In the Matter of Merchant Mariner's Document No. Z-839431 and all other Seaman Documents
Issued to: ARNE JAKOBSEN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1081

ARNE JAKOBSEN

This appeal has been taken in accordance with Title 4l United States Code 239(g) and Title 46 Code of Federal Regulations 137.11-1.

By order dated 11 February 1958, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman documents upon finding him guilty of misconduct. Two specifications allege that while serving as an able seaman on board the United States SS TUCSON VICTORY under authority of the document above described, on or about 1 May 1957, Appellant wrongfully had in his possession certain narcotics, to wit: marijuana; and he wrongfully had in his possession part of the ship's cargo consisting of one blanket and five inner tuber for automobile tires.

At the beginning of the hearing, Appellant was given a full explanation of the nature of the proceedings and the rights to which he was entitled. Appellant was represented by counsel of his own choice. Appellant 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 witnesses and several documentary exhibits. After counsel made his opening statement, Appellant testified in his own behalf and no other evidence was submitted except a stipulation that Appellant had been acquitted by the Superior Court of California of a marijuana charge substantially the same as the first specification herein. Appellant testified that he never, at any time, had possession of or used marijuana; other crew members had easy access, on the ship, to the cigar box in which the marijuana was found; and Appellant does not know how the marijuana got in his belongings. Concerning the blanket and inner tubes, Appellant stated that the Boatswain said he could have these articles and Appellant does not know whether they were a part of the ship's cargo.

At the conclusion of the hearing, the oral arguments 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 two specifications had been proved. An order was entered revoking all documents issued to Appellant.

The decision was served by registered mail on 15 February 1958. Appeal was timely filed on 10 March 1958.

FINDINGS OF FACT

On 1 May 1957, appellant was serving as an able seaman on the United States SS TUCSON VICTORY and acting under authority of his Merchant Mariner's Document No. Z-839431 while the ship was at a dock in the port of San Francisco, California.

About 1415 on this date, Appellant went ashore with Walter Kurahara, one of his two roommates on the ship. As they left the pier through one of the gates, Appellant was carrying his large, green seabag. Kurahara was carrying a small, blue, canvas zipper bag which also belonged to Appellant. Among other articles in the small bag, there was a cigar box. Appellant had placed this box in the bag on the preceding evening and the unlocked bag remained in Appellant'S quarters on the ship until Appellant went ashore at this time. Appellant was taking all his gear ashore because he did not plan to stay on board for the next voyage. He was paid off

through 1 May.

Customs Agent Kempton saw the two seamen as they went through the pier gate which opened out onto the public streets of the city. Agent Kempton called out to them and another seaman who was a short distance behind them. Appellant and Kurahara stopped while on the sidewalk about fifty feet outside of the gate. The three seamen were asked if they had any contraband and they replied in the negative. Agent Kempton then asked if they had any objection to being searched. Since neither Appellant nor the other two offered any objection, their gear was searched after Appellant had identified both the large seabag and the small zipper bag as his property.

Customs Agent Kempton found a blanket in Appellant's seabag. At first, Appellant said that he had purchased the blanket when the ship was in Wilmington, California, but he later admitted that he found it in one of the ship's mast lockers some time before. After taking several articles out of Appellant's small zipper bag, Agent Kempton took out the cigar box. It contained discharges, letters, keys, coins and other personal things belonging to Appellant. In one envelope with Appellant's name on it, there was a brown flaky substance and seeds with a greenish tinge which the Customs Agent suspected was marijuana. Appellant was placed under arrest although he denied that the flaky substance was his or that he had any knowledge concerning it. Four capsules containing white powder were also found in the small bag as well as a package of cigarette paper. (Appellant testified that he smoked Pall Mall cigarettes.) The other two seamen were not detained any longer. A search of Appellant's automobile across the street disclosed five inner tubes which Appellant had found in one of the ship's mast lockers. No evidence of marijuana or other narcotics was found in Appellant's quarters on the ship.

