IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-505225
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Celso A. GUERRERO

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1788

Celso A. GUERRERO

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 12 January 1970, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman's documents upon finding him guilty of misconduct. The specifications found proved allege that while serving as a bedroom steward on board SS SANTA MAGDALENA under authority of the document above captioned, on or about 12 April 1969, Appellant:

1) wrongfully molested a minor female passenger, D. L. J., by caressing her body in a passenger stateroom while at sea;

2) wrongfully invited the same minor female into an otherwise unoccupied passenger stateroom while at sea; and

3) wrongfully requested the same minor female to kiss him, in a passenger stateroom while at sea.

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 three witnesses taken in direct examination by oral deposition, and voyage records of SANTA MAGDALENA.

In defense, Appellant offered in evidence the testimony elicited by him on cross-examination of the three witnesses whom the Investigating Officer had deposed.

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 22 January 1970. Appeal was timely filed on 12 February 1970 and perfected on 22 April 1970.

FINDINGS OF FACT

On 12 April 1969, Appellant was serving as a bedroom steward on board SS SANTA MAGDALENA and acting under authority of his document while the ship was at sea, approaching Buenaventura, Columbia.

D. L. J., aged 12, daughter of Rev. and Mrs. G. J. was a passenger aboard the vessel. She occupied Cabin 129, which was serviced by Appellant as bedroom steward. Her parents occupied Cabin 105, not serviced by Appellant.

At about 1800 on the date in question, Miss J., who had just returned to her room from the swimming pool and was dressed in a bathing suit, received a telephone call from Appellant, asking her to meet him in Cabin 135, which was not, at the time, occupied by a passenger.

When Miss J. entered Cabin 135 Appellant invited her to look out the porthole to view the scene of arrival at Buenaventura. She

knelt on a couch at the porthold and looked out. Appellant asked her to kiss him, which she did, on the cheek.

Appellant hugged the girl, placed his right hand on one of her breasts and placed his left hand between her legs. On her objection he desisted. Appellant asked her not to tell anyone of the episode and asked her for a picture of herself as a remembrance.

Miss J., worried, went to her mother's room, knocking loudly on the door. When mother admitted her, the mother immediately perceived that the child was upset over something. As the girl cried she told her mother what had happened. She asked her mother whether she would be pregnant. The mother quickly asked questions, the answers to which assured her that the possibility did not exist.

The mother reported the matter to the father who reported it to the master. The master recorded the occurrence in the official log, warned Appellant of the seriousness of the offense, and relieved him of duty in the area. A written statement of the mother was attached to the log.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner.

Appellant's "Point I" is that "there has been no conviction for this type of offense in the Court of the State of New York." Appellant incorporates by reference his argument made on this proposition before the Examiner.

Appellant's "Point II" is that the "Examiner's decision ...fails to substantiate the charges herein." I find, however, that "Point II" actually contains several different assertions of error which, after analysis and reorganization, appear as follows:

1) the testimony of the child allegedly molested does not support the findings of the Examiner;

2) the Investigating Officer, without a complete and thorough investigation "wantonly" charged Appellant with molesting the child by kissing her, an allegation which, since it was found "not proved", was "inserted to inflame and prejudice the mind of the Examiner and it accomplished this purpose";

3) the Examiner failed to consider the citations of authority furnished by Appellant and there were none furnished by the Investigating Officer;

4) the Examiner lightly dismissed a letter addressed to the father of the child by the Investigating officer and found that it was not prejudicial to Appellant;

5) Appellant was denied a fair hearing because when SANTA MAGDALENA arrived at New York from the voyage on which the misconduct allegedly occurred Appellant's counsel was "precluded from the vessel and interviewing witnesses";

6) Counsel was denied the address of the family of the child, thus preventing full investigation by counsel, and when an address was provided, at the time application to take depositions was made, the only address given was a post office box number rather than a home address, "an obvious attempt to thwart a fair and impartial hearing"; the Examiner's finding of no prejudice in this conduct shows that "he had no understanding of the law and facts herein"

(In considering these bases of appeal, my Opinion will necessarily flesh out some of them by reference to Appellant's positions as stated in the record made before the Examiner.)

