IN THE MATTER OF MERCHANT MARINER'S DOCUMENT AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Albert B. BUNN Z-740859

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1569

Albert B. BUNN

Pursuant to the order of the court, U. S. District Court for the Southern District of New York, 20 August 1968, the Order in the captioned case is RESCINDED. The finding and order of the Examiner, dated at New York, N. Y., on 9 December 1965, are VACATED, and the charges are DISMISSED.

P. E. TRIMBLE

Vice Admiral, U. S. Coast Guard
Acting Commandant

IN THE MATTER OF MERCHANT MARINER'S DOCUMENT Z-740859 AND ALL OTHER SEAMAN DOCUMENTS
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ALBERT B. BUNN

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

By order dated 9 December 1965, an Examiner of the United States Coast Guard at New York, N. Y. revoked Appellant's seaman's document upon finding him guilty of misconduct. The specification found proved alleges that while serving as a steward utility on board the United States SS SAN ANGELO VICTORY under authority of the document above described, on or about 23 February 1965, Appellant wrongfully had in his possession, at his apartment at 501 W. 141 St., New York, N. Y., a narcotic called "Cannabis", an ingredient of marihuana or hashish.

At the hearing, Appellant elected to act as his own counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony of one witness, a New York City detective, and documentary evidence to prove Appellant's employment aboard SAN ANGELO VICTORY.

In defense, Appellant offered in evidence of one other witness, and testified in his own half.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and specification had been proved. The examiner then entered an order revoking all documents issued to Appellant.

The entire decision order was served on 10 December 1965. Appeal was timely filed on 7 January 1966.

FINDINGS OF FACT

On 23 February 1965, Appellant was employed aboard SS ANGELO VICTORY under authority of his U. S. Merchant Mariner's Document. At about 2130 on that date he arrived, from the ship, at his apartment at 501 141 Street, New York, New York. He was followed into his apartment by three New York City detectives who found a quantity of *cannabis* and a pipe the bowl of which, on laboratory examination, proved to contain the same substance.

Appellant was arrested and held, but later released. He was not convicted in a New York court of any violation of New York law.

BASES APPEAL

The bases of appeal here are not offered as *pro*positions of law and cannot be resolved to such propositions. They are discussed fully under "Opinion" herein after.

APPEARANCE: APPELLANT, pro *se.*

OPINION

A question raised by this appeal is whether evidence seized by a New York City police officer without warrant or probable cause is admissible in this proceeding. The evidence in the record is insufficient upon which to make a final determination as to whether the search and seizure were lawful, the Examiner apparently pretermitting that question as irrelevant.

With the Examiner's action I agree. The Supreme Court of the United States in 1914 adopted, as a rule of evidence for federal courts, the principle that evidence obtained in violation of the Fourth Amendment by Federal Officers should not be admitted in Federal criminal proceedings. *Weeks v. United States*, 232 U.S. 383 (1914).

In 1961, it extended the rule to the use of such evidence in States courts. *Mapp v. Ohio*, 367 U.S. 643 (1961).

It is most recent pronouncement on the subject, the Court has found illegally seized evidence inadmissible in a State proceeding to enforce the forfeiture of an automobile which had been used to transport contraband, the contraband being the subject of the illegal seizure. *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965).

The rationale of this decision is that the forfeiture proceeding is quash criminal, and therefore the exclusionary rule for criminal proceedings is appropriate. This is not the situation that we have here.

In *One Plymouth* it was found that the purpose of the forfeiture of the automobile was purely penal -- it was to punish the offending car owner even more than he could be punished by the pertinent substantive criminal provisions of Pennsylvania law. The instant proceeding under R.S. 4450 is not penal at all. It is remedial. Its purpose is, in this case, for continued safety at sea for others, to separate from the United States Merchant Marine, by revocation of his credentials, a person who has demonstrated a dangerous tendency to handle narcotics.

The purpose of the instant proceeding is not to punish Appellant -- that is the function of appropriate State or Federal penal laws -- but to insure, should the association with narcotics be properly established, that Appellant will not endanger the safety of lives at sea. This overriding concept of safety at sea renders inapplicable to this proceeding any exclusionary rule of evidence not specifically made applicable to a remedial proceeding by competent authority.

For purposes of this appeal I will assume, without deciding (for the factual reasons given above), that the seizure of narcotics was unlawful in this case. The evidence of such seizure by the New York City Police is not inadmissible in this remedial, administrative proceeding.

This question having been decided, the only question remaining is that of the credibility of witnesses.

Appellant's principal contention is that he had no knowledge of the presence of narcotics in his apartment, and it is urged upon me that the narcotics were therefore not in his "knowing" possession.

Appellant's theory is that a woman identified only as "Marie" introduced the narcotics into the premises without his knowledge.

