In the Matter of Merchant Mariner's Document No. Z-390935 and all other Seaman Documents
Issued to: ANTONI BILYK

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1266

ANTONI BILYK

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 12 January 1961, an Examiner of the United States Coast Guard at Long Beach, California suspended Appellant's seaman documents upon finding him guilty of misconduct. The specification found proved alleges that while serving as Boatswain on board the United States SS ATLAS under authority of the document above described, on or about 11 September 1960, Appellant assaulted and battered seaman Anderson J. Johnes while the ship was at sea.

Appellant was served with the charges at San Pedro on 26 September 1960 to appear for a hearing three days later at Long Beach. When he was served, Appellant expressed his desire to have the hearing in New York but he gave no reason for this and was told by the Investigating Officer to make his request to the Examiner on the opening day of the hearing. Appellant was repeatedly informed that the hearing would proceed even if Appellant was absent. Appellant flew to New York on the night of 26 September and reported to the Coast Guard office there on 28 September to renew

his request for a hearing in New York. Again, Appellant was told that the hearing would be held at Long Beach. When questioned later as to his reason for the requested change of venue, Appellant stated that it was because his wife was ill at home with a throat ailment.

On 29 September 1960 and several subsequent dates, the hearing was conducted in absentia at Long Beach because Appellant was not present or represented by counsel. The Examiner entered a not guilty plea on behalf of Appellant.

Since the ATLAS was scheduled to depart on 29 September for New Haven, Connecticut, the testimony of the seaman allegedly assaulted, Anderson J. Johnes, was taken at the hearing on this date. The Investigating Officer also introduced in evidence a certified copy of an entry in the ship's Official Logbook concerning this incident and a statement by the ship's Chief Engineer which was made and signed in the presence of Appellant during the investigation on the ship on 26 September. The Chief Engineer left the ship on the latter date and was not available to appear at the hearing.

On 25 October 1960, the Examiner admitted in evidence Appellant's testimony which was taken before an Investigating Officer in New York. Appellant's version of the incident is that Johnes grabbed Appellant around the throat with both hands lifting him off the deck and banging his head against the bulkhead; three other seaman came when Appellant yelled but they could not break Johnes' grip; while Appellant was still being forcefully choked, he used both hands to pull Johnes' head down and bit his left eyebrow until Johnes released his hold on Appellant. No other evidence was submitted in defense.

At the end of the hearing, the Examiner rendered the decision in which he concluded that the charge and specification had been proved. The Examiner then entered an order suspending all documents, issued to Appellant, for a period of nine months outright plus twelve months' suspension on twelve months' probation.

FINDINGS OF FACT

On 11 September 1960, Appellant was serving as Boatswain on board the United States SS ATLAS and acting under authority of his document.

The ship was at sea after leaving Guam on the morning of 11 September. Appellant was in charge of stowing the mooring lines below. Deck maintenanceman Anderson J. Johnes was assisting in this by operating the winch. When he saw that Appellant was intoxicated, Johnes stopped the winch and went below to tell the seamen stowing the lines to "knock off" work until the Chief Mate was notified and put someone else in charge. Appellant went below and fell against Johnes in the passageway. Johnes caught Appellant by the shoulders and told him they were knocking off work because of his condition. When Appellant began to struggle, Johnes released his hold. Appellant slipped and sat down on deck. As Johnes walked by, Appellant clawed Johnes' face. Johnes pushed Appellant away. Johnes is almost a foot taller than Appellant and forty to fifty pounds heavier.

Other seamen who had been stowing the lines came into the passageway and thought there had been a fight. Two of these seamen held Johnes and another one started to lead Appellant away. While Johnes was struggling to free himself and explain the situation, Appellant returned along the passageway. Johnes was still being restrained when Appellant pulled himself up on Johnes, or pulled his head down, and bit his left eyebrow with such a force that the eyebrow was torn away and hung down over the eye. The cut was about one and one-half inches long and one-half inch deep. It bled profusely as Johnes went to report the incident to the Chief Mate. When the Master arrived on the scene and saw that Appellant was intoxicated, the Master handcuffed Appellant to his bunk for the balance of the day.

