



COURT MARTIAL

Citation: *R. v. Corporal J.W. Brooks*, 1998 CM 30

Date: 3 December 1998

Docket: F199830

Standing Court Martial
Edmonton, Alberta, Canada
Garrison Edmonton

Her Majesty the Queen

- and -

Corporal J.W. Brooks, 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that the identity of the complainant and any information that would disclose the identity of the complainant shall not be published in any document or broadcast in any way.

FINDING

(Orally)

[1] Thank you. Corporal Brooks, as my reasons will be lengthy, you may break off and sit with your defending officer.

[2] ACCUSED: Sir.

[3] PRESIDENT: First and foremost, I will start off with some comments on the credibility of the testimony that's been heard in this trial.

[4] Generally, I found that all the witnesses appeared to be endeavouring to be accurate and honest in their responses and I should say all the, sort of, non-crucial witnesses. I reserve comments with respect to the evidence of Miss X. and Corporal Brooks for later, but I'm referring to the witnesses who reported the events at the party and at the club. They appeared to be endeavouring to be accurate and honest. They were generally articulate and their answers, except where specifically noted otherwise, were responsive to questions. The testimony of each witness was generally consistent. To a great extent, the evidence was uncontroversial and was confirmed in the testimony of Miss X. and Corporal Brooks up to the point of their trip back to the hotel, when they were-those two-were alone.

[5] The uncontroversial facts, which I found, were that notwithstanding a heavy meal with a large shot of Hungarian liqueur, possibly up to two ounces, and one large beer, Miss X. was still in the mood for some partying. She left the restaurant, I believe the Sir Lancelot, about 8:30 to 9 p.m. and she attended a party in Sergeant Weekes's room in the hotel, arriving there about 10 p.m. with her own bottle of vodka. She had a minimum of about 10 ounces of vodka at the party before the group departed for the University Club at about 1145(sic) hours, arriving at the club around midnight.

[6] At the club, she was-Miss X., became extremely intoxicated, or began showing signs of extreme intoxication by alcohol and she depended on others to assist her to navigate. She was violently ill and she required support and direction. Corporal Brooks was concerned that she was falling asleep when sitting down, at one point, and he was well aware of her state of severe intoxication at the club. Corporal Brooks and X. left the club in a taxi at about 0100 hours, or a.m., on 20th of November, and she was intoxicated when they left the club. The taxi ride back to the hotel took about five to eight minutes.

[7] At this point, there's only the evidence of X. and Corporal Brooks, and it is at this point that their evidence starts to diverge, however, there's still a good deal of common ground which I accept as accurate. The common ground is that Corporal Brooks paid for the taxi, they went up to their rooms. Corporal Brooks told her, that is, X., he would be down the hall. She went into her room, closed the door, took off her clothes and went to bed and fell asleep. The lights were out. At around 3:30 a.m., Corporal Brooks was in her bed, in her room, he asked and she refused fellatio, and sexual intercourse occurred in the

bed. The events in the hotel room, leading up to and during this incident, need to be examined in more detail.

[8] Miss X. states that, at the hotel, Corporal Brooks took her to her room, but she did not invite Corporal Brooks into her room. She thanked him at the door and he went down the hall. She recalls Corporal Brooks saying that if she needs him, he's at the end of the hall. She specifically does not recall Brooks pointing to a couch in her room. She undressed and went to sleep in her bed.

[9] In direct examination, Corporal Brooks states that Miss X. got out of the taxi and made a bee-line to her room, on her own power and that he paid for the taxi. He indicated that he went down to the-down the hall and then came back, and knocked on Miss X.'s door stating that if he was not here, meaning in her room, he would be down the hall in room 228. He recalls that Miss X. was drinking water, at this time, or what appeared to be water. He also indicated that he had no key for his room and he had to go to the lobby for his own key, and he picked up some rye and Coke and decided to go down to Miss X.'s room. He went in, the lights were out, she was in bed, apparently asleep. He admitted in cross-examination that there was no invitation from Miss X. to enter her room.

