IN THE MATTER OF LICENSE NO. 308242 AND ALL OTHER SEAMAN'S DOCUMENTS NO. Z-333205-D1

Issued to: Nicholas CANJAR

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1677

Nicholas CANJAR

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 1 June 1967, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman's documents upon finding him mentally incompetent for duty on merchant vessels.

Two charges were initially preferred against Appellant. One was of MISCONDUCT, this had four specifications. The first two specifications alleged that while Appellant was serving as third mate aboard SS AMERICAN SHIPPER he twice assaulted and battered the second mate of the vessel at Hamburg, Germany, once with his fist and once with a club, both on 22 August 1966. The other two specifications alleged that while Appellant was serving as third mate aboard SS CITY OF ALMA he did, on many occasions between 27 December 1965 and 12 January 1966, cause course changes of the vessel to be made, deviating from the prescribed courses, without permission of or notification to the master of the ship.

The other charge, of INCOMPETENCE, alleged that Appellant was, at the time of his service aboard CITY OF ALMA,unfit for service aboard merchant vessel because of mental incompetence and so remained to time of hearing.

At the hearing Appellant, although he had been advised of his right to counsel three days earlier, appeared at first without counsel and expressed a desire to obtain counsel. Six days later Appellant appeared with professional counsel. This counsel attempted to withdraw from the case before the day's proceedings were completed, but Appellant consented to his continued representation by the counsel. Pleas of not guilty to all charges and specifications were entered. Two days later, before the first witness was called, Appellant formally, on the record, disavowed his counsel and elected to proceed on his own.

At a schedule continuation of the hearing another three days later, Appellant did not appear, but the Examiner accepted the reappearance of the counsel who had been discharged on the record at the last meeting. During the next several scheduled sessions of the hearing Appellant did not appear at all. Counsel, without notice or excuse, did not appear at three.

On 16 November 1966, having presented several witnesses and documentary evidence in the form of voyage records and medical records, the Investigating Officer moved under 46 C.F.R. 137.20-27 for an order to have Appellant submit to examination.

On 6 December 1966, in open hearing, the Examiner ruled upon the motion, granting it, but found that he could not issue an order to Appellant because Appellant's location was known, even to his own "counsel", to be on a ship outside the United States on a voyage of undetermined length. Despite requests of the Investigating Officer that an immediate order of revocation be entered, the hearing dragged on.

Eventually, on 20 February 1967, Appellant and his counsel were reunited in open hearing. The Examiner announced that he intended to order Appellant to report for examination at a time and place specified. Appellant, through counsel, declared that he would not comply with such an order. The Examiner then asked Appellant whether he would accept service of such an order by mail.

Appellant allowed that he would, at "General Delivery, New York".

Except that proof of Appellant's receipt of the order was shown, Appellant was seen or heard of again on the record of hearing. He did not appear for the examination ordered.

When efforts of counsel to communicate with Appellant proved fruitless, the Examiner, on 7 April 1967, heard arguments by counsel and the Investigating Officer, reserved decision on a motion to dismiss for lack of proof, and reserved decision on the merits generally.

Appellant had presented no defense.

On 1 June 1967, the Examiner issued a decision in which he found that the charge of incompetence had been proved. Since he had found incompetence, he also held that the misconduct charged, while the acts were proved to have occurred, should not be found proved. Revocation of all documents issued to Appellant was ordered.

The entire decision was served by the Examiner on counsel by mail on 2 June 1967.

Since counsel had not been authorized to act under 46 C.F.R. 137.20-175, the attempted service was seen to be ineffective. It was not until 3 September 1967 that service was effected on Appellant. Appeal was timely filed on 18 September 1967 and perfected on 25 October 1967.

