

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO. Z-1102741 AND ALL
OTHER SEAMAN'S DOCUMENTS
Issued to: Luis D. Perez

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1557

Luis D. Perez

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 21 January 1966, an Examiner of the United States Coast Guard at New York, New York, suspended Appellant's seaman's documents for two months outright plus four months on eight months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a refrigeration oiler on board the United States SS CONSTITUTION under authority of the document above described, on or about 20 November 1965, Appellant assaulted and battered, by pushing, the second assistant engineer and shortly thereafter also assaulted the same person by shaking his fist at him in a threatening manner and offering to inflict bodily harm.

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

The Investigation Officer introduced in evidence the testimony

of the alleged victim, and entries in the Official Log Book and Shipping Articles of CONSTITUTION.

In defense, Appellant offered in evidence his own testimony and a certificate of completion of a maritime training course.

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

The entire decision was served on 25 January 1966. Notice of appeal was timely filed on 31 January 1966. Time to submit a brief was extended to 25 April 1966, but no further papers were filed by that date.

FINDINGS OF FACT

On 20 November 1965, Appellant was serving as a refrigeration engineer on board the United States SS CONSTITUTION and acting under authority of his document while the ship was in the port of Santa Cruz (presumably in the Canary Islands).

During the 1600-2000 watch that night, Appellant was observed by the engineer officer of the watch, as he was crossing the machinery flat, to be sitting on a board placed across the open top of a waste can. The engineer called out to Appellant to get up and stand his watch.

By the time the engineer got close, Appellant stood up, approached him, and pushed him with both hands against the chest. (Appellant was taller and heavier than the officer). Appellant then cocked his right fist back and stated the he would "bash" the engineer's head in at some later time.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. The notice of appeal contends that Appellant's testimony that he was in an awkward position in sitting on the board, because

of his height, that on rising he lost his balance and placed his hands on the engineer to steady himself, and that he had uttered no threat, should have been believed by the Examiner, with consequent dismissal of all charges.

APPEARANCE: Rolnick, Ezratty & Huttner, of New York, New York,
by Bernard Rolnick, Esquire

OPINION

I

Appellant complains on appeal only that the Examiner should have believed his version of the events involved rather than that of the witness against him.

The Examiner evaluates the credibility of the witnesses. In the absence of a showing that his findings are arbitrary, capricious, and not founded on substantial evidence, they will not be disturbed. No such showing has been made here.

II

There is, however, something that troubles me with respect to the second specification found proved, that dealing with the second assault.

First, the specification itself alleges two facts; (1) that Appellant shook his fist at the officer and (2) that Appellant offered to inflict bodily harm upon him. I am of the opinion that "shaking a fist," as the phrase is normally understood, does not constitute an assault. The thought apparently occurred to the drafter of the specification, because menacing words to accompany the gesture were recited.

The proof offered, and accepted by the Examiner, was not of a "shaking of a fist" but of an arm cocked back to "throw a punch." This is a more immediately menacing gesture and under many circumstances could constitute an assault, especially when connected with the threatening language alleged.

But as to the language, the Examiner made a specific finding that its import was "to do damage to him on a later date."

This appears to fall within the classic cases in which assault is not found because the language negatives an apparent intent to act now. *Turbeville v. Savage*, 1 Mod (Eng.) 3. Additionally to support this view is the absence of any evidence that the engineer officer was put in immediate fear of battery by this combination of words and gesture.

It further seems that this gesture was so immediately connected with the consummated battery as to have constituted one continuing episode, if the gesture were indeed assaultive. That it was not assaultive is, I think, established by the fact that nothing came of it.

CONCLUSIONS

I conclude that the separate, later, assault by gesture and words were not proved by the requisite evidence, but that the principal assault and battery were so proved. Accordingly, some modification of the Examiner's order is appropriate, and will be made, but the outright suspension will not be disturbed because it is entirely appropriate to the offense actually proved.

ORDER

The ultimate finding of the Examiner that the specification alleging assault without a battery was proved is REVERSED. The finding that the specification alleging assault and battery upon the officer was proved is AFFIRMED. The order of the Examiner is MODIFIED to provide for a suspension of five months, the first two to be outright, and the last three to be suspended upon eight months' probation. As MODIFIED, the order is AFFIRMED.

E. J. ROLAND
Admiral United States Coast Guard
Commandant

Signed at Washington, D. C., this 27th day of May 1966.

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