Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20220422

Docket: CMAC-616

Citation: 2022 CMAC 3

[ENGLISH TRANSLATION]

CORAM: **CHIEF JUSTICE BELL**
RENNIE J.A.
PARDU J.A.

BETWEEN:

SERGEANT A.J.R. THIBAULT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Quebec City, Quebec, on November 15, 2021.

Judgment delivered at Ottawa, Ontario, on April 22, 2022.

REASONS FOR JUDGMENT BY: CHIEF JUSTICE BELL

CONCURRED IN BY: RENNIE, J.A.
PARDU, J.A.

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REASONS FOR JUDGMENT

CHIEF JUSTICE BELL

I. Overview of the grounds of appeal and issues

[1] The appellant, Sergeant (Sgt) A.J.R. Thibault, is appealing a verdict rendered on February 18, 2020, whereby a military judge found him guilty of sexual assault contrary to

section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 (the NDA), which incorporates section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46.

[2] Sgt Thibault raises seven grounds of appeal. Grounds 1 and 2 read as follows:

1. Did the judge simply prefer the complainant's testimony to find the appellant guilty?
2. Did the judge address the third criterion of *W.(D.)*?

In my opinion, for the purposes of my analysis, these two grounds can be consolidated into one: Did the military judge adequately consider the evidence in light of the instructions in *R. v. W.(D.)*, [1991]1 S.C.R. 742, 1991 CarswellOnt 80?

[3] Grounds of appeal 3, 4, 5 and 6 read as follows:

3. Did the judge fail to consider the vital evidence that the complainant and the appellant were laughing together in bed immediately following the sexual activity?
4. Was the suspicion of collusion between the defence witnesses based on a critical error in the assessment of their evidence?
5. Did the judge commit a critical error in the assessment of the appellant's evidence?
6. Is the reasoning that the judge used to conclude that it was implausible that the complainant could be sexually attracted to the appellant illogical?

In my opinion, for the purposes of my analysis, these four grounds of appeal can be considered in two questions:

- Did the military judge commit an error, or several, palpable and overriding errors of fact; or alternatively, is the verdict unreasonable?

[4] The seventh ground of appeal as stated by the appellant reads as follows:

- Does the military status of the judge violate paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.) (Charter)?

[5] In my analysis of the grounds of appeal, I intend to address the following questions in the following order:

A. Did the military judge adequately consider the evidence in light of the instructions in *W.(D.)*?

B. Did the military judge make an error, or several, palpable and overriding errors of fact; or, alternatively, is the verdict unreasonable?

C. Does the military status of the judge deny an accused the right to a trial before an independent and impartial tribunal, as required by paragraph 11(d) of the Charter?

II. The relevant facts and the analysis of the evidence by the military judge

[6] The military judge aptly summarized the facts on which the parties agree (*R. v. Thibault*, 2020 CM 5005, at paragraphs 2–8). The appellant and the complainant were members of the Canadian Armed Forces. Both were deployed to Afghanistan in 2010. In Afghanistan, the appellant and the complainant crossed paths from time to time as both of their respective training programs took place in the same building, but they did not know one another in Afghanistan.

[7] The appellant and the complainant went to Cyprus in 2011 for a period of "decompression" before returning to Canada. In Cyprus, they had the opportunity to meet, to socialize at gatherings in the evenings, and to talk about various things, including their common interest in Jeep vehicles.

[8] After returning to Canada, the complainant and the appellant exchanged text messages two or three times. At that time, the appellant was living in Quebec City and the complainant was living in Brossard. On August 19, 2011, the appellant was visiting Brossard to help his cousin and her partner move their furniture and personal belongings to their new residence. Given that he was in Brossard, the appellant invited the complainant to meet him later on in the evening of August 19 at the residence of his cousin and her partner. The complainant accepted the invitation. When she arrived, late on August 19, there were four other people in the residence: the appellant, his cousin, the cousin's partner, and a friend of the cousin. The five chatted and consumed alcoholic beverages for a number of hours until 2 a.m., on August 20, 2011. A number of times during the evening the complainant tried to find transportation to get to Club Dix30 to go dancing. The complainant, who was a military police officer, even called the military police dispatcher to ask if a patrol officer could drive them to the vicinity of Dix30.