[10] Now, concerning the sexual incident, Miss X. stated that after she went to bed, later at night she awoke to find a pornographic movie playing on the television and Corporal Brooks was on top of her, naked. He wanted oral sex and she said, "no." Corporal Brooks then had intercourse with her and she could not do anything or respond. It was like, in her words, "an out-of-body experience." Then came the knock on the door, the wake-up call, which Corporal Brooks answered, and, according to her, he left. She testified that there was no consent or permission with respect to sex, no words of invitation. In cross-examination, she specifically did not recall Corporal Brooks on her couch or talking to Corporal Brooks concerning her earlier drunken stupid behaviour. She does not recall Corporal Brooks trying to snuggle up and kiss in the bed. She has no recollection of cunnilingus taking place and she does not recall stroking his penis during such an alleged activity. She does recall saying, "no," to fellatio because she had a cold sore, but she does not indicate if she expressed the reason for saying, "no" aloud. She also recalls that her body pushed against Brooks's hand when his fingers were inside her, which she stated was an "instinctual response" and she had no control. Then intercourse occurred, according to Miss X.'s recollection, and she couldn't move or respond, so it was clear that there were no objections or pushing away. She stated that she lost control and was unable to respond. Then the knock on the door occurred, she responded to it, and went back to bed. She does not recollect saying anything such as, "It was a nice way to wake-up," nor did she indicate where Corporal Brooks was, in the room, when she answered the door or returned to her bed. She does recall telling him he would have to pay

for the movies. Miss X. indicated that she was still intoxicated on the way to the train station that morning, later on.

[11] Corporal Brooks stated that he entered Miss X.'s room, which must have been unlocked, when the lights were out and she was in bed asleep. He watched television in her room so he could ensure that she would not miss her train. He had some rye and Coke. At about three-thirty that morning, Corporal Brooks recalls that Miss X. awoke in the dark room, with only the TV blue light, and she indicated that she had been very drunk earlier that evening and had done stupid things and that she had been horny. Corporal Brooks then asked her if she was still horny, to which he recalls the only reply was, "Uh-huh." At this, he turned on a porno movie on his way to the bed. He states that he got undressed, got into bed and started caressing her leg, she rolled her right leg over, providing access. There was fondling, he performed cunnilingus, she refused fellatio because of a cold sore. He caressed more, intercourse occurred and he continued to caress her as she was still excited. Then as things were dying down, there was a pounding on the door. After she answered the door, she went back to bed and said, "It was a nice way to wake-up." She was upset about the movies, according to Corporal Brooks. And he got up, got dressed and left. Corporal Brooks states that during the sexual activity, Miss X. was responding excitedly, working with him, it was very much like an average sexual act.

[12] In cross-examination, Corporal Brooks stated that he was well aware that Miss X. was very intoxicated during the evening at the University Club and that she was still intoxicated at 1 a.m., when they got back to the hotel, or rather, during the taxi ride. He treated her response about still being horny as an offer to have sex. He admitted that he did not shake her awake and that he did not know, at this point, if she knew who was in the room with her. He agreed that he did not ask if she wanted to have sex or identify himself in the room, but he states that her eyes were open because he could see the reflection of the TV screen in her eyes. He agreed that he did not verify if she wanted sex.

[13] I must, of course, assess the credibility of these two main witnesses and the credit or weight to attach to their conflicting testimony. I found Miss X. gave her evidence in a straight forward manner and she was articulate. Furthermore, she did not attempt to embellish her ability to recall. She admitted that her memory of the events of that night was less than complete and that it was possible that some of her memory was reconstructed from others.

