

In the Matter of Merchant Mariner's Document No. Z-895916 and all
other Seaman Documents
Issued to: JAMES E. WALLING

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

1055

JAMES E. WALLING

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 5 December 1956, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman documents upon finding him guilty of misconduct. Three specifications allege that while serving as a steward utilityman on board the American SS J. L. LUCKENBACH under authority of the document above described, on or about 16 January 1956, Appellant wrongfully had marijuana in his possession at San Pedro, California (First Specification); between 16 and 23 January 1956, Appellant wrongfully used marijuana while the vessel was in California ports or coastal waters (Second Specification); on or about 23 January 1956, Appellant wrongfully had marijuana in his possession in the Port of San Francisco, California (Oakland) (Third Specification).

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant

was represented by counsel of his own choice and he entered a plea of not guilty to the charge and each specification.

The Investigating Officer made his opening statement. He then introduced in evidence the testimony of two U.S. Customs employees and a member of the crew, Clifton Lumley, as well as several exhibits.

In defense, counsel for Appellant made an opening statement and Appellant testified in his behalf. The deposition of the manager of the hotel in San Pedro, where Appellant stayed two days during the dates in question, was received in evidence. The Examiner commented on the fact that a crew member named James Gadson would have been an important witness but that he could not be located.

At the conclusion of the hearing, the oral arguments of the Investigating Officer and Appellant's counsel were heard and both parties were given an opportunity to submit proposed findings and conclusions. The Examiner then announced the decision in which he concluded that the charge and three specifications had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served on 10 December 1956. Appeal was timely filed on 5 January 1957 but Appellant did not surrender his document until 22 November 1957.

FINDINGS OF FACT

Between 3 and 23 January 1956, Appellant was serving as a steward utilityman on board the American SS J. L. LUCKENBACH and acting under authority of his Merchant Mariner's Document No. Z-895916. Appellant shared a room on the ship with Clifton Lumley and James Gadson.

At 2206 on 16 January 1956, the ship arrived at the entrance to San Pedro, California. Appellant went ashore and registered at the Blaize Hotel in San Pedro at approximately 0200 on January. He remained registered here for two days. Later in the morning on the 17th, Appellant went to the ship and obtained a draw against his wages. Appellant returned to the hotel and left again. At approximately 1600, Appellant went back to the hotel with his two

roommates, Clifton Lumley and James Gadson. Appellant stopped at the desk and asked the manager's wife, Mrs. George W. Thomas, about changing his room because there was no heater in the one he had. Upon arrival in the hotel room, Appellant took out a paper bag and handed Lumley a plastic bag containing a greenish-brown substance which was marijuana. Lumley had previously paid Appellant for the marijuana. Subsequently, Lumley smoked cigarettes made with this matter and obtained effects not felt as the result of smoking ordinary cigarettes. Lumley was later convicted, by a court in this area, on his plea of guilty to possession of marijuana. He had been apprehended with marijuana on his person at Oakland, California, on 22 January 1956.

The ship left San Pedro on 20 January and arrived in San Francisco the following morning. On 22 January, the ship moved to Oakland, California. Lumley was arrested by Customs officials about 2000 on this date when he was searched while leaving the dock area and marijuana was found in his possession. Lumley was removed to Los Angeles prior to his trial and convicted as indicated above. He was sentenced to two years imprisonment. (Lumley had a prior record of conviction for armed robbery, a felony, in 1954 at the age of 18.)

Appellant left the ship for shore leave on 22 January at approximately the same time that Lumley was apprehended. Appellant did not return on board until about 1700 on 23 January - 21 hours later. The Customs officials confronted Appellant with a plastic bag containing 300 grains of marijuana which had been found in the folds of a blanket on Appellant's bunk. Appellant admitted ownership of the blanket but denied ownership of the marijuana and any prior knowledge whatsoever concerning it. No other evidence of marijuana was found in Appellant's belongings. Appellant was interrogated by the Customs officials and released. He was not on the ship upon departure later in the evening and this hearing commenced the next day.

Gadson returned to the ship before Appellant on 23 January. Apparently, Gadson was released after questioning and remained on the ship. He could not be located to appear at this hearing as a witness.

Appellant has no prior disciplinary record with the Coast

Guard.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged, with respect to the First Specification (the other two specifications will be dismissed), that the Examiner's decision is not supported by the evidence. The cornerstone of the case against Appellant is the testimony of Lumley. His testimony should be given little or no credence since he is a convicted felon and was also convicted for possession of narcotics aboard ship. In addition, Appellant and Lumley were not friends.

Although Appellant requested that James Gadson be called as a witness, the Coast Guard made only a feeble effort to locate him. The Coast Guard should have produced Gadson as a witness because he could have shed some independent light on the trial of this case.

It is respectfully submitted that the case against Appellant is weak and the order of the Examiner should be set aside. Alternatively, the order should be modified to a suspension since it is far too severe.

APPEARANCE: Donald J. Sullivan, Esquire, of San Francisco,
California, of Counsel.

OPINION

It is my opinion that the evidence is not sufficient to sustain the Second and Third Specifications. Therefore, they will be dismissed. Nevertheless, the order of revocation will be affirmed on the basis of the First Specification.