Johnes' wound was sewed up by the Master with five stitches. Johnes' was relieved of his duties for three days. The area over his left eye was considerably swollen when he testified at the hearing eighteen days later.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

--- Point I. Appellant was not afforded a fair and impartial hearing because the Examiner prejudged the case at the outset. Before evidence in Appellant's defense was introduced, the Examiner indicated his acceptance of Johnes' version that Appellant was the aggressor.

Point II. The findings are not supported by credible evidence. The testimony of the only government witness shows that he was in danger of being charged by his union due to this incident. Nevertheless, his testimony, that other seamen said they thought there was a fight, supports Appellant's version that he acted in self-defense. The written statement by the Chief Engineer has no value as corroborating evidence because Appellant was not represented by counsel to cross-examine the Chief Engineer.

Point III. It was prejudicial error not produce the other witnesses mentioned in Johnes' testimony. The Examiner was prejudiced against Appellant because he did not appear at the hearing.

Point IV. The request for a change of venue to New York City should have been granted. The ship was going to New Haven and Appellant lives in Brooklyn. It would have been more convenient for all parties to change the venue and Appellant was not afforded a fair trial at the absentia proceedings.

Point V. The order of suspension is too severe. Appellant's unmarred record for 17 years on American ships shows that this is an isolated incident.

Conclusion: The charge of misconduct should be dismissed. Alternatively, the order should be modified to an admonition.

APPEARANCE: Miller and Seeger of New York City, by Burton M. Epstein, of Counsel.

OPINION

I agree with the Examiner that it was a proper exercise of his

discretion to deny the request for a change of venue. Appellant failed to sustain the burden of establishing hardship or inconvenience to such an extent that it was clearly erroneous for the Examiner to deny the request. This is the standard to apply as discussed in *Commandant's Appeal Decision* No. 982.

The various contentions that Appellant was not afforded a fair hearing are the result of Appellant's failure to appear at the hearing in Long Beach as directed. It is my opinion that there was no undue prejudice against Appellant displayed by the Examiner and that he did not prejudge the case on the basis of Johnes' testimony at the beginning of the hearing. On the contrary, the Examiner was very liberal by receiving in evidence Appellant's testimony which was taken before an Investigating Officer in New York City.

It would have been preferable to have obtained the testimony of additional eyewitnesses at the hearing; but the testimony of Johnes constitutes substantial evidence in support of the alleged offense since his version was accepted by the Examiner who saw and heard Johnes when he testified substantially as set forth in the above findings of fact. The statement of the Chief Engineer has some value as corroborating evidence even though Appellant was not represented by counsel to cross-examine. Both Johnes and the Chief Engineer stated that two other seamen were holding Johnes when he was bitten by Appellant.

As stated by the Examiner, Appellant's version of the incident seems highly improbable. If three seamen could not force Johnes to release his grip on Appellant's throat, how could Appellant have previously yelled while being forcefully choked? And it is difficult to believe that Appellant would have had the strength to pull Johnes' head down and bite so hard as to cause the serious injury inflicted. Also of significance is the evident lack of injury to Appellant. The only indication of any injury is his testimony that his throat, "a few days it was hurt." This is not consistent with the alleged manhandling by a person so much larger than Appellant.

Another factor which was taken into consideration by the Examiner, in evaluating credibility, is that Appellant was intoxicated. This is substantiated by Johnes, the Chief Engineer and the Master in his logbook entry. The intoxication of a witness

at the time of the events concerning which he testifies bears on his capacity for accurate observation and correct memory, and hence is proper to consider in passing on his credibility. *98 C.J.S.* Witnesses, sec. 461 h.

It is my opinion that the alleged offense has been proved and, due to the vicious nature of this act, the order of the Examiner should be sustained regardless of Appellant's prior good conduct.

ORDER

The order of the Examiner dated at Long Beach, California on 12 January 1961, is AFFIRMED.

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

Signed at Washington, D. C., this 7th day of November 1961.

***** END OF DECISION NO. 1266 *****

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