IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1233993
AND ALL OTHER SEAMAN DOCUMENTS
Issued to: Walter E. Durden

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1671

Walter E. Durden

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 26 July 1967, an Examiner of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman's documents for one year upon finding him guilty of misconduct. The specification found proved alleges that while serving as a wiper on board the United States SS TRANSONTARIO under authority of the document above described, on or about 23 June 1967, Appellant assaulted and battered with a dangerous weapon, a knife, Glen G. Gill, the ship's radio officer.

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

The Investigating Officer and Counsel presented to the Examiner a stipulated "Agreement on Facts". The agreement included a recommendation for a suspension of one year.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved by the stipulation. The Examiner then entered an order suspending all documents issued to Appellant for a period of one year.

The entire decision was served on 2 August 1967. Appeal was timely filed on 22 August 1967.

FINDINGS OF FACT

On 23 June 1967, Appellant was serving as a wiper on board the United States SS TRANSONTARIO and acting under authority of his document while the ship was at sea. [Because of the disposition of this case no further findings are made.]

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the stipulation establishes a defense of self-defense not found by the Examiner.

APPEARANCE: Appellant, *pro se* (on appeal).

OPINION

I

Ordinarily, an argument on appeal that an examiner failed to find that an appellant had acted in legitimate self-defense would necessitate only a review to determine whether the examiner, as trier of facts, had based his findings on substantial evidence and had not arbitrarily and capriciously failed to weigh the evidence. Unusual features of this case, however, lead to the question not of whether the Examiner erred in rejecting the defense but rather whether a *prima facie* case had been established in the first place.

In this case, in a commendable effort to save time of all parties and persons concerned, an agreement was made among the

Investigating Officer, Appellant, and Appellant's counsel, that certain facts would be stipulated. The statement of facts consists of two typewritten pages of 26 lines each, plus a third page containing six lines.

The agreed facts narrate a drinking party on the boat deck of TRANSONTARIO during which Appellant and the Radio Officer, Glen G. Gill, engaged in a fight which was broken up, after Gill had been choking Appellant, by Appellant's departure toward his quarters. Gill was advised by others to go forward to his own quarters which he started to do.

Before Gill reached the catwalk leading forward, Appellant returned to the scene of the party seeking Gill. When told that Gill had gone to his quarters, Appellant went in that direction.

At this point, I quote the "Agreement on Facts":

> "There is a question in fact, which we have to resolve, whether or not Mr. Durden had in his possession at that time the knife.
>
> "Mr. Gill, at this time, continued to walk forward on the port side of the boat deck, and just as he rounded the corner of the deck house he apparently saw Mr. Durden, and it was at this point that the knifing incident took place. That is to say, on the boat deck between the catwalk and the edge of the deck house. There were no witnesses, other than the parties themselves, to the knifing.
>
> "On the aforesaid area of the ship, there was a confrontation between Mr. Durden and Mr. Gill. Gill was cut on his left hand, his left shoulder, and the left pectoral area. after Mr. Gill was cut, both Mr. Gill and Mr. Durden proceeded aft on the port side of the boat deck toward the after end of the ship. There is a question of fact as to whether they were running, or walking, and as to which one went first."

Appellant now attacks the findings. To use his own words, "the Examiner failed to establish that I was acting in self defense

according to the Agreement on Facts".

The copy of the "agreement on Facts" incorporated into the Examiner's Decision has, written in the Examiner's handwriting and initialed by him, a notation with respect to the reservation of agreement about whether Appellant had in his possession a knife at the time he was looking for Mr. Gill. The notation reads: "T.H.E.* Amended in open hearing that he did have the knife." The original sentence is enclosed in hand written brackets, and the phrase "in fact" has been altered to "of fact".

II

To look at this last matter first, we see that the transcript of proceedings, less than four pages in length, does not show that the question of fact as to whether Appellant had a knife in his possession at the time in question had been amended "in open hearing". This observation is made not to impugn the question integrity of the Examiner. I have no doubt that the parties agreed in the presence of the Examiner that Appellant had the knife in his possession at the moment in question, and that the Examiner's amendment to the agreement would not be challenged. But the fact is that this was not done "in open hearing." Mention is made of the matter only because of the state of the entire record.