The first reference to Marie in the record of hearing appears in the testimony of a Mrs. Alice Shell, a witness for Appellant, who lived on a lower floor of the same building as he. She testified that two days after Appellant was arrested Appellant's sister came from Long Island to visit. The sister came down to Mrs. Shell's apartment and asked her to come up with her to Appellant's apartment.(It does not appear whether the sister knew that Appellant was in jail at the time. In Mrs. Shell's words, ". . . when we got up there we found a little young lady that was sitting in his apartment, and she was having a party. There was weed smoking. They had something on the table, green stuff on the table that they were using. The house was full of men. Anyway

this lady, every time when he was away she was having the same." Further testimony from Mrs. Shell shows that she already knew this girl as "Marie" and that the parties went on all the time when Appellant was away. Once the woman in the apartment below Appellant's had threatened to call police because, " They were coming in and out, from downtown, uptown." But Mrs. Shell had never wished to tell Appellant about these things (R-17).

Mrs. Shell knew Marie as a woman who lived there at the time of the hearing.

Appellant then testified that at the time of his arrest he was questioned by police about the woman Marie. He declared that after he had been released from custody he found that Marie had not been questioned or arrested. " I asked her if anyone questioned her. She said no." (R23).

Marie he then identified as "a girl that was staying with me." Asked, "She was living with you?" he replied, "She was living with me." Asked, "Does she still live with you?" he replied, "No. We broke up quite a few months ago." Of his wife Appellant declared that the witness, Mrs. Shell, had met her, and "She met a couple of girls I stayed with." (All at R-23).

Of Marie's habits, Appellant testified, while noting that he and Marie had shared the apartment on the five nights immediately preceding his arrest, "She never smoke this around me. She never said anything about it. The thing was never discussed. I never knew anything about it. She never approached me. She knew I didn't indulge in this sort of thing." (R-25)

On the strength of this (as well as certain other evidence concerning a pipe, which has been commented on in the appellate proceedings and which will be discussed afterward) the Examiner chose to reject Appellant's assertion of lack of knowledge of the presence of narcotics in his apartment.

The Examiner is the primary judge of credibility, and his actions should not be disturbed without good reason. On the record of hearing alone I find no reason to disagree with the Examiner's rejection of the "Marie" theory as exculpating Appellant. Without

belaboring details, it is inherently incredible that Appellant's apartment had been used every time he was away, as testified to by Mrs. Shell, for narcotics parties, and that the narcotics on the date in question had been in his apartment, without his knowledge.

If the Examiner's rejection of this testimony needed my support, which it does not, that support can be found in Appellant's statements filed on appeal.

He has argued that for almost two months before his arrest, when he was not working at sea, he had been away from his apartment tending to his ill sister on Long Island and presumably had left the apartment open to Marie for her mischievous purposes. This sister was presumable the same one who providentially turned up at the apartment two days after his arrest to find Marie in a carouse of drinks and narcotics. But this stay on Long Island does not account for the five days just before the arrest when Appellant and Marie shared the apartment after he had returned to the ship.

Further, in the appellate documents, the status of Marie has apparently changed. Appellant states,". . . one very important thing I would like to make clear is that this lady was no 'in[ti]mate,lady friend of mine I don't know yet whether she be man or woman as far a sex is concerned. . ." It is also said in these documents that the apartment was "occupied by a young lady who was staying here more or less to look after my home since I was away so often. . ."

Far from persuading me to interfere with the Examiner's function to evaluate credibility, this appellate effort is simply confirmation that the Examiner was resoundingly correct in his original evaluation.

Finally the question of the pipe must be mentioned. It has been urged upon me in the appellate proceedings that the question of the length of the stem of this pipe, seized from Appellant on his arrest, has a decisive bearing upon the ultimate acceptance or rejection of the testimony of a witness against Appellant, the detective who arrested him, and that of Appellant himself. The discrepancy in testimony is urged as seeming to "beer out the credibility of the person charge as against that of the detective. . ."

The detective testified on his first appearance on the record that the pipe seized by him from Appellant's table had an unusually long stem, about 18 to 200 inches long. Appellant then testified that the pipe seized from him was an ordinary pipe with a stem of about seven inches. He also testified that the pipe belonged to his nephew who trying to get into a "rock and rock" combination all of whose members had pipes. The nephew, he said simply left the pipe behind in the apartment. When and why the pipe was left was not made clear.

When the pipe was produce before the Examiner for physical inspection he stated that the length of the stem of the pipe was approximately twelve inches. Under any conditions I cannot see that a showing of such a discrepancy in testimony as to the length of a pipe stem, resolved by the Examiner to be just about at the midpoint of the estimates, could be controlling as to all testimony of one witness against that of Appellant.

What the line of argument urged upon me does is more than this. It would require overlooking of the fact that a perfectly ordinary pipe which Appellant's nephew, who had it because he as trying to join a rock and roll combination all of whose members had pipes, and who had left it in Appellant's apartment for reasons not mentioned, was found to have narcotics in the bowl.

To believe that Appellant had no knowledge of the existence of what was found in his apartment would not only require belief in the "Marie" story offered but also that his nephew (unidentified otherwise) used narcotics and accidentally left his smoking equipment in Appellant's apartment.

This belief the Examiner could not extend to Appellant's evidence upon hearing the case. There is no reason demonstrated why my credulity should so far exceed the Examiner's as to lead me to overrule him in a field that is peculiarly his.

CONCLUSION

The charge and specification found proved by the Examiner were properly so found.

ORDER

The order of the Examiner dated at New York, New York on . December 1965 is AFFIRMED.

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

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

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