FINDINGS OF FACT

On 29 December 1965, Appellant was serving aboard CITY OF ALMA as third mate. When the vessel was heading west off Alligator Reef, Florida, Appellant changed the vessel's course from the prescribed course without advising the master. Some hours later, on 30 December 1965, after Appellant had been instructed to call the master at 1300, when the vessel was approaching Dry Tortugas, the master was not called, but when he arrived on the bridge at about 1330 he found that Appellant had changed from the prescribed course. On almost every 0000 - 0400 watch when the vessel was at sea, from 29 December 1965 to 12 January 1966, Appellant altered the prescribed course of the vessel by about twenty degrees for periods of about five minutes. On 12 January 1966, during the

daytime mid-watch, when the vessel was approaching the coast of England, the master discovered that Appellant had changed course thirty five degrees to the left without notification to the master.

On 17 January 1966, at Rotterdam, Holland, Appellant, at his own request was referred to the local contract physician with a complaint of a pain in his side. The physician found a "psychical disturbance". Appellant was signed off and repatriated.

On 29 March 1966, Appellant was admitted to Beckman Downtown Hospital, New York City, in an unconscious condition. Diagnosis on admission was "acute barbiturate intoxication". When Appellant was transferred to Bellevue Hospital the next day, after having stated that he was "tired of life", the diagnosis on transfer was "barbiturate intoxication; depression reaction". The Bellevue diagnosis on admission was, "suicide attempt by barbiturate overdose. Depressive reaction".

On 22 and 23 June 1966, Appellant was serving as second mate aboard SS MORMACPRIDE at New York while the vessel was being prepared for its next voyage. On the second day, Appellant, who had been working in the chartroom, complained to the master that he was being "gassed". The master investigated and found no evidence of anything unusual in the chartroom. On Appellant's demand he was paid off after further difficulties.

On 18 August 1966, while Appellant was serving as third mate aboard AMERICAN SHIPPER he assaulted and battered the second mate by shoving him in the chartroom. Later the same day, Appellant made threats of physical violence to the second mate in the presence of the chief mate.

On 20 August 1966, at Bremerhaven, Germany, Appellant told the vessel's master that he intended to kill the second mate.

On 21 August 1966, at Hamburg, Germany, after making statements, apparently to himself, about "dropping a bomb" on someone, Appellant assaulted and battered the second mate by beating him over the head, and on the arms, shoulders, and back, with a club, two or three feet long, wrapped in newspaper.

Appellant was removed from the vessel and repatriated.

On 9 March 1967, Appellant failed to comply with an order of the Examiner to report to the U. S. Public Health Service Hospital in New York for psychiatric examination.

BASES OF APPEAL

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

(1) Appellant was denied due *pro*cess becau*se* the testimony of the witness Fase was taken at a time when Appellant was at sea and could not expose Fase's testimony as untrue;

(2) since CITY OF ALMA (the vessel aboard which Appellant's service had been first in point of time) terminated its voyage in New Orleans, Louisiana, the Third Coast Guard District, specifically the Marine Inspection Office and Examiner in New York, had no jurisdiction; and

(3) documents admitted into evidence, specifically official log-book entries and medical records, were hearsay and should not have been admitted.

APPEARANCE: Appellant, pro se.

OPINION

I

The first po*in*t discussed is that Appellant did not have the opportunity to cross-examine the witness Fase, Appellant's position being that he was not present at the hearing session at which Fase's testimony was taken and, hence, he lost the chance to prove that Fase was lying when he testified that he was an AB seaman on Appellant's watch.

Whether or not the Examiner was justified in accepting an assertion of a counsel, discharged on the record by Appellant, that he had ben re-retained and thus represented Appellant, it is

established that Appellant appeared with that counsel on 20 February 1967. Appearance was on the record, and was made without comment.

This was a ratification of the counsel's authority to act.

There is ample evidence in the record that Appellant, by going to sea, himself denied his counsel the ability to consult with him. Appellant cannot be heard now to complain that his counsel's ability to cross-examine the witness was hampered by Appellant's own act.

It may further be pointed out that at a time when Appellant was voluntarily acting as his own counsel he was notified of a day certain for reconvening and he failed to appear, giving no notice to anyone of any disability. The hearing could (and possibly should) have continued at that point in *absentia*. Had this been done, obviously Appellant could not have urged his own voluntary disregard of the proceedings as having denied him a right.