[9] At around 2 a.m., they all decided to go to bed. The military judge concluded that the complainant had consumed [TRANSLATION] “between four and five alcoholic beverages. Each beverage contained between one and several ounces of rum” (at para. 7).

[10] It was agreed that the appellant and the complainant would sleep in the living room on an inflatable mattress big enough to accommodate two people. The mattress was in the middle of the living room and the living room was visible from the kitchen.

[11] This concludes my analysis of the parts of the decision upon which the parties generally appear to agree. The military judge described the divergent positions of the parties at paragraphs 10 to 18 of her reasons.

[12] She described the complainant’s testimony at paragraph 15:

> [TRANSLATION]
>
> As it was too late to go to a nightclub, it was agreed that the accused and the complainant would spend the night at Ms. Montpetit’s residence. The complainant said that she agreed to share the mattress with the accused. At around 2:30 a.m., she suddenly felt tired given the late hour. She felt dizzy as a result of the alcohol she had consumed. She said that she mentioned this to the accused and quickly fell asleep, alone and fully dressed, on the mattress. Subsequently, she felt Sergeant Thibault touching her. She said that she removed his hand. Rejecting her statements that she was feeling unwell and ignoring her refusal to engage in sexual activities with him, he allegedly continued to touch her despite the complainant’s attempts to remove his hand. She said that she was afraid of being raped. She recalled seeing, at a certain point, her legs being held up while Sergeant Thibault removed her leggings. She described the sexual acts that followed, intermingled with blackouts corresponding to moments when she has no memory of what occurred. She testified that she communicated her refusal with words and gestures, by removing and blocking the hands of the accused when he touched her, or by pushing his body upward

> to avoid vaginal penetration. She also said that she prevented anal penetration by the accused, until the attempt was abandoned where she said that she felt like a “dead bug” because she was frozen with fear. The sexual acts allegedly continued until the sun came up. When the sexual acts ended, she went to the washroom and, as she did not smell the scent of latex on her hand after touching her genital area, she deduced that a condom had not been used during the sexual acts.

[13] She describes the testimony of the witnesses for the defence (the appellant) at paragraphs 16 to 18.

> [TRANSLATION]
>
> [16] Three witnesses were called in support of Sergeant Thibault: Ms. Montpetit; her partner, Mr. Laperle; and the accused himself. At the start of the trial, the accused made admissions concerning essential elements relating to identity and the date and the location of the offence.
>
> [17] The witnesses for the defence, including the accused, provided almost identical testimony about the details of the evening, insisting on their truthfulness and, in so doing, contradicting the complainant’s testimony about these details, notably the time at which she arrived at Ms. Montpetit’s residence. The complainant said that she arrived between 9 p.m. and 10 p.m., while everyone for the defence said that she arrived between 11:30 p.m. and midnight. The complainant stated that the accused gave her a guided tour of the new residence, but, according to the defence, it was Ms. Montpetit who gave the tour. However, in his testimony, the accused acknowledged having accompanied Ms. Montpetit and the complainant for part of the tour. The complainant testified that she had agreed to share the mattress on the floor with the accused as she did not see any problem with sleeping beside a brother in arms. The evidence for the defence is that the complainant was offered an alternative sleeping arrangement, but that she was the one who wanted to sleep alongside Sergeant Thibault. These details, which were contested rigorously in the defence of the accused, concern the context of the matter; they are not facts that are material to the charge. They can, however, assist the Court in assessing the reliability and credibility of the witnesses. The Court will address this later, when assessing these issues.

