

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

HER MAJESTY THE QUEEN

AND:

ANTHONY JAMES JOHNSTON

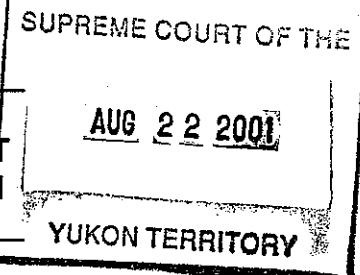
KEITH PARKKARI

Appearing for Crown

MALCOLM CAMPBELL

Appearing for Defence

**MEMORANDUM OF JUDGMENT
DELIVERED FROM THE BENCH**



[1] WONG J. (Oral): The accused is charged with sexual assault of Crystal Sadie Joe, and from the evidence it is clear that sexual connection took place in January of 1994 at Haines Junction during the trials for the Arctic Winter Games. I need not review some of the evidence which I canvassed earlier in the trial within the trial.

[2] In essence, the ultimate issue is whether the sexual connection was nonconsensual. The evidence advanced by the Crown is that all persons were grossly intoxicated from alcohol drink on that particular evening. The

complainant, who is now deceased, at the time of intervention by Suzanne Hume and Margaret O'Brien was so intoxicated that she could not give seemingly intelligible communication. She also had to be assisted in walking home.

[3] The following day, although sobered up somewhat and hung over, she had difficulty in recollecting what took place, and when Suzanne Hume and Margaret O'Brien related to Crystal what had taken place, her immediate reaction was that it was rape. She also related to Margaret O'Brien her recollection that the accused had been hitting on her and she had said no. Circumstantially, I think, on the whole of the evidence, the inference that the Crown would be advancing from the evidence is that both parties, having been grossly intoxicated, somehow both ended up in the bedroom and intercourse took place. The deceased's reaction indicates that, from her standpoint, it certainly was nonconsensual, because this was not something that she would have done willingly.

[4] The accused gave evidence and said that after considerable drink he and Crystal were kissing quite passionately in the living room. However, that seems to be not agreed with by the evidence of Mr. Geddes, who said that he was present in the living room throughout the time, and although Crystal and the accused appeared to be getting along well, by laughing, talking, and obviously liking each other, which he put under the general heading of flirting, he did not see either of them engaged in kissing or in any other form of physical intimacy in the living room. His evidence is that the complainant was drunk but able to walk

and talk. Now, that seems also to be inconsistent with the evidence given by Suzanne Hume and Margaret O'Brien.

[5] In essence, even if Crystal Joe had given evidence in this matter, there is a clear conflict of the positions. If I was presiding with a jury, I would be obliged under law to give what is a three-step process analysis under the authority of *R. v. W.(D.)*, [1991] 1 S.C.R. 742, namely the instructions given by Mr. Justice Cory. First, the trier of fact must consider if they accept the evidence of the accused. If they do, that is the end of the matter and he should be found not guilty. The second step is that if the Court finds that the accused's evidence is equivocal in terms of not actually accepting it but not necessarily rejecting it, then by definition that is reasonable doubt and he should be found not guilty. The third step, of course, is that even if the Court rejects the accused's evidence, then it is obliged to consider the rest of the evidence and ask whether the Crown's onus has been satisfied beyond a reasonable doubt as to its theory or contention on the charge.

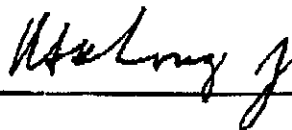
[6] I have directed my mind to all three steps. In my view, the evidence given by the accused is suspicious, but I am not prepared on the whole of the evidence to reject it. Even if I was to reject it, on the third step, because Crystal Joe is now deceased and was not able to elaborate on her evidence, there are shortcomings in the Crown's case.

[7] I think what probably happened in this case was that the parties having been grossly intoxicated, Mr. Johnston initiated sexual overtures. It is unclear

whether there was any opposition from Ms. Joe. Somehow, she ended up in the bedroom, and from the initial observation of both Suzanne Hume and Margaret O'Brien, it appeared, since there was a lack of a struggle, to be consensual. On the other hand, one has to consider that Crystal Joe was grossly intoxicated, and therefore also consistent with a circumstance where she was so intoxicated that she was almost comatose, in which case she was not in a position to either give her consent or to refuse. On that basis, she may well have been taken sexually advantage of while she was in that semi-conscious state.

[8] On that aspect it is unclear, and I am in agreement with defence counsel that a conviction should not be rendered.

[9] Would you please stand. On the basis of the evidence, I find you not guilty. Consider yourself fortunate.



WONG J.