APPEARANCE: Zwerling & Zwerling, New York, New York, by Irving Zwerling, Esquire.

OPINION

A preliminary comment may be made here on a most unusual

procedure followed in this case. All live testimony was taken by deposition. The Investigating Officer, upon receipt of the depositions, offered in evidence only the testimony of the witnesses taken on direct examination. Appellant then placed in evidence only the testimony of those same witnesses taken on cross-examination. There was no comment on this procedure made by the Examiner.

Since there was no objection to this procedure, I can only assume that some prior off the record, agreement must have been reached as to how the material should be submitted, and there is no error. I mention the point here to dispel any future misunderstanding that might arise should investigating officers believe that they may submit in evidence only deposition testimony taken on direct examination without offering the entire deposition in evidence.

II

Looking to Appellant's "Point I", that no person has ever been convicted of such an offense in the "Court of the State of New York", a simple reply could be made to the effect that this is of no significance. Appellant could as well have argued that no person had ever been convicted of such an offense in Rhode Island, Oklahoma, or South Dakota.

Although this hearing was held in New York, New York criminal law and criminal procedure do not control in proceedings under R.S. 4450 and 46 CFR 137. See Decision on Appeal No. 1485, a case in which present counsel were on the record.

Here, for the first time, I am constrained to "flesh out" Appellant's argument by resorting to his submission to the Examiner.

Appellant argued that misconduct of the kind alleged can not be found proved on the uncorroborated testimony of the victim alone. He cited *People v. Porcaro* (1959), 6 NY 2nd 248, 160 NE 2nd 488. 189 N.Y.S. 2nd 194. The citation is inappropriate for several reasons.

In the cited case, the proposition urged by Appellant is offered only by one judge in a separate concurring opinion. The point in question will be discussed in more detail below, but the fact is that the trial court refused to grant a certain motion and Porcaro was convicted. The Appellate Division by unanimous vote, in an unsigned order, without opinion, upheld the trial court. 174 N.Y.S. 2nd 447. By leave of one justice of the Appellate Division, the case was taken to the Court of Appeals. By a vote of 4 to 3 the Court of Appeals reversed. Judge Fuld's vote was with the majority, for reversal. He, and only he, in his concurring opinion, argued that the theory exposed by Appellant was implicit in New York law and should be explicitly expressed. The other members of the majority did not accept this view and the minority roundly denounced it while also disagreeing with the opinion of the Court. It is apparent that the theory exposed by Appellant is not yet the law even in New York.

Further, in the Porcaro case, the situation was entirely different from that in the instant case. There, the charge was impairment of the morals of a minor. The minor's testimony dealt with both ordinary sexual intercourse and oral sodomy. The trial court refused to order the physical examination of the minor's hymen, on the grounds that oral sodomy alone was enough to prove the charge and thus the condition of the hymen was not relevant to the essence of the offense. The Court of Appeals held that the condition of the hymen was relevant to the fundamental question of the child's credibility, because her total testimony tended to prove normal sexual intercourse. In the instant case, from the different nature of the allegation and the evidence, there is no need to look to the physical condition of the child.

Lastly the instant case does not involve uncorroborated testimony in the first place. There was a fresh complaint from the minor, and there was a closely following confrontation by the master with Appellant who chose, in reply to the official log entry read by the master, to declare "Nothing to say." See Decisions on Appeal Nos. 1052, 1185, 1228 and 1346. See also Decision on Appeal No. 1679, affirmed in NTSB Order No. EM-3 (RODRIGUEZ).

Since there is a direct connection, I take up at this point the matter raised in the third item of my analysis of Appellant's "Point II", that the Examiner dismissed his citations to

authorities and, in the absence of citations by the Investigating Officer, the Examiner"took up [his] banner" and supplied his own.