[14] In my view, such a possibility of reconstructed memory is always present where there is a group activity among people who may discuss it amongst themselves at a later date. In this case, it is possible that she spoke to other troop members about her conduct at the-Sergeant Weekes's party and at the club, but this portion of the evening is well

established in the evidence and is really in no serious dispute. If there is a possibility that her memory of the events, in her hotel room later, was reconstructed from others, the only available source of information would be Corporal Brooks, either directly or second-hand from others. It is clear that their stories are not at all similar as to the events in her darkened hotel room. In my opinion, this possibility is not of any significance in this case, particularly in the absence of some evidence of actual tainting of her memory as to the events in the hotel room.

[15] Miss X. readily admitted she made no verbal objections nor physical efforts to repel Corporal Brooks. She did not categorically deny that certain other activities occurred in her room when cross-examined, but rather, she stated simply that she did not recall or that she had no recollection of such when those questions were put to her. There were no inconsistencies within her evidence; she explained the lack of verbal or physical objection as an inability to respond through a loss of control. She did say, "no" to the requested fellatio, but this was the only verbal request that was made of her from Corporal Brooks and she responded in kind, that is, verbally. There were no other requests for other sexual activities and there were no verbal objections. It must be remembered that she indicated that she was still under the influence of alcohol later on in the morning, so she would be more so, that is, more under the influence of alcohol at the time of the sexual intercourse. I found that X. was a credible witness and I accept her evidence as worthy of belief.

[16] Corporal Brooks gave his evidence in an articulate and clear fashion and was responsive to questions in cross-examination. There was nothing in his demeanour to suggest he was not being truthful. He was also relatively sober during the relevant time period. In examining his evidence, he indicated that he entered the darkened room of a sleeping intoxicated woman he had just met that night, without an invitation, so that he could ensure that she would not miss her train. Apparently, the door was unlocked, so that he could just as easily have stayed up in his room and could have awakened her, physically, in the morning, if she would not respond to knocking on the door or a telephone call. He assumed that by stating he would either be in her room or his, that he had implied permission to enter her room. He also assumed that an affirmative response by a woman that she was still horny, was an invitation or offer to have sex with him. It hardly needs repeating that an acknowledgement that one is horny does not amount to an invitation to have sex with a relative stranger. The negative response by Miss X. to fellatio, because she had a cold sore, cannot be turned into consent to have other sexual activities not involving contact with the cold sore.

[17] In my view, the testimony of Corporal Brooks is not plausible or consistent within itself on the following matters: his reason for entering Miss X.'s unlocked room to

ensure that she not miss her train; his reason for assuming that he had her authority to enter her room when she was in bed and asleep; his reason for assuming that she offered or invited him to have sex; and his evidence that she awoke from a drunken slumber after only about two and half hours of sleep, for no apparent reason, and started conversing with him about her earlier drunken and stupid behaviour.

[18] I find these aspects of his testimony implausible, that is, they just do not add up, they don't make sense, in my view. For these reasons I prefer the evidence of X. to that of Corporal Brooks as to the incidents that occurred in her hotel room and I reject his testimony where it differs from her evidence.

[19] In the case of *R. v. M.(M.L.)*, referred to by counsel, the Supreme Court of Canada stated unequivocally that it is error to hold that a victim is required to offer some minimal word or gesture of objection, and also that it is error to hold that lack of resistance must be equated with consent.

[20] I find, as fact, that X. had the capacity to consent at the relevant time, but that she did not consent to any sexual activity in her room on the early morning of 20 November, 1997 with Corporal Brooks or with anyone else. She was still intoxicated at that time and Corporal Brooks knew she would still be under the influence of alcohol. She awoke to find Corporal Brooks on top of her requesting fellatio, she refused to perform this. He then digitally penetrated her and had sexual intercourse with her. Miss X. did not verbally or physically object to or resist the sexual activity other than the fellatio, to which she verbally said, "no." Her body responded to some preliminary digital penetration in an instinctive manner by pressing against Corporal Brooks's hand. Corporal Brooks made no efforts to verify if Miss X. was consenting to the sexual activity.

