



## COURT MARTIAL

**Citation:** *R. v. Captain A.G.M.*, 1997 CM 26

**Date:** 28 August 1997

**Docket:** F199726

Standing Court Martial  
Halifax, Nova Scotia, Canada  
Canadian Forces Base Halifax

**Her Majesty the Queen**

- and -

**Captain A.G.M., accused**

**Before:** Commander R.F. Barnes, 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that the identity of the complainant and any information that would disclose the identity of the complainant shall not be published in any document or broadcast in any way.**

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### **FINDING**

(Orally)

[1] Now, at the outset, I note that the prosecution had voluntarily conceded that the *actus reus* of the remaining charge on the charge sheet was limited to a consideration of

the facts surrounding the second encounter in the wardroom of HMCS X. on the 8th of March 1997. Mr Bright, therefore, did not address the facts surrounding the first encounter from the point of view of the *actus reus* for sexual assault. In view of this concession, which was relied upon by the defence, it would be inappropriate for me to consider the first encounter as part of the *actus reus*. It remains, however, as part of the context and the general circumstances in which the second encounter took place.

[2] There's a good deal of common ground in the testimony of the witnesses who were present in the wardroom and who observed the encounters between Sub-Lieutenant M. and Captain A.G.M.. However, the testimony varies as to fine details of each encounter. The events took place some five and half months ago and some of the witnesses had consumed a fair amount of alcohol during the afternoon and evening, notably Captain A.G.M. and Lieutenant(N) F.. Lieutenant(N) L. does not recall which arm of Captain A.G.M. came around in front of Sub-Lieutenant M. on the second occasion. She did not see an actual touching of the breast area nor a squeezing motion of Captain A.G.M.'s hand, but she recalls that he used the expression or an expression similar to, "Come here you sweet young thing." Lieutenant(N) F. recalls that on the second occasion, or the second encounter, Captain A.G.M.'s right arm came over Sub-Lieutenant M.'s right shoulder and his right hand was on her – rather his right hand was on her left breast. He observed that Captain A.G.M.'s face was in her left neck area but he cannot say if there was contact or a kiss in this second occasion.

[3] In cross-examination, Lieutenant(N) F. could not say that the touch of the breast was intentional or not and later he indicated that it was fifty-fifty whether he was hugging her or going for the breast. He indicated that Captain A.G.M. certainly wanted to get close. Lieutenant(N) F. indicated that he was not in a great position to observe the touched area. This would make sense if he continued to stay on the right side of Sub-Lieutenant M. as he - the position he was in during the first encounter.

[4] The complainant, Sub-Lieutenant M., stated that on the second encounter Captain A.G.M. again came up from behind her and draped his arm over her right shoulder and along her arm while he tried to nuzzle her neck and his left hand went under her left arm and squeezed her left breast. In cross-examination she agreed that Captain A.G.M. only used the expression "young thing" on this occasion and not the terms sexy or babe which he had used on the first encounter.

[5] In his evidence Captain A.G.M. agreed that he used the term "sweet young thing" or "young thing" on the second occasion and that he used the words babe or sexy on the first occasion. He also testified that he wrapped his arms around Sub-Lieutenant M. and gave her a kiss on the first occasion, whereupon she spun around and gave him a

talking to or a lecture about the physical contact. He saw that she was angry. He indicated that it was clear she did not want that sort of thing. On the second occasion Captain A.G.M. stated that he again approached Sub-Lieutenant M. from behind somewhat so that she could not see him approach and that he placed his right hand on her right shoulder and his left hand on her left arm or shoulder, but he stated he did not try to kiss her on this occasion since he only wanted to talk to her. He stated that his right hand did not touch her breast and he thought it was not possible to grab her left breast. He said it was possible that he accidentally touched a breast on the first occasion but not the second. Later in cross-examination he stated that on the second occasion his left hand went to her left arm but he did not check the placement visually of his hand. He admitted after having read her statement; that is, Sub-Lieutenant M.'s statement, there was some possibility that he had touched her breast on this second occasion. He also gave evidence that the contact was friendly contact since he is a friendly, physical type of person. But I note in his letter at Exhibit 3 that he refers to a display of affection rather than friendly contact.

[6] The demeanour of Captain A.G.M. in the witness chair did not inspire confidence. He had a slight smile on his face during a considerable portion of his testimony and at another time during cross-examination he became argumentative with the prosecutor and tried to cut-off his question with a response in a raised voice which did not address the question which the prosecutor was trying to formulate at that time.

[7] I found Sub-Lieutenant M. to be a credible witness as I did Lieutenant's o. and N.. While their evidence varied as to details, the differences are the sort of points which might well be the result of different observers noticing or not noticing different details. It is evident that there was no collusion in their stories. Where the evidence of Sub-Lieutenant M. differs from that of Captain A.G.M. with respect to the second encounter, I prefer the evidence of Sub-Lieutenant M..

[8] I find as fact that Captain A.G.M. knew that a physical advance such as the first one was definitely not welcomed by Sub-Lieutenant M. and that is as a result of their first contact. I find that he approached her again from behind, although other avenues of approach were open to him. He draped or placed his right arm over Sub-Lieutenant M.'s right shoulder and he touched her left breast with his left hand while attempting to nuzzle or kiss her neck with his face.

[9] The offence of sexual assault is one of general intent and the intent required is the same as for the offence of assault; this is, an intention to apply force in the form of physical contact with the complainant. This general intention is clear from the evidence in this case, including the evidence of the accused Captain A.G.M.. The lack of consent is amply established to this sort of contact from the evidence of Sub-Lieutenant M.'s

reaction to the first encounter with Captain A.G.M.. There is ample evidence to establish identity and the date and place of the offence.

[10] I'm satisfied that this assault was committed in circumstances of a sexual nature which violated the sexual integrity of Sub-Lieutenant M.. The words spoken on both occasions by Captain A.G.M., the nature of the kiss on the first occasion, the attempted nuzzling on the second encounter and the manner of the contact, including the touch on the breast all point to the sexual nature or circumstances of the approach. The touch with some degree of force on the breast amounted to a violation of the sexual integrity of the complainant. I'm satisfied that all the elements of the offence of sexual assault have been established beyond a reasonable doubt. I've also, however, carefully considered the words of Mr Justice Cory in the case of *R. v. W.(D.)*. However, the testimony of Captain A.G.M. does not raise any doubt in my mind. I remain convinced beyond doubt that the offence of sexual assault was committed as charged.

[11] Would you stand up, Captain A.G.M..

[12] The court finds you guilty of the first charge of sexual assault.

[13] You may be seated.

**Counsel:**

Major J.S. MacKay, Deputy Judge Advocate Gagetown, Counsel for Her Majesty the Queen

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