The record of proceedings shows that the Investigating officer did provide citations to authority, all to earlier Decisions on Appeal in similar proceedings. Counsel before the Examiner, declared that he was "insulted" because, after all his personal research in New York law, the Investigating Officer had not cited one State court decision. R-117.

46 CFR 137.03-1 specifically makes Commandant's decisions in these proceedings binding on examiners. When decision in point are found, there is no need for investigating officers or examiners to do further research into State opinions, which may be persuasive but are not controlling as to what is "misconduct" under 46 CFR 137.05-20(a), Item (1).

I repeat here, for the benefit of all parties interested in saving time and effort, that the criminal law and rules of evidence in criminal proceedings in New York, as they are now or may become by ruling of the State's Court of Appeals, or by action of the State Legislature, are not controlling in determining what constitutes "misconduct" or what standards of proof must be met in these proceedings.

III

The testimony of the child was rendered valueless, according to Appellant, by her answer to his last question on cross examination. "Would you say the whole incident as you described it in this room 135 was confusing?" The answer was "Yes."

The answer is not the damaging admission that Appellant would have had the Examiner take it to be. It is one thing for a situation to be confusing; this is a far cry from an admission by a witness that he was so confused as to have been incapable of observing events or to be incapable of recalling them.

The child's testimony was clear and direct that Appellant had asked her to kiss him, which she did, on the cheek, that he had put his arm around her, that he had placed a hand on her breast and that he had placed a hand between her legs. The Examiner's

evaluation of her testimony as reliable and probative need not be disturbed.

IV

The assertions that the Investigating Officer "wantonly" charged Appellant with kissing the girl in an effort to influence and prejudice the mind of the Examiner must be rejected out of hand.

It is true that the specification alleging this act of misconduct was dismissed by the Examiner. It is true also that the dismissal was on a routine motion by Appellant on the grounds that the evidence did not support the allegation. The claim of improper influence on the Examiner is raised for the first time on appeal.

The very fact that the Examiner sifted the evidence so as to arrive at a decision to dismiss this one specification is itself silent proof that he was not unduly inflamed by a "wantonly" made charge. In fact he distinguished between Appellant's request to be kissed (and being, at his request, kissed on the cheek), and Appellant' kissing the child.

The entire record, however shows that the specification was not preferred "wantonly" nor without adequate investigation. At the time of service of the charges, 23 April 1969, the date of return of SANTA MAGDALENA to New York, the Investigating Officer had the voyage records of the vessel available, the log entry and the attached statement of the child's mother. With out inquiry into the *quantum* of evidence needed to justify preferral of charges, it seems clear that what was available was enough. The primary witness was in Guayaquil, Ecuador, but "investigation" to the extent of requiring interview of the witness prior to the preferral of charges was not necessary; there was sufficient cause in the material available to authorize service of charges and it was reasonable to provide for contingencies of proof as to "kissing" or "asking to be kissed". The event shows the wisdom of the alternative allegations. In any case, the Appellant's assertions that the one specification was "wantonly" brought "to inflame and prejudice the mind of the Examiner" is absolutely without support.

V

Turning to the letter sent by the Investigating Officer to the father of the child at Guayaquil, I must again "flesh out" Appellant's brief by reference to the record made before the Examiner.

There were several aspects of this letter that annoyed Appellant. For the moment I confine myself to the accusation that it inflamed the witnesses to testify against Appellant. (Item 4, under Appellant's POINT II, set out in "BASES OF APPEAL" above.)

This letter suggested to the Rev. J. that cooperation in testifying in this case was desirable from the standpoint of preventing future molestations of young females aboard ship.

At the hearing, Appellant's counsel argued thus about the effect of this letter:

> "To show you how influential it is - it was, on page 6, the question was: 'How did you make this fact known, if you did, to the Captain?'...Answer: 'I stated that if I could be sure that the room steward would never repeat this incident to another person I would be willing to drop the case.' That's almost just another paraphrasing of...Commander Hayes' statement that he's going to do something in the future against girls. Now where did the Reverend J. get it except out of that fourth paragraph?"

