IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-324899-D1 AND ALL OTHER SEAMAN DOCUMENTS
Issued to: Pranas ASTRAUSKAS

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1576

Pranas ASTRAUSKAS

This appeal has been taken in accordance with Title 4l United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 22 April 1966, an Examiner of the United States Coast Guard at Long Beach, California, suspended Appellant's seaman's documents for one month outright plus two months on twelve months' probation upon finding him guilty of misconduct. The specification found proved alleges that while serving as Carpenter on board the United States SS CANADA BEAR under authority of the license above described, on or about 20 April 1966, Appellant engaged in mutual combat with another crewmember, while under the influence of alcohol, while the vessel was at San Francisco, California.

The hearing was held in joinder with that of the other crewmember, William L. Rodrigues. The single specification alleged against Rodrigues was identical with that served upon Appellant except for the substituted names.

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

The Investigating Officer introduced on evidence extracts from the shipping articles of CANADA BEAR, and testimony of the master of the vessel. The Investigation Officer then rested, but immediately thereafter called Rodrigues as witness. Rodrigues testified and the Investigating Officer rested again.

In defense, Appellant offered in evidence his own testimony.

At the end of the hearing, the Examiner rendered an oral decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents issued to Appellant for a period of one month outright plus two months on twelve months' probation.

The entire written decision was served on 30 April 1966. Appeal had been timely filed on 22 april 1966.

FINDINGS OF FACT

On 20 April 1966, Appellant was serving as Carpenter on board the United States SS CANADA BEAR and acting under authority of his document while the ship was in the port of San Francisco.

On the evening of 19 April 1966 Appellant had been ashore and had dinner with his wife. Before the dinner he drank two martinis. Some time after dinner he returned to the ship. On board he drank two bottles of beer. Preparations were being made for sailing.

Sailing was delayed past 0030, the scheduled time on 20 April. At about 0130, the master of the vessel, who was sitting in the saloon with the pilot, heard noises of an altercation. When the master reached the scene of the fracas on the main deck he saw several people there. The carpenter (Appellant) was being restrained by two crewmembers and was shouting. Rodrigues was near

the entrance to the galley and was bleeding from a head wound.

Appellant had a hammer in his hands. It was taken from him. When Appellant attempted to tell the master what had happened the master refused to hear him and sent him to his quarters.

The head wounds on Rodrigues were found not to be serious.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. No grounds are urged in the written appeal although non-professional counsel at the hearing had argued that the order was excessive.

APPEARANCE: At the hearing: Gordon Ellis, Port Agent, Sailors' Union of the Pacific.

On appeal, Appellant, pro se.

OPINION

I

In my findings I have refrained from utilizing the testimony of Rodrigues as the predicate for anything.

One reason for this is that the Examiner, in his decision, has not done so.

In it very true that the Examiner, after making findings substantially the same as mine (based upon the master's evidence), goes on to say in his formal "Findings of Fact":

> "According to the version of the events by the second electrician, Rodrigues, at about 0130 hours the person charged and Rodrigues entered into an argument about the night lunch. Both the person charged and Rodrigues had been drinking and began pushing each other and threw a few punches at each other, both of whom had an opportunity to have left the scene.

The second electrician alleged that at no time was he struck by the hammer which the person charged had in his hands."

It must be clearly pointed out that these statements do not constitute "findings of fact." They are frankly a mere recitation of testimony. The qualifying words are seen: "according to the version of . . .," and "The second electrician alleged . . . ."

The second reason why I have not utilized the testimony of Rodrigues is the trouble I am given by the manner in which he appeared as a witness.

The Investigating Officer announced formally, after the master had testified, "The Government rests its case." (R-15). Immediately thereafter, without a recorded break, he announced, "At this time the Government would like to call Mr. Rodrigues."

The Examiner directed Rodrigues to move to the witness chair and raise his hand to be sworn.

Counsel for Appellant entered an objection: "It don't know what is happening, -- your rest case, -- that means you're finished."

Without more, the witness was sworn and commenced to give testimony under questioning by the Investigating Officer. Rather significantly,this initial line of questioning is captioned "CROSS-EXAMINATION" in the transcript. (R-16).

(I note that after this testimony the Investigating Officer again declared, "The Government rests its case," [R-21], and Counsel was moved to remark, in reply to a question by the Examiner, "Well, every time the Lieutenant says he rests his case I get the idea the - - -." Here he was interrupted by the Examiner.)