[21] Although Corporal Brooks did not categorically state in his evidence that he honestly believed that Miss X. was consenting, I think that it is fair to state that that was the thrust of his testimony, and I will not deprive him of a consideration of that defence, that is, honest but mistaken belief in consent, but the defence will have to be based, of course, on my findings of fact. This is not a jury trial, so I do not need to consider whether there is an air of reality raised on the evidence to such a defence in order to leave it with a jury. I must, however, consider the defence in view of my findings of fact, to determine if the defence has been made out.

[22] In assessing the honesty of Corporal Brooks's belief in consent, I must, of course, consider whether there are reasonable grounds for such a belief. Having rejected his evidence as to the conversation about coming back to her room and staying in the room, about Miss X. being horny, and having rejected his evidence as to the occurrence

of penis stroking and cunnilingus, the only factual basis with respect to a belief in consent is Corporal Brooks entering the bed naked without any invitation or indicia of consent, the negative response of Miss X. to requested fellatio, her degree of intoxication, her physical response to digital penetration, and the lack of other verbal or physical objections by her during the sexual encounter.

[23] In my view, in all the circumstances during this evening, there was no reasonable grounds on which Corporal Brooks could base an honest belief that Miss X. was consenting to the sexual activity. There was no factual basis for believing in consent when he undressed and climbed into her bed. A refusal to engage in fellatio should have been a clear warning, even assuming that she uttered the reason for such refusal as being a cold sore. Corporal X.'s physical response to the digital penetration is capable of supporting a belief in consent. Her lack of resistance could be viewed as a factor capable of supporting a belief in consent, but in this case, the lack of resistance must be tempered by Miss X.'s degree of intoxication and the fact that she had just become conscious of Corporal Brooks on top of her, in her bed.

[24] In the circumstances of this case, the lack of resistance following the refusal of fellatio cannot be equated with consent. I do not accept the assertion that Corporal Brooks honestly held the belief that X. was consenting to sexual activity with him on the-at the relevant time. Section 273.2 of the Criminal Code precludes the defence of belief in consent where the accused person's belief arose from recklessness, or wilful blindness, or where the accused did not take reasonable steps in the circumstances known to him at the time, to ascertain that the complainant was consenting.

[25] In my view, Corporal Brooks did not take reasonable steps to ascertain if X. was consenting to sexual intercourse. The need to ascertain if she was consenting arose from the fact that he had climbed into her bed naked without consent while she was sleeping, and further, from her refusal to perform fellatio. In the circumstances, he could not hold an honest belief in consent, and I find that he did not so hold such an honest belief.

[26] There's ample evidence to establish beyond a doubt, the date, time and place of the offence and that Corporal Brooks made physical contact, including sexual intercourse, with X. and that this contact, on his part, was intentional. I'm satisfied beyond a reasonable doubt that there was no consent to the physical contact in the bed, including sexual intercourse. I'm also satisfied beyond a reasonable doubt that Corporal Brooks was aware that Corporal X. did not consent to the activity. There's no dispute that the physical assault was sexual in nature.

[27] Although I have rejected the testimony of Corporal Brooks as to his version of events in the bedroom, before finding guilt, I am required to review his evidence in the context of all the other evidence in the case, to ascertain whether his evidence, nonetheless, raises a reasonable doubt in my mind. I have so reviewed his evidence and his testimony, as I have said earlier, contains illogical and unreasonable assumptions on crucial points of evidence. The testimony of Corporal Brooks does not raise a reasonable doubt in my mind. Would you stand up, Corporal Brooks?

[28] The court finds you guilty of the first charge on the charge sheet. You may sit down.

Counsel:

Major D.K. Fullerton, Regional Military Prosecutions Edmonton, Counsel for Her Majesty the Queen

Major R.W. Callan, Directorate of Defence Counsel Services, Counsel for Corporal J.W. Brooks