Second Specification

The only evidence that Appellant used marijuana between 16 and 23 January 1956, as alleged, is Lumley's testimony that, on 21 January, both seamen were on the ship's fantail when he took a "couple of drags" on Appellant's cigarette before lighting a marijuana cigarette of his own. Lumley testified that he could

tell by the peculiar odor that Appellant was smoking a marijuana cigarette. In view of the fact that Lumley commenced smoking a marijuana cigarette immediately thereafter, it appears that this subject was on his mind and he might easily have taken it for granted that Appellant was smoking a marijuana cigarette. Either his imagination could have mistakenly caused him to believe the odor was present before he lighted his own cigarette; or his recollection could have been confused as to whether the odor became apparent before or after he lighted his cigarette. The evidence is too weak to support the specification.

The finding and conclusion that this specification was proved are reversed. The Second Specification is dismissed.

Third Specification

Proof of this specification was based on the testimony of the two Customs employees. They stated that a package of marijuana was accidentally found in Appellant's blanket at 0100 on 23 January and replaced until Appellant returned at 1700 on this date. Accepting completely the testimony of these two officials, I still do not think that the facts are adequate to support the element of "possession" by Appellant. He was away from the ship for some 21 hours. In this respect, the case is similar to Commandant's Appeal No. 568 wherein the order of revocation was vacated. In that case, a package of marijuana was found in the toe of one of Appellant's slippers which was in his room on the ship. Appellant had been off the ship for 20 hours before returning and being questioned about the marijuana. He denied having any knowledge about it. In the instant case, Appellant occupied the room with two other seamen - one was convicted of possessing marijuana and the other was a narcotics suspect as the result of the incidents under consideration. It is reasonable to believe that either of these two seamen might have placed the marijuana in Appellant's blanket. Also, it is conceivable that the marijuana package could have fallen onto Appellant's blanket when Lumley's bunk, the one above Appellant's, was thoroughly searched on the night of 22 January after Lumley's arrest.

Due to these circumstances, the finding and conclusion that the specification was proved are reversed. The Third Specification is dismissed.

First Specification

I agree with Appellant that the case against him is based largely on the testimony of Lumley and that his credibility is impeached to some extent by his criminal record. The Examiner stated that he carefully scrutinized Lumley's testimony in view of his record as a felon and recognized the fact that there were inconsistencies in his testimony as well as that of the Appellant. Nevertheless, the Examiner accepted portions of Lumley's testimony as the truth because it dovetailed completely with other evidence in the case. For this latter reason, it is my opinion that there is substantial evidence in the record to support the finding that Appellant had wrongful possession of marijuana on 17 January 1956 in his hotel room; and that he gave a plastic package of it to Lumley.

Lumley's testimony fits in very well with the deposition testimony of the manager of the Blaize Hotel in several minor but significant respects. Both agree that Appellant returned to the hotel on the afternoon of the first day (17 January) and talked with the manager's wife Mrs. Thomas - not the manager himself - about changing Appellant to a heated room. Appellant emphatically denied that he ever mentioned this matter to Mrs. Thomas and he was very evasive and inconsistent with respect to when he again returned to the hotel after leaving a second time on the first day. Conceivably, Lumley might have known about the intention of Appellant to change his room, due to lack of heat, by overhearing Appellant tell this to Gadson in a barroom. Appellant testified that he said this to Gadson when Lumley was present. But Lumley could not have overheard Appellant say he talked to Mrs. Thomas about it because Appellant repeatedly denied that he discussed the matter with her.

Another factor is that Lumley and the manager both testified that, on this occasion, Appellant stayed in his hotel room about ten minutes before leaving.

The significance of these details is magnified by the fact that Appellant and the hotel manager were friends; and there are indications that the manager's testimony agreed with Appellant's where that of both is clearly refuted by other evidence in the

record. The manager produced hotel register to show that Appellant arrived there early in the morning on 16 January. Appellant's testimony agrees with this even though the ship did not arrive at the San Pedro harbor entrance until 2206 on 16 January. The latter fact was stipulated in evidence from the ship's bridge logbook and also was eventually supported at the end of Appellant's testimony. In addition, Appellant's testimony presents a maze of confusion and contradictions as to what he was doing at various times on the first two days in San Pedro.

Superficially, the hotel manager's testimony appears to be helpful to the Appellant since the manager stated that Appellant was alone when he talked with Mrs. Thomas just before returning to his room for the second time on the first day. But in view of the factors mentioned above, it is my opinion that the combined effect of Lumley's and the manager's testimony is to show that Lumley was with Appellant. The logical inference is that Lumley's presence was denied because his further assertions that he received marijuana on this occasion from Appellant are true. This constitutes substantial evidence in support of the specification, particularly considering the unconvincing nature of Appellant's testimony. The difference in dates (17 instead of 16 January) is not a material variance.

As to the contention that the Coast Guard was requested by Appellant to call the third roommate, Gadson, as a witness, the record shows that counsel for Appellant rested without requesting the appearance of any other witnesses after Appellant had testified. Presumably, Gadson would have testified favorably to Appellant's cause in order to prevent a similar hearing involving Gadson. Hence, it is not likely that his testimony could have been given the weight of that of an impartial witness.

The finding and conclusion that the First Specification was proved are sustained. It is the regulatory policy of the Coast Guard to revoke the documents of all seamen found guilty of possession or other association with narcotics. 46 CFR 137.03-1. There is no reason to make an exception in this case.

ORDER

The order of the Examiner dated at San Francisco, California,

on 5 December 1956, is

AFFIRMED.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 23rd day of July, 1958.

***** END OF DECISION NO. 1055 *****

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