In the Matter of Mariner's Document No. Z-828491 and all other Licenses and Documents
Issued to: CLIFFORD M. ROBINSON

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

916

CLIFFORD M. ROBINSON

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

By order dated 23 January 1956, an Examiner of the United States Coast Guard at San Francisco, California revoked Merchant Mariner's Document No. Z-838491 issued to Clifford M. Robinson upon finding him guilty of misconduct based upon three specifications alleging in substance that while serving as a messman on board the American SS F. J. LUCKENBACH under authority of the document above described, on or about 9 August 1954, he wrongfully had marijuana in his possession (First Specification); he wrongfully had heroin in his possession (Second Specification); and he was wrongfully under the influence of narcotic drugs (Third Specification).

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the two possible results of the hearing - dismissal or revocation. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and each specification proffered against him.

Thereupon, the Investigating Officer made his opening statement. Over strenuous objection, the Investigating Officer introduced in evidence several documentary exhibits and the testimony of two witnesses. The exhibits included a copy of the record of Appellant's conviction before the Yokohama District Court of Justice for possession of heroin and marijuana on 9 August 1954.

Appellant did not testify. He offered in evidence a statement by the Chief Steward of the F. J. LUCKENBACH that Appellant was off duty on 9 August in order to go to the doctor at Yokohama, Japan.The Examiner denied counsel's motion to dismiss on the ground that there was no evidence in the record other than hearsay.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusions, the Examiner announced his decision and concluded that the charge and the specifications had been proved. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-838491 and all other licenses and documents issues to Appellant by the United States Coast Guard or its predecessor authority.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On 9 August 1954, Appellant was in the service of the American F. J. LUCKENBACH as a messman and acting under authority of his Merchant Mariner's Document No. Z-838491 while the ship was in the port of Yokohama, Japan.

On this date, Appellant went ashore on authorized leave to consult a doctor about a pain in his back. While ashore, Appellant was in possession of heroin and marijuana. He was hospitalized at the U. S. Army Hospital in Yokohama where it was determined that Appellant was suffering from acute poisoning which resulted from the use of heroin.

On 29 October 1954, Appellant was convicted before the

Yokohama District Court of Justice for unlawful possession of marijuana and heroin on 9 August 1954. Appellant was sentenced to eight months' imprisonment at hard labor but this sentence was held in abeyance and Appellant was placed on three years' probation.

Appellant has no prior record.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that:

1. R.S. 4450 must be strictly construed since it is a penal statute. Therefore, it cannot be held that Appellant was "on board" as alleged in the specification or that Appellant was "acting under authority of his document" (" in the service of the ship") while committing willful acts of misconduct ashore.

2. Action should have been taken under Public Law 500 (46 U.S.C. 239b(b)(1))) which expressly provides for revocation of documents after conviction for a violation of the narcotic drug laws.

3. The Japanese court records (Exhibits I AND II) were improperly admitted in evidence since they are not an exception to the hearsay rule and there is no evidence that Japanese courts have jurisdiction over citizens of the United States.

4. The logbook entries (Exhibit IV) were improperly admitted because they are not exceptions to the hearsay rule and they contain hearsay on hearsay.

5. The Clinical Record (Exhibit V) is hearsay since it is not authenticated.

6. The testimony of the Investigating Officer (other than the one who tried the case) should be stricken or given no weight because the prescribed procedure was not followed during the investigation when said Investigating Officer obtained admissions from Appellant.

7. Neither the jurisdiction nor the ultimate facts are proved by other than hearsay evidence which is not substantial evidence within the meaning of the Administrative Procedure Act.

APPEARANCE: Thomas L. Rothwell, Esquire, Legal Aid Society of San Francisco, of Counsel

OPINION

1. The Coast Guard has consistently interpreted R.S. 4450, as amended (46 U.S.C. 239), as a remedial statute rather than a penal one. See Commandant's Appeal No. 825, page 7. It has also been held repeatedly that jurisdiction attaches under this statute even though the misconduct is committed while the seaman is on shore leave. Since the employment relationship continues to exist while a seaman ia ashore during the course of a voyage, he is considered to be "in the service of the ship" and, therefore, "acting under authority of his document." The latter is the jurisdictional requirement of 46 U.S.C. 239. See Commandant's Appeal Nos. 361 and 795.

Preferably, the specifications should have stated that Appellant was "in service of" the ship rather than "on board". But this defect is not fatal since Appellant was on notice as to what was intended to be proved in support of the specifications. *KUHN v. C.A.B.* (C.A.,D.C., 1950), 183 F. 2d 839. There is no element of surprise in this respect.

2. Public Law 500 (46 U.S.C. 239a-b) has no application in this case because this statute does not apply to foreign convictions. It is a supplemental statute to 46 U.S.C. 239 since there is no jurisdictional requirement that the seaman must be "acting under authority of his document" at the time of the offense. Title 46 U.S.C. 239 provides for both revocation and suspension of documents. By regulation (46 CFR 137.03-1), revocation is required in narcotics cases proved in proceedings under 46 U.S.C. 239. See Commandant's Appeal No. 889.

3. The Examiner clearly stated that the judgment of conviction in the Japanese court constituted substantial evidence independently of the testimony by a Coast Guard officer as to

admissions of Appellant. In support of this, the Examiner refers to Commandant's Appeal No. 773 which, in turn, cites *Wigmore on Evidence* as authority for the proposition that properly authenticated foreign judicial records are an exception to the hearsay rule. There is no doubt that the copies of court records herein under consideration (Exhibits I and II) are certified and authenticated in accordance with 28 U.S.C. 1741. There is no basis for questioning the jurisdiction of the Japanese courts over events which occurred in Japan. For these reasons, the conviction for possession of marijuana and heroin adequately supports the First and Second Specifications, respectively.

4. The logbook entries (Exhibit IV) are admissible as records made in the regular course of business (28 U.S.C. 1732). But I agree with Appellant's contention that these entries are no entitled to any weight as evidence in support of the specification.

5. It is my opinion that the Clinical Record (Exhibit V) is also admissible as a record made in the regular course of business and meets the tests of trustworthiness sufficiently to constitute and exception to the hearsay rule. See *Medina v. Erickson* (C.A. 9, 1955), 226 F. 2d 475, concerning the admissibility of hospital records of a patient. The Clinical Record is made on a standard form, it is certified as a true copy by the Registrar (Custodian of the records) of a U. S. Army Hospital, and it contains an extensive narrative of the physical examination of Appellant prior to making the diagnosis of acute heroin poisoning on 9 August 1954. Hence, I conclude that this evidence is sufficient to make out a prima facie case with respect to the Third Specification which alleges that Appellant was wrongfully under the influence of narcotic drugs on 9 August 1954.

6. As indicated under paragraphs 3 and 5 above, I have acceded to Appellant's request that no weight be given to the testimony of the Coast Guard officer to whom Appellant made certain admissions while the officer in question was, in effect, making an official, supplemental investigation of the alleged offenses.

7. Since the ultimate facts alleged in the three specifications are proved by the documentary evidence in the record, the testimony of the Coast Guard officer is superfluous.

CONCLUSION

Proof of any one of the specifications would be adequate to require the order of revocation.

ORDER

The order of the Examiner dated at San Francisco, California, on 23 January 1956 is AFFIRMED.

J. A. Hirshfield
Rear Admiral, United States Coast Guard
Acting Commandant

Dated at Washington, D. C., this 20th day of September, 1956.

***** END OF DECISION NO. 916 *****

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