> [18] Sergeant Thibault's testimony confirms most of these contextual facts, as recounted by the other defence witnesses. He also confirmed certain aspects of the complainant's testimony regarding the context in which they met, the complainant's alcohol consumption on the evening of August 19, the complainant's intention to go to nightclubs to dance, and the complainant's unsuccessful attempts to find transportation to go out. With regard to the material facts, he testified that when the others decided to go to bed, he went to the living room with the complainant, near the mattress that was located in the centre of the room. He testified that he then took of his shirt and pants and kept his boxers on "out of modesty". The complainant allegedly removed her leggings before lying down on the mattress. He lay down next to her on the mattress and started to caress her. Allegedly, they then talked about their mutual sexual attraction. According to his testimony, after both lay down, they started to kiss one another. Each apparently took off their own undergarments. He said that he offered to go get a condom from his bag, which was in his vehicle, but she allegedly refused, saying that she was taking oral contraceptives and that she had no sexually transmitted diseases. He described the sexual activities, their order and their sequence in a manner that was very similar to the complainant's narrative. However, he said that she had not expressed refusal, quite the contrary: not only was the complainant consenting, she was an active, even passionate, participant in the sexual activities that they engaged in on the morning of August 20, 2011. Moreover, according to his testimony, they allegedly had orgasms at the same time.

III. Self-direction as to the law

[14] The military judge then directed herself on the applicable law and jurisprudence. The appellant does not contest the military judge's self-direction concerning the burden of proof beyond a reasonable doubt, consent, the essential elements of a sexual assault, or even the direction concerning the application of *W.(D.)*. Therefore, I will not address the directions, and instead I will move directly to the grounds of appeal.

A. *Did the military judge adequately consider the evidence in light of the instructions in R. v. W.(D.)?*

[15] The military judge described the test set out in *W.(D.)*, *supra*, as follows:

> [TRANSLATION]
>
> [22] In order to determine whether the prosecution proved beyond a doubt that the complainant did not consent to the sexual activities, the Court must assess the credibility of the witnesses, particularly that of Sergeant Thibault and that of the complainant.
>
> [23] In *R. v. W.(D.)*, [1991] 1 SCR 742, the SCC established a test to help triers of fact assess the credibility of witnesses. This is not about preferring one testimony over the other. Rather, the Court must determine whether it believes the version provided by the accused. If it does, the Court must acquit. If this is not the case, the Court must determine whether the testimony of the accused leaves a reasonable doubt. If it does, the Court must acquit. Otherwise, the Court must assess all of the evidence to determine whether it leaves a reasonable doubt as to the guilt of the accused.

[16] It is impossible to consider the *W.(D.)* test without the military judge's self-direction regarding proof beyond a reasonable doubt. The substance of the *W.(D.)* test is to ensure that a trial does not become a credibility contest. A judge must weigh the evidence and test the evidence provided by the accused and the complainant within the context of the evidence adduced: for example, see *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152 at para. 9. In this case, it is true that the military judge did not assess the appellant's evidence in isolation, for the purposes of the *W.(D.)* test. The appellant argues that each step of the *W.(D.)* test must be considered individually before proceeding to the next part of the test. I reject this approach. It seems to me that the assessment of the evidence provided by an accused must be considered in the context of the rest of the evidence. That is what the military judge did in this case. Furthermore, even if the judge did not divide her analysis into three separate parts, the three considerations of *W.(D.)* are evident in the analysis. I will explain.

