In the Matter of Merchant Mariner's Document No. Z-61065 and all other Seaman Documents
Issued to: JUAN DE DIOS DIAZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1079

JUAN DE DIOS DIAZ

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 1 July 1958, 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 specifications alleges that while serving as a fireman on board the United States SS SANTA MARGARITA under authority of the document above described, on or about 26 January 1958, Appellant wrongfully had possession of narcotics, to wit: marijuana.

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. Although advised of his right to be represented by counsel of his own choice, Appellant elected to waive that right and act as his own counsel with the assistance of his wife. He entered a plea of not guilty to the charge and specification.

The Investigating Officer made his opening statement. He then

introduced in evidence the testimony of the Junior Third Mate and various documentary exhibits.

In defense, Appellant offered in evidence his sworn testimony and a small cardboard package. Appellant testified that he found a few marijuana cigarettes in this package, he intended to get rid of the cigarettes but put them in his coat pocket and forgot about them until he was searched while ashore two days later. Appellant stated repeatedly that no cigarettes were found in his locker by the Customs officials.

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

The decision was served on 3 July. Appeal was timely filed on 9 July by counsel for Appellant and a brief was submitted at a later date.

FINDINGS OF FACT

On 26 January 1958, Appellant was serving as a fireman on board the United States SS SANTA MARGARITA and acting under authority of his Merchant Mariner's Document No. Z-61065 while the ship was in the port of Antofagasta, Chile.

At approximately 2100 on this date, Appellant was in the dock area when he was searched by local Customs officials. Several handmade marijuana cigarettes with twisted ends were found in Appellant's possession (R. 39, 49, 56). The searchers knew from experience that the substance contained in the cigarettes was marijuana and expressed this view to Appellant (R. 43). Appellant was taken on board the ship by Customs officials who then searched his locker and personal belongings in the presence of Appellant and the Junior Third Mate on watch. After about an hour, a package containing a few handmade marijuana cigarettes was located in Appellant's locker. Appellant was required to remain on board in the custody of the Master until the ship left port (R. 16).

There was no entry of this matter made in the ship's Official Logbook until 13 February 1958.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that the Investigating Officer did not sustain the burden of proof as required by 46 CFR 137.09-50 since the case rests solely on incompetent and inadmissable hearsay evidence. The decision is not supported by reliable, probative and substantial evidence as required by 46 CFR 137.21-5 but it is contrary to the evidence and to the law. The order of revocation is harsh and unreasonable for the offense alleged in view of Appellant's prior clear record and his failure to appreciate the seriousness of the charge.

It is respectfully urged that the decision be reversed and the proceedings either dismissed or a new hearing ordered.

Appearances on appeal: Emanuel Friedman, Esquire of New York City, of Counsel

OPINION

There is considerable merit in Appellant's attack on the quality of the evidence contained in the Official Logbook entry and the so-called Consular Report received in evidence as documentary exhibits introduced by the Investigating Officer. Nevertheless, the order of revocation will be affirmed primarily on the basis of the testimony given by the Junior Third Mate and Appellant.

The logbook entry was not made until more than two week after the offense was committed. Title 46 U.S.C. 702 states that the entry shall be made on the day of the offense. The entry was not timely made and it fails to meet other requirements of this statute. Although it is admissible under 28 U.S.C. 1732 as an entry made in the regular course of business, it is not adequate to make out a prima facie case against Appellant since there was not substantial compliance with 46 U.S.C. 702.

The so-called Consular Report consists of a document, under

seal and signed by the U.S. Consul at Antofagasta, certifying that certain attached letters, with enclosures, were signed by a named physician who was taken Chief of Zone II of the National Health Service at Antofagasta, Chile "to whose official acts faith and credit are due." (These words are quoted from the Consul's document.) The attachments to the Consul's document state that analysis disclosed Appellant's cigarettes contained marijuana and that a "fee" of three thousand pesos imposed against Appellant was paid by the local agent for Grace and Company.

As contended by Appellant, this consular document was exactly the same type as the one which the court said was not admissible, under 28 U.S.C. 1740, in *Nieto v. McGrath* (D.C. Texas, 1951), 108 F. Supp. 150. It was held that the letter attached to the Consul's certification, as above, was not "such an official document or paper on file in the Consul's office as is admissible under the statute [28 U.S.C. 1740]." It is clear from the decision that this conclusion was based on the application of the strict rules of evidence in a court of law. But under the relaxed rules of evidence applicable in administrative proceedings, it is my opinion that the documents in question were admissible as hearsay evidence; but, as the log entry, insufficient to make out a prima facie case. In *Rhodes Pharmacal Co. v. F.T.C.* (C.A. 7, 1954), 208 F. 2d 382, the court said:

> "We recognize that the rule is well established that evidence which would be excluded in an ordinary lawsuit may, under many circumstances, be received on hearings before an administrative agency. The Supreme Court has stated, ` * * * technical rules for exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed.'"

However, primary reliance must be placed on other evidence. The testimony of the Junior Third Mate and Appellant is considered adequate to support the above findings of fact. One admission by Appellant was particularly damaging. Referring to the writing on the package in which he claims to have found the handmade cigarettes with twisted ends, Appellant stated:

"It doesn't say `marijuana,' true, but that's what I find."

The Junior Third Mate testified that the same kind of handmade cigarettes were found in Appellant's locker on the ship. After that, Appellant was detained on board in the custody of the Master. It is my opinion that the circumstantial evidence and Appellant's admissions are adequate to establish that marijuana cigarettes were found both on Appellant's person and in his locker. The logbook entry and the Consul's document merely supply corroborating evidence. This meets the test of "reliable, probative and substantial evidence" even though hearsay evidence is involved. See citations on page 8 of *Commandant's Appeal Decision* No. 467 in support of this.

It has been held that an administrative order is void if the findings were contrary to the indisputable character of the evidence (*United States v. Shaughnessy* (D.C. N.Y. 1956), 143 F. Supp. 270 citing 227 U.S. 88, 91) or if improperly admitted hearsay affected the correctness of the administrative findings. *Klaw v. Schaffer* (D.C. N.Y. 1957), 151 F. Supp. 534. Appellant's case does not fall into the former category because of the convincing nature of the evidence, nor into the latter because the hearsay documents were properly received in evidence by the Examiner.

Much of Appellant's testimony is directed toward denying that cigarettes were found in his locker. Although the Examiner accepted the Mate's testimony to the contrary, this point is relatively unimportant since the possession of marijuana while ashore may be just as much of a potential hazard to the ship and her personnel under some circumstances as possession on board the ship. Appellant admitted the possession of marijuana cigarettes ashore. Such admissions might not have been made if Appellant had been represented by counsel at the hearing. But that does not prevent the use of such admissions to make out the case against Appellant. He had full opportunity to obtain counsel during the course of several adjournments and he was informed of this right by the Examiner at the hearing as well as by the Investigating Officer before the hearing.

The order of revocation is not considered to be harsh in any case involving narcotics regardless of a seaman's prior clear record. Therefore, the order will be sustained.

ORDER

The order of the Examiner dated at New York, New York, on 1 July 1958, is AFFIRMED.

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

Dated at Washington, D. C., this 20th day of November, 1958.

***** END OF DECISION NO. 1079 *****

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