MERCHANT MARINER'S DOCUMENT NO. 323226-D2 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Frederick Whalon Conkling

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1571

Frederick Whalon Conkling

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 November 1965, an Examiner of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman's documents for 6 months outright plus 6 months on 12 months' probation upon finding him guilty of misconduct. The specifications found proved allege that while serving as a boatswain on board the United States SS GREEN POINT under authority of the document above described, on or about 23 July 1965, Appellant wrongfully made threats against, and assaulted and battered, a fellow crewmember, one Carlos V. Contreras.

This hearing was held in joinder with one involving Carlos V. Contreras, the alleged victim of Appellant's assault and battery. Contreras was also charged with assault and battery upon Appellant.

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

The Investigating Officer introduced in evidence the testimony of certain witnesses. Both Appellant and Contreras introduced the testimony of other witnesses, and both testified themselves.

At the end of the hearing, the Examiner rendered a decision in which he concluded that the charge and both specifications had been proved. The Examiner then served an order revoking all documents issued to Appellant for a period of 6 months outright plus 6 months on 12 months' probation.

The entire decision order was served on 1 December 1965. Appeal was timely filed on 17 December 1965. Appellant was given until 4 April 1966 to file further brief but did not.

FINDINGS OF FACT

For reasons given later, I make no findings of fact in this case, other than the finding that there is jurisdiction in that appellant was serving under authority of his seaman's document aboard SS GREEN POINT on 23 July 1965.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Specific matters contended on appeal are discussed in Opinion, below.

OPINION

T*he* case of Appellant was heard in joinder with that of another seaman. Appellant, as noted, was charged with threatening the safety of the other seaman and with assault and battery upon him.

The other seaman was charged with assault and battery upon Appellant.

The record of proceedings shows four different areas of contact between these two persons:

(1) evidence of statements by Appellant to others about his assaultive intentions toward the other seaman;

(2) evidence that the other seaman had thrown a bucket at Appellant;

(3) evidence that the other seaman had without excuse of self-defense assaulted and battered Appellant, possibly using a weapon;

(4) evidence that Appellant had on another occasion struck the other seaman on the head with a wrench.

It often happens in these proceedings that a question of fault arises about two persons involved in the same transaction. This is not uncommon in cases of negligence in collision, where either or both of the parties may be to blame. Such cases are usually heard independently by examiners and are judged independently upon appeal. In these cases the adjudication of fault of one party is usually a problem completely divorced from the question of fault of the other; and the disposition of one has no bearing upon the disposition of the other even on appeal.

It also happens often in these proceedings that the episode under consideration is an affray in which either party or both may be found to have assaulted and battered the other (if both, then because the original victim had used improper force in self-defense such as to become retaliation), or in which willing mutual combat may be found.

The case I have before me now is of a different character. Both men involved were charged with assault and battery upon the other, but not upon the same occasion.

These were cases that could not have been heard separately, because the relevant evidence could easily have been separated and presented to an examiner, as to each person, for all of the four areas I have mentioned. They were not heard separately, however, but in joinder, and in reviewing the record on this appeal I cannot

close my eyes to any part of the record.

The first significant thing in this record is that the Examiner made a finding that the other seaman had committed an inexcusable assault and battery upon Appellant, and then dismissed the charges against the other seaman.

The second is that as to the assault and battery found proved against Appellant, the sole supporting evidence is that of the other seaman, evidence controverted by Appellant. Ordinarily, when an examiner makes a decision as to credibility of witnesses it should not be, and it is not, disturbed. But in this case, the Examiner's decision shows plainly that he rejected completely the testimony of the alleged victim here as to the occasion when he was the alleged assailant.

The testimony of the alleged victim here is that he did not see Appellant strike him because his back was turned. The corroboration for the striking was the wounds on his head. There were no other eyewitnesses. But this corroboration does not rule out the contention of Appellant that he, on that occasion, struck in self-defense.

I have, then, a situation in which an Examiner completely rejects the testimony of the other seaman and makes findings *contra* his testimony, and of corroboration by other witnesses completely accepts it.

This appears to me a case where the individual belief of the reviewer may be substituted for that of the trier of facts.

Despite the fact that the Examiner dismissed the charges against the other seaman, the fact is that the decision in Appellant's case is practically verbatim the decision in the other case. It shows that the other seaman should have been found guilty of assault and battery upon Appellant.

It also shows that with respect to that occasion Appellant's alleged victim was lying. The Examiner has given me no reason to accept this alleged victim's testimony in some respects and not in others. On review, I may therefore reject the testimony of the other seaman completely. When the Examiner has found that the

party was lying in one instance and offers no rehabilitating reason to accept his testimony in another, I am free to act.

On the complete and single record here I am convinced that the other seaman committed assault and battery despite the dismissal of the charge. I could also accept and affirm a finding that Appellant had committed an assault and battery, had charges been found proved against both parties.

But I am loath to affirm a finding against Appellant when it is based upon the uncorroborated testimony of another whom the Examiner, by his recitation of facts in this very decision, specifically found to be lying in respect to another episode between these two men.

CONCLUSION

I conclude that the evidence is not of the quality necessary to sustain a finding that Appellant committed the offense charged.

ORDER

The order of the Examiner dated at New Orleans, La., on 26 November 1965, is VACATED. The findings are SET ASIDE and the charges are DISMISSED.

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

Signed at Washington, D. C., this 19th day of July 1966.

APPEALS

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