[17] First, immediately after referring to the *W.(D.)* test, the military judge stated that she assessed his credibility. She explained, *inter alia*, that the living room was an open space, with no door, and was visible from the kitchen. She pointed out that the appellant and the complainant hardly knew one another. The judge rejected the testimony that the complainant had demonstrated a sexual attraction toward the appellant, pointing out that after they returned from Cyprus and before August 19, 2011, their interactions were limited to several messages about Jeeps. The judge pointed out that the complainant accepted the appellant's invitation on August 19 because she wanted to be in the company of someone who had been deployed. Furthermore, even during the evening of August 19, 2011, the complainant was more interested in going out and going to bars. The judge considered the complainant's evidence and the context of the events of the evening to reject the appellant's claim of a sexual attraction. The military judge also considered the fact that the complainant was tired and intoxicated in rejecting his evidence of a night of consensual sexual relations. Faithful to the first and second parts of the *W.(D.)* test, the military judge concluded as follows:

> [TRANSLATION]
>
> In conclusion, this Court rejects the testimony of the accused as his version is not credible for the reasons stated above. His testimony leaves no doubt as to his guilt.
>
> (at paragraph 32)

[18] After having assessed the appellant's evidence in the context of other evidence, the military judge moved on to the testimony provided by his cousin and her partner. The military judge pointed out that neither of them had observed the material facts (at para. 28). Furthermore, they admitted that the two of them had discussed the matter and that they had discussed the matter with the appellant since March 2012. The judge noted that the two testified with

[TRANSLATION] “striking certainty and similarity” (ibid.). The military judge ended her analysis of their testimony by stating that she [TRANSLATION] “gives little weight to these testimonies as a whole.” (ibid.)

[19] After analyzing the testimony of the cousin and her partner, the military judge turned to the complainant’s testimony. The judge made findings of fact, including, among other things, that the complainant [TRANSLATION] “had no sexual or romantic interest in the accused” and that the complainant [TRANSLATION] “wanted to be in the company of someone who had been deployed and that she wanted to go out and go dancing” (at para. 32). In light of the military judge’s findings rejecting the material parts of the testimony of the appellant, the cousin, and her partner, all that remained was the complainant’s testimony. This testimony recounted a night where she fell asleep quickly, alone and dressed, where she felt dizzy, had consumed between four and five alcoholic beverages, was not aware of when the appellant joined her on the mattress and had tried to block the appellant’s hand, expressing her refusal a number of times. The complainant described feeling like a [TRANSLATION] “dead bug” and, in the end, remained passive during the sexual activity.

[20] Reading the text of the judgment, it is clear that the military judge did not move directly from the first to the second prong, and then on to the third prong of the *W.(D.)* test. The process that the military judge used by putting the appellant’s testimony in context and integrating the complainant’s testimony into the analysis of the appellant’s testimony causes some confusion. Nevertheless, even in *W.(D.)* the Court observed that a failure to use the exact wording of *W.(D.)* is not fatal. All that is required is that the jury, or the judge, as the case may be, is aware of the burden and that the burden remains on the prosecution. It is the substance that is important, not

the form. See: *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 at para. 23; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at para. 46; *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499 at para. 9; *R. v. J.H.S.*, *supra*, at para. 13.

[21] At the end of paragraph 32, the military judge concluded:

> [TRANSLATION]
>
> The Court finds that the prosecution discharged its burden of proving beyond a reasonable doubt that the complainant did not consent to the sexual activities with Sergeant Thibault on the morning of August 20, 2011.

As explained in *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, this statement itself raises a reasonable inference that the accused failed to raise a reasonable doubt (at para. 13, citing *R.E.M.*, *supra*, at para. 66).

[22] I am of the opinion that the military judge directed herself correctly as to proof beyond a reasonable doubt and applied the substance of the Supreme Court of Canada's instruction in *W.(D.)*.

B. *Did the military judge make an error, or several palpable and overriding errors of fact; or alternatively, is the verdict unreasonable?*

[23] The appellant claims that the military judge made multiple errors of fact and failed to refer to relevant pieces of evidence. The appellant is correct that the military judge made at least one error of fact. The question is whether or not the error is palpable and overriding. In other

words, did it have an impact on the decision? It is also true that the military judge did not mention specific evidence. The question here is: was it necessary in the circumstances?

