

In the Matter of Merchant Mariner's Document No. Z-265957-D3 and
all other Licenses, Certificates and Documents
Issued to: LEO STRASSMAN

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

982

LEO STRASSMAN

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 10 April 1957, an Examiner of the United States Coast Guard at New York, New York, revoked Appellant's seaman documents upon finding him guilty of misconduct. The specification alleges that while serving as Master-at-Arms on board the American SS INDEPENDENCE under authority of the document above described, on or about 2 June 1955, Appellant assaulted a fellow crew member, Jim Happy, with a dangerous weapon, to wit: a steel chair.

At the beginning of the hearing on 3 December 1956, 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. Appellant entered a plea of "not guilty" to the charge and specification.

On 22 March 1957, after several adjournments, counsel for Appellant moved for a change of venue to San Francisco because

Appellant had become a legal resident of San Francisco after moving there from New Jersey. The Investigating Officer objected to the motion since he intended to produce a witness to establish matters in aggravation of the offense; this witness was available in New York area; and it was unreasonable to make this request at such a late date in the hearing. Counsel for Appellant contended that Appellant's conviction by a Federal court was adequate proof of the offense. The Examiner denied the motion on the ground that Appellant did not sustain the burden of showing that a change of venue was required for the convenience of witnesses and Appellant since he had voluntarily removed his residence from the New York area after the hearing started and the Investigating Officer's would not be available to testify in San Francisco. Hence, the Examiner determined that Appellant would not be prejudiced by the denial of the motion.

On 1 April 1957, counsel for Appellant introduced in evidence a letter from Appellant which extended counsel's authority to represent Appellant in his absence. The letter stated that Appellant was not able to be in New York due to his financial situation.

The Investigating Officer made his opening statement on 1 April 1957. He then placed in evidence certified copies of the record of Appellant's conviction by the United States Court for the Southern District of New York for assault upon Jim Happy with a dangerous weapon on 2 June 1955. Over objection, seaman Happy testified before the Investigating Officer rested his case. Counsel for Appellant rested without indicating any desire to present evidence on behalf of Appellant.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order revoking Appellant's Merchant Mariner's Document No. Z-265957-D3 and all other licenses, certificates and documents issued 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 2 June 1955, Appellant was serving as Master-at-Arms on board the American SS INDEPENDENCE and acting under authority of his Merchant Mariner's Document No. Z-265957-D3 while the ship was in the port of Genoa, Italy.

At approximately 1800 on this date, Jim Happy, a first-class deck steward, was in his room changing clothes when Appellant entered the room and stated that he wanted to fight Happy. The latter said he did not want to fight and continued dressing in the three-foot wide space between his bunk and locker. Appellant picked up a steel chair next to the bunk and used it to strike Happy a hard blow over his left eyebrow. Happy could not escape because he was trapped between the locker and bunk with his back to the bulkhead. He had raised his left arm in an unsuccessful attempt to ward off the blow. Appellant then used his fists to punch Happy several times. Appellant is a large man weighing about 200 pounds.

The steel chair cut Happy's forehead to such an extent that the wound required three internal and eight external stitches. He was still receiving medical treatment for this injury when he testified at the hearing on 1 April 1957 - 22 months after the injury occurred.

As a result of this incident, Appellant was tried before the United States District Court for the Southern District of New York. The indictment filed on 27 June 1955 alleged that, on or about 2 June 1955, Appellant, willfully and with intent to do bodily harm and without just cause or excuse, assaulted Jim Happy with a dangerous weapon, a steel chair, in violation of 18 U.S.C. 113(c). Appellant was found guilty by a jury. On 21 August 1956, he was sentenced to nine months' imprisonment but execution of the sentence was suspended and he was placed on probation for one year. The case was appealed and, on 12 March 1957, it was affirmed. *United States V. Strassman* (C.A.2, 1957), 241 F2d 784.

Appellant's prior record consists of a probationary suspension in 1950 for failing to obey a lawful order, using abusive language to the ship's officers and acting in disorderly manner.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is urged that the denial of the motion for a change of venue was erroneous and prejudicial to Appellant because it deprived him of the right to testify in his own behalf and the right to call character witnesses who were in San Francisco. The government could not have been prejudiced by a change of venue since the Federal court conviction of Appellant was res judicata and the deposition of the seaman assaulted could have been submitted at San Francisco. However, Appellant was denied a fair and impartial hearing because the testimony of Jim Happy aroused emotions not related to the legal aspects of the case. In the interest of justice, the motion should have been granted.

The Examiner exceeded his authority when he questioned Jim Happy in such a manner that the Examiner assumed the role of prosecutor.

In conclusion, it is respectfully requested that the order of revocation be vacated and a new hearing ordered to permit Appellant to submit evidence in mitigation.