II

A frequently stated point on appeal is that the Examiner had no authority to act because the voyage of CITY OF ALMA had ended in New Orleans, Louisiana; hence there was no jurisdiction to hold a hearing in New York.

Jurisdiction in cases under R.S. 4450 (46 U.S.C. 239) is not limited to the geographical area in which an offense was committed nor to the port in which a vessel terminates a voyage. Jurisdiction attaches when it can be perceived that an act cognizable under R. S. 4450 (46 U.S.C. 239) has occurred, and charges have been preferred under 46 C.F.R. 137.

As a practical support of the wisdom of the statutory provisions concerning jurisdiction, it must be observed that when CITY OF ALMA completed its voyage Appellant was long gone from the ship and had been repatriated. Further reason it seen for permitting proceedings wherever the person charged is found when it is noted that the first two specifications of misconduct preferred against Appellant dealt with matters occurring aboard AMERICAN

SHIPPER, a vessel the operation of which is New York - based, and, again, a ship from which Appellant had been separately repatriated before its voyage was completed. A third factor is that testimony as to Appellant's behavior also was elicited from a witness on a ship of another New York - based company.

These considerations should make it crystal clear that had Appellant first been found in Seattle or San Diego that port would be the one to exercise initial jurisdiction.

III

Much of Appellant's arguments on appeal are devoted to alleged improper acceptance of evidence into the record by the Examiner. The helter-skelter attack can be turned away by pointing out that every objection raised on appeal was raised on the record and resolved by the Examiner. There is no need, on review, to inquire into such questions as whether business records have properly been admitted into evidence when the only objection raised to their initial consideration was that they are "hearsay".

IV

The Order of the Examiner is the only appropriate order in such a case. Although Appellant's counsel asked that his license and documents be suspended only until the disability could be shown to the Examiner to have been removed, the Examiner correctly ordered a revocation. Indeterminate suspensions after proof of mental incompetence have been held unauthorized. Decisions on Appeal Nos. 897, 1086, 1502.

But approval of the Findings and Order here is not to be taken as expression of approval of all the Examiner's actions in his decision.

It is noted that the Examiner found proved all the facts alleged in the misconduct specifications and declared that if he had not been forced to reject the word "wrongfully" there alleged he would have revoked for the brutal assault and battery alone. "Wrongfully" was rejected from the specifications only because Appellant had been found "mentally incompetent".

Lest anyone be misled by my affirmation of the results of this case, I wish to make it clear that proof of the "mental incompetence" charge in this case did not automatically necessitate dismissal of the misconduct charges.

A condition of mental incompetence such as to disqualify a person from holding a seaman's license or document is not equatable to a state of legal insanity such as to constitute a defense against a criminal indictment. The tests are entirely different.

To establish mental incompetence to hold a license or document, all that is needed is substantial evidence. When competency is properly in issue in a criminal case, there must be given proof beyond a reasonable doubt that the accused is legally responsible.

If legally responsibility were raised as a defense to a misconduct charge in these proceedings, an examiner who used as a test to justify dismissal of the charges the fact that he was not persuaded beyond a reasonable doubt that the person charged was legally responsible would be as much in error as one who refused to consider evidence of incompetence at all.

But since the two conditions are not legally identical, and since the quality and quantity of proof are entirely different, it seems obvious that a person charged may be found both mentally incompetent to hold a seaman's license or document and guilty of acts of misconduct for which he was legally responsible.

I do not wish to go too far here in speculation as to whether an examiner, presently authorized to issue an unappealable and final dismissal of charges after consideration of questions of fact, should never allow himself to be influenced by standards of "competency" imported from criminal law, law as to "commitment" of insane persons, or law on wills. I do not wish to make it clear that there is no compulsion on an examiner to dismiss a charge of misconduct merely because he finds that at the time of commission of the act the party was not mentally competent to hold a seaman's license or document.

ORDER

The order of the Examiner dated at New York, New York, on 1 June 1967, is AFFIRMED.

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

Signed at Washington, D. C., this 18th day of January 1968.

INDEX

***** END OF DECISION NO. 1677 *****

Top