I am not much concerned that after a case has been "rested" it is permitted to be reopened. These remedial administrative proceedings under R.S. 4450 are not bound by the rules of criminal procedure or even by the court rules of civil procedure. Flexibility is allowable and desirable, to permit that the ultimate

end of Title 52 of the Revised Statutes, safety at sea, can be reached.

But in this case, the non-professional counsel, who had made a "lawyer's" objection that the Government had rested and he couldn't see what was "going on", was brushed aside. The swearing of the witness was completed and the witness testified without comment by the Examiner or anyone else as to why the "rested" Investigating Officer was calling another witness.

It also bothers me that the witness who was called was a non-compellable witness, a person charged in the very proceeding before the Examiner. He had pleaded guilty, it is true. Had the proceedings been served after his plea, or had they been disparate to begin with, he might have been a compellable witness *against* Appellant. But even after he pleaded "guilty" he could not be required to testify in h*is* own hearing, which this was.

The Examiner advised both persons charged, at the outset of the hearing:

> "Lastly, you have the right to testify in your own behalf. However, you cannot be made or required to do so . . ." (R-5).

I do not wish to speculate here whether somehow the party Rodrigues came to believe that once he pleaded guilty to the specification he would no longer be testifying "in his own behalf" if he did testify on call of the Investigating Officer, but would only be testifying against Appellant. I can see only that he was peremptorily called by the Investigating Officer, after that officer had "rested," was sworn as a witness over the objection of counsel for Appellant, and was interrogated by the Investigating Officer on what the transcript calls "CROSS-EXAMINATION."

The privilege accorded to persons charged under R.S. 4450 not to testify in suspension and revocation proceedings may be waived. Also, generally, such a privilege may not be invoked by a third party.

Thus, if Rodrigues had expressly waived his privilege not to

testify, over Appellant's objection, what happened on this record would be acceptable, on the grounds of waiver and on the liberal terms of administrative proceedings which can permit reopening of the record if done in such a way as not to be a mere harassment.

In the instant case, non-professional counsel for Appellant offered the technical objection that the Investigating Officer had rested but was calling immediately another witness. The objection was brushed aside and the witness, a party, was heard as a witness "called," but "cross-examined," by the Investigating Officer.

I believe that I can, and should, brush aside the technicalities of "who may claim the privilege," and rule that the testimony of Rodrigues was not properly before the Examiner in Appellant's case.

I may say here that decisions on appeal, while binding upon examiners and all other Coast Guard personnel alike, are not vehicles for instructing on how a particular matter should be handled, but there is more than one way "to skin a cat." In this case there is every indication that eye witnesses or earlier-on-the-scene witnesses might have contributed more than the master to a picture of the facts.

A valid suspicion arises that the persons "restraining" Appellant might have been better witnesses to what happened. The master did not appear on the scene until the fracas had been ended. No reason for the failure to call witnesses as to earlier events.

II

The acceptable record then comprises the testimony obviously does not establish a voluntary mutual combat, since he arrived on scene after the combat had ended and refused to hear an explanation from Appellant.

His testimony that Appellant was being restrained when he arrived on the scene is not conclusive as to Appellant's having engaged in mutual combat, but could mean no more than that Appellant, having been assaulted, desired to, but was being denied the opportunity to, retaliate.

III

It should be unnecessary to observe that the plea of guilty to a charge of mutual combat by Rodrigues is not evidence against Appellant. It could conceivably be no more than a self-serving declaration by one who has committed assault and battery to afford a means of escape to a lesser offense by implicating another.

IV

The question next is whether Appellant, by testifying, in fact filled in any gaps in the case against him.

Appellant testified that he did not use the hammer on Rodrigues. He said, "No, I push at him like that, -- so I won't get to hurt myself." The record indicates that Appellant made gestures of pushing at Rodrigues, with his hands at the ends of his hammer. (R. 23, 25).

In this connection, cross-examination of Rodrigues by Appellant's non-professional counsel is interesting. Rodrigues had testified that several blows had been struck by both parties. On the cross-examination, the following appears:

"Q. Instead of pushing you did throw a few blows?

A. Well, I imagine I did.

Q. Yeah, well -- the carpenter as I say, not being a fighting man, he disliked to do what he did but he had a hammer in his hand and so instead of using it against a shipmate, what he did was -- he held it like this more or less to stop you?

