Citation: *R. v. Master Seaman B.B.J. Willms*, 2007 CM 2021

Docket: 200748

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE BORDEN

Date: 15 November 2007

PRESIDING: COMMANDER P. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
MASTER SEAMAN B.B.J. WILLMS
(Accused)

FINDING
(Rendered Orally)

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[1] Master Seaman Willms, this court finds you guilty of charge number 1 and directs a stay of proceedings on charge number 2. You may break off and be seated beside your counsel.

[2] Master Seaman Willms is charged with two offences under the *National Defence Act*. The first charge is a charge of assault contrary to section 266 of the *Criminal Code* and the second is a charge of ill-treatment of a subordinate contrary to section 95 of the *National Defence Act*.

[3] It is alleged that on 5 May 2006 at CFB Borden he grabbed the complainant by the arm and pulled her upstairs to her room. The named complainant in both charges is Private White who was some two weeks into her basic recruit training at CFB Borden when she and her platoon mates completed some physical training at the pool. White suffered an accidental kick that broke and dislodged a contact lense. This caused her great discomfort and reduced her vision to the point that she was effectively blinded. When her platoon mates returned to the classroom by bus she remained on the bus in order to go back to her room in the barrack block to attend to her eye and retrieve her eye glasses. On the bus she was accompanied to the barrack block by her roommate, Ordinary Seaman Wolfe, and the accused who was one of the instructors on her course.

Because her vision was impaired she required assistance to get off the bus into the barrack block and up the stairs to her room.

[4] The charges against the accused refer to his actions when he and Ordinary Seaman Wolfe accompanied Private White up the stairs in the direction of her room. Although the accused is charged as a member of the Reserve Force there is no issue as to jurisdiction as the events occurred on the Canadian Forces Base Borden.

[5] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes by evidence that the court accepts the guilt of the accused beyond a reasonable doubt.

[6] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty that is insufficient to find guilt beyond a reasonable doubt and the accused must therefore be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt. But reasonable doubt is not frivolous or imaginary doubt, it is not something based on sympathy or prejudice, it is a doubt based on reason and common sense that arises from the evidence or the lack of evidence. The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt the accused is to be found not guilty.

[7] The rule of reasonable doubt applies to the credibility of witnesses in a case, such as this case, where the evidence discloses different versions of the facts that bear upon the issues. Arriving at conclusions as to the facts of the case is not a process of preferring one version given by one witness over the version given by another. The court may accept all of what a witness says as the truth or none of what a witness says, or the court may accept parts of the evidence of a witness as truthful and accurate. If the evidence of the accused as to the issues or the important aspects of the case is accepted it follows that he is not guilty of the offence. But even if his evidence is not accepted, if the court is left with a reasonable doubt he is to be found not guilty. Even if the evidence of the accused does not leave the court with a reasonable doubt the court must still look at all the evidence it does accept as credible and reliable to determine whether the guilt of the accused is established beyond a reasonable doubt.

[8] Private White testified that the accused had a hold of her upper right arm. He took her up the stairs holding firmly to the arm and held on until White was in her room attending to her eye. She testified that the grip of the accused hurt her. Later she noticed bruising of her arm where she had been held by the accused. She testified that she did not want or need the assistance of the accused at the time and did not consent to being grabbed by him. She characterized his action in taking and keeping hold of her arm as aggressive.

[9] The accused, Master Seaman Willms, testified that he and Wolfe held White by taking one arm each to travel the short distance from the bus to the barrack block. He does not disagree that he accompanied White up the stairs of the barrack block to her room and in so doing he states he was holding on to her left arm while Wolfe was holding the other arm. Then at the top of the stairs Ordinary Seaman Wolfe went ahead to open the door to the room. He testified he intended to help Private White by guiding her to her room as she was unable to see properly.

[10] Ordinary Seaman Wolfe testified that she and the accused were holding on to White from the bus to the door. They were holding on to White going up the stairs when about halfway up the accused pulled White away from her by the arm telling Wolfe in a loud voice that if she touched White she could be charged with fraternisation. Later that evening she saw the bruising on White's arm which she described as large and black.

[11] While there were several areas in which the witnesses gave inconsistent evidence on matters that I regard as essentially peripheral, there is no issue that the accused took hold of White. On all the evidence I accept the evidence of Wolfe that the accused pulled White away from her stating words to the effect that she was not to touch White. I find that this amounted to the application of force by the accused to White and there is no doubt that his application of force was an intentional act on his part. Indeed, he testified that by so doing he intended to assist White up the stairs to her room. I'm also satisfied on the basis of White's evidence that White did not consent to the taking of her arm by the accused. Not only did she testify that she did not consent but I accept her evidence and find as a fact that the grip of the accused caused her pain and resulted in the bruising to which both White and Wolfe testified.

[12] Before the accused can be found guilty of assault the prosecution must also establish that the accused knew that the complainant was not consenting to the application of force. The prosecution may establish this element of the offence by showing that the accused was reckless as to whether or not the complainant consented to the application of force. White had asked her friend and roommate, Wolfe, for assistance but had not made any request of the accused nor had she said anything to the accused that would entitle him to believe that he could contact her physically. On all the evidence he seems to have thought that he was entitled to render to her such assistance as he saw fit. He, himself, made no inquiries as to whether or not White needed or wanted his help. In

my view, he was at least reckless as to whether or not White consented to being assisted by him by the taking of her arm.

[13] The accused testified that he only wished to help White by guiding her up the stairs to her room. It is argued that this is not a criminal intention, but the element of intention in the offence of assault relates to an intention to apply force. The force need not be accompanied by any particular level of violence, indeed a mere touching is sufficient to constitute assault if accompanied by the intention to apply force. In my view, the claim of the accused is rather that his motive in touching the complainant was innocent and not intended to achieve a criminal objective. It is true that there is no suggestion in the evidence that the accused bore any particular malice or animus toward White. But even if his motive in taking White's arm was to assist her I am not left in any reasonable doubt that he intended to apply some level of force in so doing.

[14] It is argued by counsel that even if the accused did assault White, it was under the mistaken belief that she consented to the contact. In my view, this submission is simply not supported by the evidence. At no point did the accused in his evidence claim that he thought the complainant was consenting to him taking her arm. His counsel argues correctly that in law such a finding of fact can be made on the basis of all the evidence showing that his intention was merely to assist the complainant whether or not there is direct evidence of the state of mind of the accused at the relevant time.

[15] I have already dealt with this argument in my finding that the accused was reckless as to whether the complainant consented. But in any event, such a finding is at odd with the clear evidence of injury, albeit of a relatively minor nature, caused to the complainant by the grabbing of her arm by the accused. In my view, there is no merit or force to the suggestion that the accused honestly believed that the complainant was consenting to his application of force to her arm. The accused is therefore guilty of the assault charged in charge number 1.

[16] In my view, the above findings of fact establish that the behaviour of the accused toward the complainant was "ill-treatment" as that term is used in section 95 of the *National Defence Act*. By that, I refer to treating badly, or cruelly, or harming, or abusing. He is accordingly guilty of charge number 2. As charge number 2 is charged as an alternative charge to charge number 1, and charge number 2 is a less serious offence based upon the maximum punishment prescribed by statute, there will be a stay of proceedings with respect to charge number 2.

COMMANDER P. LAMONT

Counsel:

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