The speciousness of the argument is easily apparent.

When the Rev. J. advised the master of the ship on 12 April 1969 (evidence adduced by Appellant) that he would not press charges against Appellant if he were certain that Appellant would not perform such acts again, but that he had no such assurance, he had not only not received the letter in question; he was still on the ship, and the date of his statement was the date of the alleged offense. Nothing could be more certain than that the letter of 30 April 1969 to Rev. J. did not influence a statement that he made on 12 April 1969.

When Mrs. J. testified that her initial reaction to the complaint of her daughter was that "my first impulse was to kill the man, strangle him, and claw him" (evidence adduced by Appellant), she was testifying as to her condition on 12 April 1969, not as to her condition after receipt of the letter which solicited the testimony of the J.'s for the hearing.

Appellant's own cross-examination of the witnesses destroys the notion that the witnesses were improperly induced into testifying against Appellant by the letter sent to them from New York by the Investigating Officer.

VI

In connection with this letter, although Appellant does not specify the matter on his appeal, I will again "flesh out" another aspect of his complaint both because Appellant made so much of the matter on the record and because the Examiner not only participated in the argument at hearing but adverted to it in his opinion.

The letter, in addition to requesting cooperation of the family, also advised of the identity of Appellant's Counsel and said that if Counsel communicated with the family "there is no reason or compulsion for you to make any reply to him." While the Examiner correctly found that there was no prejudice in fact to Appellant stemming from this advice, I cannot accept his criticism of the giving of the advice because, in his words, "witnesses are available to both sides with neither side having the right to impose on such availability..." D-6.

It is undeniably true that any counsel may seek to interview any potential witness for the other side. Canons of Professional Ethics, No. 39, American Bar Association. There is no comparable canon on the other side of the picture. There was nothing improper or unethical in the Investigating Officers advising the witnesses that there was no "reason or compulsion" for them to talk to Appellant's Counsel. No effort was made to make them believe that they could not talk to Appellant's Counsel. Both the Examiner (R-30) and Counsel (R-33) admitted that there was nothing wrong as a matter of law in the Investigating Officer's having tendered the advice given.

While the advice given was not erroneous and not unethical, it is also true that Appellant makes no claim of actual prejudice. The record does not disclose that at any time from 16 May 1969, when Appellant was furnished an address for the witnesses, to 25 June 1969, when the depositions were taken, Appellant made any effort to interview the witnesses, much less that he was rebuffed by them because of some improper advice.

VII

Appellant's renewed complaint that he was denied a fair hearing because his Counsel was denied access to him aboard SANTA MAGDALENA on its arrival at New York at the end of the voyage on which the misconduct took place is absolutely without merit.

The matter was argued before the Examiner and was adequately disposed of by him. It is immaterial that a ship owner may properly deny access to his property to certain classes of person. Appellant had every opportunity to subpoena witnesses and had the right to ask for time to seek out witnesses. He did not avail himself of these possibilities, although the actual hearing ran from 30 April 1969 to 14 October 1969 and the Examiner's decision was not rendered until 12 January 1970.

I specifically note that Appellant disclaimed any implication that Coast Guard personnel sought to prevent his access to the vessel. R-27, 28.

VIII

On the question of the address of the witnesses some comment is needed both because of the confusion which Appellant attempts to create in the matter and because of a gratuitous remark made by the Examiner in his opinion.

At the first meeting before the Examiner on 30 April 1969, Appellant asked for the address of the 4. J's so that he could conduct an investigation. At the time it was evident that the testimony of the witnesses would have to be taken at Guayaquil, Ecuador, although it had not yet been determined whether the depositions would be open depositions, depositions on written interrogatories, or depositions on written direct interrogatories

with open cross-examination. The Investigating Officer refused to do more at the time than disclose that the witnesses were at Guayaquil.

