



COURT MARTIAL

Citation: *R v Amirault*, 2011 CM 2018

Date: 20110907

Docket: 201127

Standing Court Martial

Pembroke Armoury
Pembroke, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Captain (Retired) T.W. Amirault, Offender

Before: Commander P. Lamont, M.J.

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in the judgement as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

[1] 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.

[2] 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 a frivolous or imaginary doubt, it is not something based upon sympathy or prejudice, it is a doubt based upon 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.

[3] The complainant, Bombardier N.F., testified that, on the date alleged in the charges, in the afternoon she was taking part in an exercise with the unit in the Peta-wawa training area. As part of her reconnaissance duties she was sitting by herself in the backseat of a military vehicle when the accused approached her. They had some small talk and then he put his hand on her left thigh and massaged her thigh up to the region of her groin and groped her vaginal area over her combat clothing. She was stunned and shocked, laughed nervously and brushed his hand away with her own hand. Then he reached out and touched her breast area inside her outer clothing but over her t-shirt. He stopped when she became more forceful and aggressive in pushing him away. He chuckled and stated that, "both of them could get in trouble for this." The incident lasted for maybe five minutes. She felt unsafe and went elsewhere in order to be around other people. The following day she encountered the accused at a social function and he apologized.

[4] The accused was interviewed by the National Investigative Service on 4 August, 2010. The interview was video and audio recorded and the court was provided with a transcript of the interview. The accused cooperated with the investigator. In his evidence at trial the accused adopted his recorded statement as his testimony. I find there to be almost no discrepancies between the complainant's version and his as to what transpired on the occasion in question.

[5] With respect to such inconsistencies as there may be, I accept the evidence of the complainant who impressed me as a witness with her detailed recollection of the incident despite the difficulties she obviously had speaking of these matters in court.

[6] I find that in the course of his interview with the investigator the accused was attempting to minimize the degree of his intrusive behaviour. I specifically find from the evidence of the complainant that he massaged the breast of the complainant rather than simply touching her in the breast region with one or two fingers.

[7] On the evidence I have heard there is no real dispute that the accused engaged in intentional sexual touching of the complainant on the date and in the place alleged, and I accept her evidence that she did not consent to this conduct, but it is an essential ele-

ment of the offence charged in the first charge that the prosecution demonstrates that the accused knew that the complainant did not consent to the touching.

[8] In the present case I am satisfied beyond a reasonable doubt that the accused was at least reckless as to whether or not the complainant consented to the touching. In law this amounts to proof of knowledge of lack of consent. On all the evidence there was no basis upon which the accused could reasonably conclude that the complainant consented to be touched in a sexual manner while seated in a vehicle in a gravel pit during a military exercise.

[9] In the course of his interview with the investigator, however, the accused stated, "Honestly, I misinterpreted the young lady." In its context he appears to claim that because of their previous conversations including his claim that she stated, "that it felt good when he massaged her thigh," that she was consenting to sexual touching. I do not accept this evidence.

[10] I find the accused told the truth to the investigator about his state of mind when he said, "I was basically feeling the waters to see what she meant by the game was at her place, it was available, and, you know, like, what exactly she was leading up to. That was more my intention, I think, at that time to see if there was anything more than just, you know." And later, "You know, like, there's a whole gambit of reasons why that should never have happened, plus the fact that it's just not accepted in the military to begin with. That's a non-acceptable, you know, act and I know better, you know. And it's morally wrong, you know. I mean, even if she was willing, it would still be wrong in a lot of ways."

[11] I conclude that when he touched the complainant he did not care whether she consented to the touching, he just wanted to see if she might consent or would object. This amounts of recklessness and the required mental element is proven beyond a reasonable doubt.

[12] Captain Amirault is guilty on the first charge. With respect to the second charge counsel are agreed that the admitted conduct of the accused on the occasion in question amounts to sexual harassment and ill-treatment and I am invited to make a finding of guilty on the second charge. Because I have already found the accused guilty of the first charge and the second charge is laid in the alternative I order a stay of proceedings on the second charge pursuant to Queens Regulations and Orders article 112.40(2)(a).

FOR THESE REASONS, THE COURT:

[13] **FOUND** you guilty of the first charge, for an offence under section 130 of the *National Defence Act* and orders a stay of proceedings on the second charge, for an offence under section 95 of the *National Defence Act*.

Counsel:

Captain R.D. Kerr, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Captain D.M. Hodson Directorate of Defence Counsel Services
Counsel for Captain (Retired) T.W. Amirault