[24] First, the appellant claims that the military judge erred in stating, at paragraph 26 of her decision, that it was implausible that the complainant would have engaged in an intimate conversation with someone, while undressing in front of him, and that they would have kissed one another. The appellant says that this finding of implausibility is against his evidence at pages 265 and 282 of the Appeal Book, where he testified that [TRANSLATION] "[the complainant] removed her leggings and lay down in her tank top, underwear and bra". The complainant said that she did not undress and fell asleep immediately. Given the context of the events, including the time, the number of drinks consumed by the complainant, the [TRANSLATION] "open" living room location, and the fact that three other people who were unknown to the complainant were sleeping in the same house, the judge's finding was reasonable.

[25] Second, the appellant claims that the judge erred when she stated that his (the appellant's) testimony that they had had [TRANSLATION] "consensual sexual relations until the sun came up and had had mutual orgasms, is not credible" (at para. 26 of the reasons). The appellant is correct when he says that it was the complainant and not him who testified about sexual activities [TRANSLATION] "until the sun came up". He testified that two sexual acts occurred during the night, one at the beginning and one at the end, separated by a period of sleep. The complainant testified about touching and non-consensual sexual acts as the sun came up. In context, I do not consider this error to be palpable and overriding. The context is simple. The appellant and the complainant went to bed after the others did, at 2 a.m. The military judge took

judicial notice of the fact that the sun purportedly rose at around 5 a.m. on August 20, 2011 (at page 390 of the Appeal Book). Considering the appellant's evidence regarding the conversations that he had with the complainant, their intimacy before the first sexual act, his description of the sexual acts and his claim about the two mutual orgasms, the military judge's error is of no consequence. Two sexual acts, as described by the appellant, separated by a period of sleep, changes nothing. The night was not long. The appellant's testimony and that of the complainant are not irreconcilable. In fact, given how short the "night" was, there is nothing palpable and overriding in this error, if it was an error at all.

[26] The case law is divided in Canada concerning the consequences of a "misapprehension" of evidence, that is, an erroneous interpretation of the evidence upon which the verdict is based. In *R. v. Bains*, 2012 ONCA 305, at para. 21, the Court found that even one error can be enough to order a new trial. On the other hand, in *R. v. S.C.D.Y.*, 2020 ABCA 134, at paras. 23 and 112, the Court stated that a single misapprehension is not enough to order a new trial if there is other evidence upon which the judge relied to support the finding.

[27] As previously stated, I am not convinced that, in the circumstances, there was a misapprehension given how short the "night" was and all of the activities described by the appellant.

[28] Third, the appellant says that the military judge erred in her assessment of the evidence in response to the allegation of an attempt at anal sex with the complainant. The military judge found that his testimony about this attempt corroborated the complainant's evidence. The judge wrote the following at paragraph 27:

> [TRANSLATION]
>
> [27] However, Sergeant Thibault corroborated the complainant's version regarding the frequency, the nature and the sequence of the sexual activities, including his attempt at anal penetration and the complainant's objection to this sexual act. He claimed that this sexual act was accidental on his part, as if trying to adjust his testimony to that of the complainant to make it more credible.

[29] The appellant states that the military judge erred in rejecting his version of an accident. At trial, he testified as follows at page 274 of the Appeal Book:

> [TRANSLATION]
>
> . . . Then, I tried to start the relations from behind. It is maybe at that moment that she talked about near anal penetration or something like that. It was maybe at that point that, in the heat of the moment, I might have gotten lined up wrong, if you'll pardon the expression, it was not at all what I was trying to do. It is not a practice that I enjoy in my life. So, I moved so that I was behind her, and she said, "no, I would rather not from behind." She turned around, she got on top of me.

[30] In fact, the appellant is asking this Court to reassess the evidence, which is not our role. The appellant does not agree with the military judge's interpretation of the evidence. The claim that the judged erred is without merit.