Subsequent analysis confirmed Agent Kempton's suspicion about the flaky substance. It contained 17 grains of marijuana. The four capsules did not contain any prohibited narcotic drug. As a result of this marijuana in Appellant's personal effects, he was tried and acquitted before the Superior Court of San Francisco. At the hearing, the Investigating Officer refused to agree to the further suggested stipulation that the court concluded that Appellant was illegally searched by Agent Kempton.

A United States Commissioner in San Francisco found that Appellant was guilty of unlawfully taking property of another with respect to the blanket but not with respect to the five inner tubes. Appellant paid a fine of $100.

Appellant has no prior record. He has been going to sea on United States merchant vessels since 1949.

BASES OF APPEAL

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

POINT I. Evidence obtained by illegal search and seizure was improperly admitted in evidence. There was no probable cause to suspect Appellant and the authority of Customs officers, under 19 U.S.C. 1581-2, to search without a warrant or probable cause does not extend to persons who have been "allowed to pass out into the public streets of the city" after leaving a ship. *United States v. Yee Ngee How* (D.C.Calif., 1952), 105 F.Supp. 517. The Examiner was incorrect in stating that Appellant waived his constitutional right by voluntary consent to the search for contraband. Mere acquiescence or peaceful submission to a search by a federal agent, without clear consent, is not a waiver.

POINT II. The Examiner's decision is not supported by reliable, probative and substantial evidence. Actual knowledge of possession, which is a necessary element of wrongful possession, was not proved. There is no conjecture as to how the marijuana got in the cigar box but no convincing evidence. Other crew members had continuous access to the box. Also, it was seriously prejudicial for the Examiner to assign no weight at all to Appellant's acquittal in the California court since this material evidence constitutes substantial

evidence in Appellant's favor.

POINT III. The order of revocation is excessive with respect to the blanket and inner tubes.

In conclusion, it is respectfully submitted that wrongful possession of marijuana has not been shown. Accordingly, the order should be reversed or modified.

APPEARANCES: Morton L. Silvers, Esquire, of San Francisco, California, of Counsel.

OPINION

It is believed that the allegation of wrongful possession of marijuana is supported by substantial evidence which was properly admitted by the Examiner. On this basis alone, the order will be affirmed since this is misconduct involving narcotics, for which offenses revocation is required. 46 CFR 137.03-1.

POINT I

The hearing record does not clearly support or contradict the Examiner's opinion that Appellant voluntarily consented to the search by the Customs Agent. The only testimony on this point was given by one witness and it is vague. Agent Kempton simply stated that none of the three seamen offered any objection to being searched. He did not know whether he or Appellant had opened Appellant's bags. On this state of the record, it is indeterminate as to whether the following test set forth in *Hoing v. United States* (C.A.8, 1953), 208 F.2d 916 was met in this case:

> "....It is not a violation of the Fourth Amendment for officers .... to make a search ... where the person accused or being investigated has consented to the making of the search, if the consent has been given voluntarily and not as a matter of probable compulsion from the demands or domination of authority, and if the search has been kept within the bounds of the actual consent."

In the above case, the court held that the evidence was admissible when it was discovered by a Government agent after he asked whether appellant would mind if they looked around the room to see if they could find any identification (which appellant denied having) and appellant replied, "No, certainly, go ahead, gentlemen." The hearing record here under consideration does not show whether Appellant gave any such verbal consent when he was asked if he objected to being searched.

It is not considered necessary to resolve the above issue, however, in view of the fact that the search which Customs officials are authorized, under 19 U.S.C. 1581, to conduct upon entry is of the broadest possible character. See *United States v. Yee Ngee How*, supra; Commandant's Appeal Decision No. 316. In the *Yee Ngee How* case, the statement that the right of a Customs official to conduct a search in the public streets is dictum since petitioner. How was searched before he left the pier. In the present case, the evidence shows that Agent Kempton saw Appellant as he went through the pier gate to the public area and Appellant stopped when no farther than about fifty feet from the pier. It was stated in *Yee Ngee How* that it would achieve an absurd result and one inconsistent with the purpose of 19 U.S..C. 1581 to hold that a person could be searched on board the vessel but not while he stood on the pier to which the vessel was tied. It seems to me that it would be equally inconsistent with the purpose of the statute to state that a search fifty feet off the pier was not permitted even though Appellant was under constant observation after leaving the pier a matter of a few seconds before he stopped. Hence, I conclude that, on the facts shown, this was a reasonable search by a Customs Officer and the evidence seized was admissible at the hearing.