(Demonstrated by holding both hands in front of him as with an imaginary instrument held on either end.)

A. Yeah, yeah, that's right." (R-18).

After the answer had been given, the Investigating Officer objected. The Examiner stated, ". . . you are not asking questions, you're making a statement." Counsel then said, "What I'm trying to get at is, well, answer me: You did come after him with hands up and the carpenter, not being a fighter had to back off."

The Examiner then declared, "This may be your conclusion Mr. Ellis. This is not mine . . . . I don't accept testimony from you."

Even without hearing this exchange, I read it as containing legitimate, if not perfectly worded, questions on cross-examination. The first quoted effort by counsel, although characterized by the Examiner as a statement, was recognized by the witness as a question, and he provided a clear answer before the Investigating Officer saw fit to object.

The last quoted effort by counsel is just as plainly a question to which the witness could have answered "Yes" or "No," meaning that things did or did not happen as had been described, although the Examiner prevented a reply.

This seems to me too restrictive a curtailing of cross-examination. But what did appear was significant. Rodrigues admitted that Appellant's motions involved a pushing with the hammer held at both ends. This confirms the description of his own actions by Appellant.

If Appellant was thus pushing with the hammer, he was not striking blows with his fists.

V

Upon the entire record, then, even including the testimony of Rodrigues, I am far from being convinced that there is substantial evidence that Appellant voluntarily engaged in fisticuffs with Rodrigues.

VI

The thought occurs to me that the Examiner, having seen and

heard the witnesses, may have believed, in view of the injuries to Rodrigues, that blows with the hammer had been struck by Appellant, but that the parties had reached an amicable agreement before hearing to obscure the truth. But if this were the truth Appellant's offense was greater than "engaging in mutual combat." It would have been "assault and battery with a dangerous weapon."

Suspicion that a greater offense was in fact committed and concealed cannot justify a finding that a lesser offense, not proved, occurred.

VII

There is no short-cut to the ascertainment of truth. Fundamentally, the fault here would seem to lie in the failure to call available identified witnesses.

There is also a complete failure to elicit on the record specific testimony as to who did what, and when, from the witnesses who did appear.

When the examiner gave his decision on the record he said:

> "Now this is not just a case of two men just pushing each other because certainly one of you at least, was bleeding considerably as a result of this fight. Who started it I don't know, and it probably isn't particularly important in this particular case." (R-31).

The overtones of this statement are unmistakable. The Examiner did not believe that he had testimony before him to give him the means to arrive at the truth. But "in this particular case" it is important to know "who started it" and what happened, because Appellant pleaded "not guilty".

I have said before, and repeat now, that rejection of testimony tending to prove one thing does not prove the contrary. there must be some evidence tending to prove the contrary before any finding may be made at all. Appeal Decision 894.

Had Rodrigues not testified at all, an inference might have

been supported that Appellant had hit him with the hammer. A finding could then have been made against Appellant even on the lesser charge of mutual combat, although he would be escaping a greater charge. But Rodrigues did declare that he was not struck with the hammer and the Examiner did not find that he was.

Sometime, as once remarked, a plaintiff can establish for himself a presumption but then, by proving too much, can prove himself out of court.

VIII

One final word may be in order here.

The specification preferred against each of the persons charged in this hearing contained the words, "while under the influence of alcohol." The question of being "under the influence" is not of the essence of the offense and should not have been pleaded. Evidence as to intoxication would be admissible as describing a circumstance of a fight or as describing a circumstance of a fight or as impeaching the credibility of a witness, but unless intoxication is of the essence it should not be pleaded.

Also, in this case there was no evidence to support a finding that Appellant was in fact intoxicated. There is evidence that he "had been drinking." He testified to having "two martinis" before dinner and "two beers" later in the night. The master testified that he had seen Appellant drinking a beer. The master did not give an opinion that Appellant was " under the influence."

There was insufficient evidence in the record to authorize an inference, from the quantity of drinks consumed, that Appellant must have been intoxicated.

Conclusion

The faults of investigation, presentation, and conduct of the hearing cannot be corrected at this time.

ORDER

The order of the Examiner dated at Long Beach, California on 22 April 1966, is VACATED. The charge and specification are DISMISSED.

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

Signed at Washington, D. C., this 12th day of August 1966.

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