[31] In addition to the errors of fact noted above, the appellant raises three other alleged errors committed by the military judge. He attacks the judge's finding that there was collusion between his cousin and her partner, he claims that the judge erred in finding that the complainant was not sexually attracted to him and he claims that the judge failed to address the evidence that the appellant and the complainant were laughing on the mattress after the last sexual act.

[32] There are two types of collusion: intentional collusion, and unintentional collusion resulting from communication among witnesses. See *R. v. Clause*, 2016 ONCA 859, at para. 81. The trier of fact must decide what weight should be given to evidence tainted by collusion or collaboration: *R. v. Burke*, [1996] 1 S.C.R. 474, at p. 495, 1996 CarswellNfld 85.

[33] In this case, the judge noted that the cousin, her partner and the accused had all discussed the events of August 19 and 20, 2011, since March, 2012. She noted that the cousin considered the appellant to be like a brother. She noted the striking similarities between the cousin's testimony and that of her partner (at para. 28 of her reasons).

[34] The cousin acknowledged having spoken to the appellant about the incident during the seven-month period between the assault and the date on which she submitted a statement to the police. The cousin admitted that she had had discussions with the appellant following her statement to the investigators. The cousin and her partner spoke about the matter in the two weeks between their respective statements (at p. 215 of the Appeal Book).

[35] Decisions regarding questions of collusion and collaboration, even unconscious (unintentional), fall to the trier of fact. This Court should not attempt to play the role of a trial judge with regard to this issue.

[36] The military judge based her finding regarding a lack of sexual attraction on the events of the evening, the context, but, also the complainant's testimony. There was evidence upon which the judge could base her finding of fact: direct evidence from the complainant. The

complainant's direct evidence considered in the context of all the evidence, lends itself to the interpretation and finding of fact made by the judge.

[37] I will now turn to the question of the alleged laughter in the early morning of August 20, 2011. The appellant is correct that the military judge does not mention the alleged [TRANSLATION] "laughter" in her decision. The appellant is also correct that he, his cousin and her partner all testified about laughter heard when the cousin and her partner were coming down the stairs early in the morning. It is also true that the complainant denied this laughter. At page 336 of the Appeal Book, during cross-examination, counsel for the defence and the complainant had the following exchange:

> [TRANSLATION]
>
> Q. OK. And the next morning, to Major Langlois' question, you say that you did not laugh, and that there was nothing funny?
>
> A. No. I didn't find anything funny in it. No.

[38] A number of observations must be made about this evidence and the military judge's lack of discussion regarding it. First, a judge is not required to itemize every conceivable issue, argument or thought process: *R. v. O'Brien*, 2011 SCC 29, [2011] 2 S.C.R. 485, at para. 17.

[39] Second, specific details about the nature of the alleged "laughter" are lacking. The military judge did not know whether it was long and complicit laughter, an uncomfortable giggle, or a nervous laugh.

[40] Third, if there was laughter after the last sexual act and when the cousin and her partner appeared, on the morning of August 20, without further information, I do not see any relevance to the allegations of the events of the night before. Each victim responds differently to assault. The alleged laughter was relevant only for assessing credibility. According to *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 1999 CanLII 711 (SCC):

> In sexual assault cases which centre on differing interpretations of essentially similar events, trial judges should first consider whether the complainant, in her mind, wanted the sexual touching in question to occur. Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant. If the trier of fact is satisfied beyond a reasonable doubt that the complainant did not in fact consent, the *actus reus* of sexual assault is established and the inquiry must shift to the accused's state of mind.
>
> (at para. 61)

[41] Given the military judge's findings regarding the appellant's credibility and the finding of collusion between the three defence witnesses, if there is an error, I consider that, in the circumstances, the decision can be saved by applying subparagraph 686(1)(b)(iii) of the *Criminal Code*, which is incorporated into section 241 of the NDA. The Supreme Court summarized the correct application of subparagraph 686(1)(b)(iii) as follows:

> [85] The curative proviso set out in s. 686(1)(b)(iii) may be applied where there is no "reasonable possibility that the verdict would have been different had the error . . . not been made": *R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617; *R. v. Khan*, [2001] 3 S.C.R. 823, at para. 28. Applying the curative proviso is appropriate in two circumstances: (i) where the error is harmless or trivial; or (ii) where the evidence is so overwhelming that the trier of fact would inevitably convict: *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R.