APPEARANCE: Irving Zwerling, Esquire, of New York City, of Counsel.

OPINION

The Examiner's denial of the motion for a change of venue was not erroneous; this action did not deprive Appellant of a fair trial by permitting Jim Happy to testify before the Examiner.

The analogy in the Federal courts is based on the authority contained in 28 U.S.C. 1404(a) which reads as follows:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Under this statute, the same standards are controlling as in

the application of the doctrine of *forum non conveniences*. *Ford Motor Co. V. Ryan* (C.A.2, 1950), 182 F2d 329. This doctrine provides that the court may refuse to exercise its jurisdiction and dismiss the case if it appears that for the convenience of litigants and in the interest of justice the action should be instituted in another forum. In determining whether this doctrine should be applied, the court should consider the private interests of the litigant, relative ease of access to sources of proof, availability of witnesses, cost of obtaining attendance of witnesses, the question of a fair trial, administrative difficulties and factors of public interest; but unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. *Gulf Oil Corporation V. Gilbert* (1947) 330 U.S. 501.

Timeliness of the motion is another factor applied to 28 U.S.C. 1404(a). Delay in making the motion to transfer the action is to be given some consideration but it is not alone determinative of the ultimate decision as to whether the transfer should be granted. *Molloy V. Bemis Bros. Bag Co.* (D.C.N.Y., 1955), 130 F. Supp. 265.

It is clear from the above that the burden of establishing hardship or inconvenience is on the moving party. It is equally true that the statute vests the trial court with a broad discretion. *Fannin V. Jones* (C.A.6, 1956), 229 F2d 368. To warrant reversal on appeal, there must be something more than an erroneous decision; there must be a denial of transfer which is so clearly erroneous as to constitute an abuse of discretion. *Chicago, Rock Island and Pacific Railroad Co. V. Igoe* (C.A. 7, 1955), 220 F2d 229.

In the case under consideration, Appellant bases his claim, that the hearing should have been transferred to San Francisco, primarily on the grounds that he was deprived of his right to testify and that the testimony of seaman Happy before the Examiner was an emotional appeal was not necessary to prove the charge in view of the record of Appellant's conviction.

The hearing record shows that Appellant removed his residence to San Francisco after the hearing had started in New York without

objection by Appellant or his counsel. It was than three months later that counsel made a motion to change the venue - ten days after h is conviction was affirmed by the Court of appeals. This delay in making the motion must be weighed against Appellant.

As to Appellant's inability to testify at the hearing, this was brought about by his voluntarily choice to move to California during the course of the hearing. Hence, the fact that his financial situation might have prevented his return to New York to testify deserves little consideration. also, the record shows that the Examiner pointed out to counsel that Appellant's testimony could be presented in deposition form but no attempt was made by counsel to take advantage of this suggestion even though he submits that this is the procedure which should have been followed with respect to the testimony of seaman Happy.

In order to obtain the presence of Happy at the hearing, it was necessary to conduct the proceedings in the vicinity of New York. Although Appellant's conviction was proof of the offense, it did not relate the details which the Examiner needed in order to decide upon the order to be imposed against Appellant's documents. Hence, there was no reason to exclude the testimony of Happy which revealed the vicious nature of the attack by Appellant. Counsel for Appellant had the opportunity to cross-examine Happy whereas this would not have been true in California if his deposition had been sent there.

After consideration the elements of convenience to the parties and witnesses as well as the interest of justice, it is apparent that the best place to have conducted the hearing was in New York. Delays and administrative expenses would have increased if the case had been transferred to San Francisco. On the other hand, counsel admits that Appellant could only have testified as to matters in mitigation in view of the res judicata effect of the court conviction. The same would have been true with respect to the testimony of any characters witnesses in California. It is not conceivable that this would have caused the Examiner to lesson the order of revocation in view of the severity of the injury to Happy as testified to by him and supported by the Federal court decision cited above.

It is my conclusion that it was a proper exercise of

discretion for the Examiner to deny the motion to transfer the hearing since Appellant did not even approach sustaining the heavy burden of showing justification for a change of venue.

Appellant's objection to the manner in which the Examiner questioned seaman Happy apparently relates to a line of questioning which led to the answer that the steel chair was "heavy." In view of the serious injury which resulted from the use of the chair by Appellant, the weight of the chair is not material and the error, if any, was harmless.

The order of revocation will be upheld since it was warranted by the deliberate, unprovoked attack upon seaman Happy which resulted in serious injury to him.

ORDER

The order of the Examiner dated at New York, New York, on 10 April 1957, is AFFIRMED.

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

Dated at Washington, D.C., this 4th day of September, 1957.

***** END OF DECISION NO. 982 *****

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