newly discovered, reopening of hearing
- Pretrial statements

Hearings

- Defenses, necessity of presenting

Motion to reopen, timeliness
Reopening of, newly discovered evidence

Intent

Inferred from nature of acts performed

Jurisdiction

No need for document to be present at hearing
Party must serve under authority of document at time of alleged offense

Misconduct

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