> 272, at para. 53; *R. v. Van*, 2009 SCC 22, [2009] 1 S.C.R. 716, at para. 34; *Khan*, at paras. 29-31.
>
> (*R. v. R.V.*, 2019 SCC 41, [2019] 3 S.C.R. 237, at para. 85)

In this case, the error, if it exists, would be considered harmless or trivial.

[42] To conclude this part of my analysis, I am of the opinion that the reasons are sufficient and, in the context, the verdict meets the requirements of reasonableness. The military judge (1) informed the parties of the reasons for her decision; (2) demonstrated to the general public that justice had been done; and (3) wrote reasons that permitted appellate review. See *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 51, 55; *R.E.M.*, *supra*, at para 11. The military judge's reasons are sufficient for meeting their objectives in light of the evidence submitted and the arguments made. *R.E.M.*, *supra*, at paras. 16–17.

IV. Constitutionality of section 165.21 of the NDA

[43] The appellant claims that the decisions of this Court in *R. v. Edwards*; *R. v. Crépeau*; *R. v. Fontaine*; *R. v. Iredale*, 2021 CMAC 2 and *R. v. Proulx*; *R. v. Cloutier*, 2021 CMAC 3 are not determinative of this ground of appeal. The appellant states that at page 288 of *R. v. Généreux*, [1992] 1 S.C.R. 259, 1992 CarswellNat 668, Lamer C.J. found that a system in which the judges must be members of the Canadian Armed Forces is intrinsically inconsistent with paragraph 11(d) of the Charter. However, at page 295, Lamer C.J. stated that "[t]his, in itself, is not sufficient to constitute a violation of s. 11(d) of the Charter".

[44] I also note that since *Généreux*, Parliament has amended the NDA several times to strengthen the independence of military judges. Bill C-25, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Session, 36th Parliament, 1998 (assented to December 10, 1998) provided a statutory basis "for independent military judges, in terms of tenure, remuneration, and removal only through an inquiry committee process" (*Draft Internal Report – Court Martial Comprehensive Review*, January 17, 2018 (online), at p. 38). Subsequently, Bill C-16, *An Act to amend the National Defence Act (military judges)*, 1st Session, 41st Parliament, 2011 (assented to November 29 2011) and Bill C-15, *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, 1st Session, 41st Parliament, 2013 (assented to June 19 2013), further amended the appointment process, tenure of office, remuneration, and conditions of employment for military judges so as to ensure the independence of the judiciary.

[45] For the reasons set out in *Edwards et al*., *supra*; *Proulx* and *Cloutier*, *supra*; and, more recently, in *R. v. Christmas*, 2022 CMAC 1, and *R. v. Brown*, 2022 CMAC 2, I dismiss this ground of appeal.

[46] It may be that civilian judges are fit to be judges in the military justice system at the first instance level, but this decision is one for Parliament, not the judiciary, to make.

V. Conclusion

[47] For all of these reasons, I would dismiss the appeal and uphold the guilty verdict against the appellant.

"B. Richard Bell"
Chief Justice

"I concur.
Donald J. Rennie, J.A."

"I concur.
Gladys I. Pardu, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-616
STYLE OF CAUSE:	SERGEANT A.J.R. THIBAULT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	QUEBEC CITY, QUEBEC
DATE OF HEARING:	NOVEMBER 15, 2021
REASONS FOR JUDGMENT BY:	BELL C.J.
CONCURRED IN BY:	RENNIE, J.A. PARDU, J.A.
DATED:	APRIL 22, 2022

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