A dispute arose between the Investigating Officer and the Examiner, with the former arguing that no law or regulation required him to disclosed addresses of witnesses to Counsel, and the Examiner pointing out that under 46 CFR 137.20-140(b) an applicant for deposition testimony was required to give the "name and address" of the witness. The Examiner did not pursue the matter, possibly because the Investigating Officer had not yet applied to take depositions so as to make the paragraph pertinent. The Examiner then ordered that the address be provided with the application to take depositions.

I need not reach here the matter of whether the Investigating Officer had a duty at this time to give the best address he had available. Subsequent events obviate the question.

At the next session on 16 May 1969 Appellant admitted that he now had the address. R-34b. The question of address was not mentioned again at this session. However, final arrangements were made at this time to take open depositions at Guayaquil. Neither the Application nor the Examiner's order to take the depositions was made part of the record. This error was:

1) waived by Appellant's failure to object, and

2) cured by the fact that the depositions were taken with Appellant's participation and admitted into evidence without comment.

However, it is apparent that three documents:

1) the letter to the J. 's mentioned above,

2) the application to take depositions, and

3) the Examiner's order to take depositions,

used a post office box number as the address.

It is emphasized here that on 16 May 1969 Appellant and the Examiner were satisfied, without comment, with the address provided. The depositions were taken on 25 June 1969 with Appellant's Counsel present at Guayaquil.

It was not until after the depositions had been returned and admitted into evidence that Appellant, in his closing argument, claimed "foul", as he now does on appeal, because he had found out on 25 June 1969 that the J. 's had a street address. He urges now that the giving of a post office box number instead of a street number hindered his investigation.

There is absolutely no merit to this contention. If the Investigating Officer could reach the witnesses at the post office box address, and if the Examiner could reach the witnesses at that address for his order to take depositions, Appellant's Counsel could also have so reached them for any purpose he had in mind from 16 May 1969 to the time of appearance of the witnesses more than a month later.

Turning to the Examiner's comment on the "address" matter in his opinion, I find him saying that the Investigating officer "even [had] recourse to semantics in endeavoring to construe the word 'address' contained in 46 CFR 137.20-140(b) as meaning a Post Office Box rather than a street and house address." D-7. I find the Examiner's use of the word "semantics" here unfortunate. Semantics is a reputable science and one of its most important applications in the field of law is in statutory interpretation. "Recourse to semantics" does not mean the same as "mere quibbling" or "a play on words". More disturbing is the fact no such argument was ever made on this record, which I have summarized above with respect to this matter. Most disturbing is the fact that if such an argument had been made, the Examiner was wrong in castigating it. Lest there be any doubt in the minds of those who might read the Examiner's opinion, I hold explicitly that a post office box number is sufficient address for the purpose of the regulation involved. Too many seamen for too many years have used as their only address of record "25 South Street, New York", or a box at "Rincon Annex, San Francisco", or "Seamen's Section, Custom House, New Orleans", for the regulation to mean anything more precise.

I cannot avoid pointing out that the Examiner, like Counsel, had no objection to the address when given on 16 May 1969, and that the proof of the adequacy of the address was that the depositions were obtained.

IX

At two places in his brief Appellant refers to a fact which is not in evidence but of which I can take notice. The Examiner who heard this case is no longer employed by the Coast Guard; he has sought occupation elsewhere after over twenty years. Appellant does not merely imply but flatly asserts that the imminent departure of the Examiner caused him to treat this case as a matter of "clearing his desk". However, the attention which the Examiner gave in his decision to many irrelevancies advanced by the Appellant clearly belies this contention.

ORDER

The order of the Examiner dated at New York, New York, on 12 January 1970, is AFFIRMED.

W.J. SMITH
Admiral, United States Coast Guard
Commandant

Signed at Washington, D. C., this 1 day of MAY 1970.

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