Although there is some implication in the record that Appellant was acquitted as the result of the court's opinion that he had been subjected to an illegal search by the Customs Agent, there is no indication as to what evidentiary facts this opinion was based on. The evidence presented before the court may have been considerably different than that which was introduced at the hearing. Hence, this possible reason for Appellant's acquittal has no bearing on this point so far as this proceeding is concerned.

POINT II

It is my opinion that the entire record considered by the Examiner and that the testimony which he accepted, as the trier of the facts, constitutes adequate evidence to reach the conclusion that Appellant had actual knowledge, i.e. conscious possession, of the marijuana in his small zipper bag.

Concerning the access of others to the cigar box, it is not required that the possession of a narcotic be "personal and exclusive" in order to find a person guilty of a narcotic offense. *Borgfeldt V. United States* (C.C.A. 9, 1933), 62 F2d 967. In the case of *NG Sing V. United States* (C.C.A. 9, 1925), 8 F2d 919, it was stated that the mere fact that the place of concealment of the narcotic was accessible to other parties by ordinary means would not justify the court in determining as a matter of law that a jury would not be warranted in finding that the property concealed was in the possession of the person accused. The same is true in this case.

Also related to the question of access to the box, there is no indication in the record that Appellant was "framed" by one of his shipmates; and the Examiner considered as tenuous Appellant's testimony that Kurahara had said he wanted to see Appellant about something important on the next day. Appellant was free to subpoena Kurahara to testify at the hearing so that he could be questioned on this point. No attempt was made to subpoena this seaman.

The evidence shows, by Appellant's own admission, that both bags belonged to him although the smaller one was carried by Kurahara. Accepting Appellant's word that he had packed the small zipper bag on the preceding evening and left it unlocked in his quarters until departing on the next day, there is nothing to indicate or any reason to believe, other than Appellant's unsupported testimony, that someone else had placed the marijuana in the cigar box either before or after Appellant packed it. Since Appellant was not going back to the ship, it does not appear that anyone, with the possible exception of Kurahara, would have a reasonable opportunity to retrieve the marijuana after it was taken ashore in Appellant's bag. In any event, it is clear that Appellant's physical possession of the marijuana is established

because he was right next to the seaman carrying his small bag.

The Examiner rejected Appellant's testimony that he did not have any knowledge concerning the marijuana found by Agent Kempton. Under circumstances where a defendant's knowledge of the presence of the narcotic in his physical possession is material, the weight to be attached to the denial of a defendant is for the jury to determine. *Gee Woe V. United States* (C.C.A. 5, 1918), 250 Fed. 428, cart. den. 248 U.S. 562. Similarly, the weight to be given Appellant's denial in this administrative action is for the Examiner to determine. *Commandant's Appeal Decisions* Nos. 712 and 8109

The Examiner's decision shows that he commented on Appellant's acquittal in the California court. Further consideration of a criminal trial acquittal is not required in these administrative proceedings where the degree of proof necessary is less than that required to convict in criminal actions.

Since the Examiner rejected Appellant's denial of knowledge of the marijuana, it is my opinion that the balance of the evidence leads to the conclusion, as the most probable inference from the established facts and circumstances, that Appellant had conscious and knowing possession of the marijuana. I think the evidence meets the test that it must be substantial, that is, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. V. N.L.R.B.* (1938), 305 U.S. 197. It does not necessarily follow that evidence is not substantial because it permits two or more possible inference. *Balto. and Ohio Railroad Co. V. Postom* (C.C.A., 1949), 177 F2d 53.

POINT III

As a matter of policy, the specification referring to the blanket and inner tubes is hereby dismissed because it alleges comparatively minor offenses and Appellant was fined $100 when these matters were taken before a United States Commissioner in San Francisco.

ORDER

The order of the Examiner dated at San Francisco, California, on 11 February 1958, is AFFIRMED.

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

Dated at Washington, D.C., this 18th day of December, 1958.

***** END OF DECISION NO. 1081 *****

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