



COURT MARTIAL

Citation: *R. v. Corporal S.T. Jones*, 1997 CM 11

Date: 14 May 1997

Docket: F199711

Standing Court Martial
Halifax, Nova Scotia, Canada

Her Majesty the Queen

- and -

Corporal S.T. Jones, accused

Before: Colonel G.L. Brais, M.J.

Warning

Subject to sub-section 486(3) and 486(4) of the *Criminal Code* and section 179 of the *National Defence Act*, the court has directed that the identity of the complainant and any information that would disclose the identity of the complainant shall not be published in any document or broadcast in any way.

FINDING

(Orally)

[1] Okay. The court finds the accused not guilty of the first charge. Go with your counsel, please.

[2] In this case the prosecution had to prove beyond a reasonable doubt that the accused sexually assaulted Miss X.. In order to do so, the prosecution had to prove the following essential ingredients:

- the date and place of the event;
- the identity of the accused;
- the identity of the victim;
- the assault, i.e., the application of forces directly or indirectly by the accused to the victim;
- the lack of consent of the victim;
- the sexual nature of the assault; and
- the guilty intent of the accused.

[3] On the basis of the evidence tendered by the prosecution and by the defence, the court is satisfied that in the early hours of 30 May 1992 between 1:30 and 2:30 hours the accused, Corporal Steven Jones, touched the victim, X., on her breast, that such touching was of a sexual nature, and that he did so intentionally, i.e., knowingly and voluntarily. The court was not satisfied, however, that the victim was touched on the buttocks or that she was not consenting to the touching of her breast.

[4] In order to arrive at this conclusion, the court reviewed the testimonies of the victim, Miss X., of the eye witness, Miss A., and of the accused himself. Miss X., the victim, is of little assistance in this case. She has no recollection of the events on the beach and does not testify that she did not consent to any form of sexual touching by the accused. It must be noted that the fact that Miss X. is currently unable to recall any of the events which transpired on the beach in the early hours of 30 May 1992 does not mean that at the time of the events she did not know what she was doing or was not conscious of what was happening around her, including perceiving that Corporal Jones was touching her breast and being able to consent to such physical contact. No evidence has been led to that effect.

[5] Miss A. testifies that she heard Miss X. orally object to the sexual touching of her buttocks even though at the same time Miss X. was laughing and was not demonstrating any of the physical signs of objection. She testifies that she saw the accused touch the victim's breast on three separate occasions and that she had to push him off every time. She did not see the accused touch the buttocks of the victim. Miss A.

provides the court with the only evidence of the required lack of consent on the part of the victim. In that regard, her testimony is essential to the case for the prosecution.

[6] As to the accused, he admits that on one occasion, he actually touched the breast of the victim and that she did not object. He confirms that during the events she was laughing and gave him the impression that she was consenting to his actions. He also describes how they had been walking arm in arm or arms around each other's waist prior to the sexual touching.

[7] As stated earlier, the testimony of Miss A. was essential to the case for the prosecution inasmuch as she provided the only evidence of a lack of consent on the part of Miss X. The case for the prosecution would fail if her evidence was not believed by the court. This is what has happened.

[8] The court has concluded that Miss A. was not a credible witness. Common sense dictates that a police officer investigating a charge of sexual assault and a legal officer preparing the prosecution of a sexual assault would most certainly inquire about evidence of a lack of consent on the part of the victim, especially where the victim is unable to shed any light on that issue, and if so, they would see the crucial importance of the evidence of the words allegedly spoken by the victim and likely record it in their notes.

[9] Is the absence of notes on the issue an indication that the matter never arose because the words were not spoken or evidence that Miss A. only talked about this evidence yesterday? She could not recall discussing the issue with the investigator and the prosecutor. What is the truth? The court cannot tell. There are also the matter of the full moon as the only source of light which indeed never was. There is the matter of her advanced state of intoxication, the matter of the argument she had been having with the accused throughout the preceding night and at the time of the events, the matter of the money she already owed to the accused at the time and her being assaulted later by the accused on the same night.

[10] The absence of evidence of a lack of consent as an essential ingredient of the offence alleged in the first charge on the charge sheet is fatal to the case for the prosecution. It was not necessary therefore for the court to address its mind to the defence that was put forward by the defence of honest by mistaken belief and to the arguments in response that were--in anticipation, I should say, that were put forth by the prosecution. However, for the sake of clarity and to complete the record, had the court retained the evidence of Miss A. that indeed the victim had said, "No, do not touch my bottom" and had recognized this as having taken place, because of the attitude of Miss X. shortly before, the way she was handling herself with the accused, walking arm in arm, walking

with arms around the waist, because of her reaction, her laughter, her giggling, also the very apparent lack of physical resistance on her part, the court would have concluded that there was an air of reality upon which the defence of honest but mistaken belief could be based and that the accused could indeed have believed, and that would have been sufficient to find him not guilty as well, would have believed, was I saying, that the victim was consenting to his "come on" as it was described here or his advances to more properly say.

[11] So for all these reasons, the court found the accused not guilty of the first charge. Thank you. So Corporal Jones, you may leave the courtroom. Would you give him his hat, please. Thank you.

[12] The proceedings of this court martial in respect of this accused are now terminated. Thank you.

Counsel:

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