III

There would be little difficulty in disposing of this case if certain conditions had been met. After all, the Examiner's amendment to the "Agreement on Facts" has not been challenged on appeal, nor do I question its reliability even if it was not "in open hearing." Appellant was represented at hearing by professional counsel. Appellant agreed that a one year suspension would be in order prior to the opening of the hearing.

But despite the "Agreement on Facts," Appellant pleaded not guilty, and now raised the question specifically that self-defense findings were not made by the examiner.

If Appellant had entered a plea of not "guilty" there would be nothing to hear on appeal. The stipulation of facts, entered on advice of professional counsel, the willingness to accept a one

year suspension, would be absolutely conclusive. Since Appellant pleaded "not guilty" the possibility is not foreclosed that his agreement to a one year suspension was only conditional upon his being found guilty. But he had not agreed to be found guilty.

IV

There is no evidence in this record on several important points. Had the evidence been adduced on the record some inference might have been drawn by the Examiner, but the wording of the stipulation of facts precludes certain inferences.

It cannot be inferred that Appellant withdrew from the scene to obtain a weapon and retaliate upon his opponent, both because of the way the "question of fact" was resolved and because the stipulation, even as amended, leads to inference that Appellant did not have the weapon upon him at the initial encounter or that, if he did not, he went to get it for aggressive purposes.

The "Agreement on Facts" speaks only of a "knifing incident" with no witnesses to it. The "Agreement" pointedly leaves open the question of the aspect of the parties when they met on this occasion. If Appellant were pursuing or even following Gill, certain inferences might be drawn from the fact of cutting with a knife. If the opponents met fact to fact, it might be that the cuttings could amount to no more than legitimate self-defense.

This very point is raised by Appellant, that the points of cutting, all on the left side of the body of Gill at widely separated points, the insignificance of the cuts, and the fact that Gill was never off duty, are all consistent with an act of self-defense.

It is true that "self-defense" was not raised on the record by affirmative evidence from Appellant. But what was affirmatively raised on the record in any case?

It was not agreed that Appellant sought out Gill with the intent to use a knife on him. It was not even agreed that Appellant went to get a knife, or even that he went and got a knife, from which inference could be drawn that he had an intent to do something with the knife.

There may be no doubt that a "knifing incident" occurred, but there is no evidence as to how the individuals met on that encounter.

Appellant complains on appeal, by implication, that the "Agreement of "Facts" which he entered was intended to establish a defense of "self-defense." The basic fact is, however, that the evidence against him, in the form in which it was received, does not sustain the burden of proving by substantial evidence that Appellant committed an assault and battery upon another with a knife. There is only a probability that he cut Gill under undisclosed circumstances.

In this decision I am not attempting to discourage efforts like the one attempting here: To present the examiner hearing the case with a statement of facts agreed upon beforehand, leaving the examiner only with a problem of applying law to the facts.

I am familiar with analogous situations in criminal proceedings where facts are stipulated, by way of a plea of "guilty," in return for certain agreements about sentence. It may be noted that when such a case occurs in a court-martial the accused has an absolute guarantee as to his ultimate sentence. In the civil courts there can be, of course, no more than an agreed-upon recommendation to a judge who may accept it or not.

I see no reason why such agreements cannot be made in suspension and revocation proceedings, when appropriate, but, naturally, the examiner cannot be precluded from entering what he considers to be an appropriate order. The agreement here was not of this nature. The facts were not stipulated by a plea. They were stipulated by a narrative statement which does not add up to a statement of assault and battery, nor even to a set of facts from which assault and battery may be properly inferred.

While the procedure followed here is not to be discouraged, it may be emphasized that the Investigating Officer, in particular, must see to it that enough facts are stipulated to establish a *prima facie* case which would overcome the presumption set up by

a plea of "not guilty."

CONCLUSION

The "Agreement on Facts" set out in the transcript of proceedings and in the Examiner's Decision does not establish a *prima facie* case of assault and battery with a knife.

ORDER

The Order of the Examiner, entered at San Francisco, Calif., on 26 July, is VACATED. The findings of Evidentiary and of Ultimate Facts (except as set out above) and the Conclusion are SET ASIDE. The case is REMANDED to the Examiner for further appropriate proceedings.

P. E. Trimble
Vice Admiral, United States Coast Guard
Acting Commandant

Signed at Washington, D.C., this 20th day of December 1967.

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