

**Court Martial Appeal Court
of Canada**



**Cour d'appel de la cour martiale
du Canada**

Date: 20230411

Docket: CMAC-627

Citation: 2023 CMAC 4

**CORAM: CHIEF JUSTICE BELL
SCANLAN J.A.
MCCAWLEY J.A.**

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

CORPORAL A.A. ZAPATA-VALLES

Respondent

Heard at Toronto, Ontario, on February 22, 2023.

Judgment delivered at Ottawa, Ontario, on April 11, 2023.

REASONS FOR JUDGMENT BY:

SCANLAN J.A.

CONCURRED IN BY:

**CHIEF JUSTICE BELL
MCCAWLEY J.A.**

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REASONS FOR JUDGMENT

SCANLAN J.A.

[1] A Military Judge rendered a clear and concise decision explaining why he found Corporal Zapata-Valles not guilty in relation to one charge pursuant to s.130 of the *National Defence Act*, R.S.C. 1985, c. N-5 (pursuant to s. 271 of the *Criminal Code*, R.S.C., 1985, c. C-46). The assault was alleged to have occurred on the evening of September 14, 2017, following an evening of both the complainant and Corporal Zapata-Valles having consumed a substantial amount of alcohol. The Military Judge found that even though the complainant, by reason of intoxication, lacked the capacity to consent to the sexual activity in question, the Respondent had an honest but mistaken belief that she had consented and therefore acquitted him.

[2] The Crown appeals the acquittal.

[3] First I review some of what the Military Judge said in finding Corporal Zapata-Valles had an honest but mistaken belief that the complainant consented to the sexual activity in question. The Military Judge accepted the evidence of the Corporal Zapata-Valles and two other persons who briefly observed Corporal Zapata-Valles and the complainant in a room as the sexual encounter occurred.

[4] For context I note the Military Judge had earlier in his decision determined that the complainant lacked the capacity to consent because of her consumption of alcohol. He found her to be a credible witness, but that due to her intoxication she could not remember the events as described below:

...

However, Caporal Zapata-Valles submitted to the court that he did not commit the alleged offence because he had an honest but mistaken belief that the complainant consented to the sexual activity in question.

In order to consider it, the Court must decide first if there is an air of reality to that defence. In *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29, at paragraph 86, the SCC mentioned a well-established principle regarding the application of the air of reality test:

...The question is whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true.

From the evidence adduced by the accused, Corporal Zapata-Valles believed that: the complainant consented to be kissed while they were on the bottom of the stairs; the complainant consented to be kissed and touched while they were in a corner of the hallway; the complainant consented to have full intercourse with him while he was on top of her; the complainant consented to have oral sex performed on her by him; the complainant consented to perform oral sex on him; the complainant consented to have full intercourse with him while she positioned herself on top of him; the complainant consented to have full intercourse with him when they adopted a doggy-style position.

The accused's evidence amounted to more than a bare assertion of belief in consent. He described some specific words and many actions on the part of the complainant that led him to believe that she was consenting. He clearly stated that before kissing her the first time, he warned her. She kissed him and nodded her head to communicate her acceptance and satisfaction. She kissed him back.

Then they moved to a different location in the hallway, she actively and voluntarily participated in the kissing and the touching that occurred. Further to some moans he heard, **Sergeant Edwards even saw her on the top of the accused, riding him.** While in the storage room, a place where **Sergeant Conroy discovered them by pure coincidence, the complainant made different actions to communicate her consent to the accused.** She participated in taking off the accused's clothes, she laid down first when they took the missionary position and invited him with her arms to take his place between her legs, she ran her fingers in his hair when he performed oral sex on her, she said yes to his request to perform oral sex on him, she got on top of him to continue to have full

intercourse, she willingly switched position when they adopted a “doggy-style” position.

The accused’s evidence of the complainant’s participatory actions, if believed, could lead a jury to conclude that he honestly believed she was consenting despite his being mistaken about her ability to legally consent because of intoxication. Then, the Court concludes that there is an air of reality to the defence of honest but mistaken belief in consent.

Under our law, **there cannot be an honest belief that the complainant communicated consent to the physical contact unless Corporal Zapata-Valles took reasonable steps in the circumstances known to him at the time to find out whether the complainant consented. It appears to the Court that he did so.**

Corporal Zapata-Valles knew that they both drank alcohol and that their faculties could be affected by it. **Accordingly, he made sure that she was responsive to any initiative he took. He warned her before kissing her and made sure that she approved it. As she was actively engaged, he could kiss and touch her in a sexual manner as she did for him. When they had full sexual intercourse in the storage room, they were both active participants and he even asked her verbally if she agreed to perform oral sex on him, to which she responded positively.**

Such description is in line with what they both described as some kind of mutual interest they showed toward each other in the mess before. They had some kind of flirty attitude.

The Court finds that there is evidence that [sic] complainant’s voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct. The evidence shows that there is no diametrically opposed versions that could bar the defence within the meaning of *R. v. Park*, [1995] 2 S.C.R. 836.

The Court must now consider whether Corporal Zapata-Valles honestly believed that the complainant communicated consent to the sexual activity in question. Three different persons saw, for a short moment, at three different times the accused and the complainant in the basement of the armoury on that night, which are Sergeant Edwards, Sergeant Conroy and Private Gill, and none of them noticed something of concern, as they all concluded that everything seemed to be done in a consensual manner.

The evidence of Corporal Zapata-Valles is the same. He sincerely and honestly believed that the complainant consented to all the sexual activities because she actively communicated her consent through her actions or words. **The Court does not see any evidence that would lead it to conclude differently.** The prosecution did not refute his defence beyond a reasonable doubt.

In fact, there is no evidence, other than the one of the accused, which would provide any indication to the Court that the physical state of the complainant continued to decrease as suggested by the prosecution, when she left the mess until she was found almost passed-out in the basement of the armoury, which would clearly impact on the credibility and the reliability of the accused's version of the events related to the sexual activity in question.

In such a situation, the Court is left with an absence of evidence in order to contradict or make-no-is left with an absence of evidence in order to disbelieve the version of the events provided by the accused. In addition, the absence of better specific timeframes limits in some way the ability for the Court to assess better the credibility and the reliability of all testimonies provided. People were consuming alcohol, talking with each other and obviously did not pay attention about the duration or the specific timings when some things happened.

Finally, the loss of memory of the complainant due the consumption of alcohol is indicative of only one thing: she could not testify about what happened during that period of time she spent with the accused in the basement of the armoury. It does not help the Court to determine at all if there was a real possibility that she could be unable to do almost anything as suggested by the prosecution or being active and voluntary as related to the Court by the accused.

Corporal Zapata-Valles testified in a straightforward and calm manner. He seemed to have a good memory of what happened on that night. His testimony was reasonable and consistent and he reported what he saw and heard. Two aspects of the events he reported to the Court were supported by two different witnesses. **The Court has no reason to disbelieve his testimony, and it concludes that the accused's testimony is credible and reliable.**

Accordingly, **the Court concludes that Corporal Zapata-Valles did not commit the alleged offence because he had an honest but mistaken belief that the complainant consented to the sexual activity in question.**

Consequently, the Court concludes that the prosecution did not prove beyond a reasonable doubt that Corporal Zapata-Valles committed a sexual assault on S.R. as alleged in the charge. For all these reasons, the Court finds Corporal Zapata-Valles not guilty of the first charge of sexual assault contrary to section 271 of the *Criminal Code*.

[Emphasis added].

[5] I am satisfied that the facts as found by the Military Judge support a finding that the Respondent had an honest but mistaken belief that the complainant consented. It is not for this Court on appeal to second-guess the Military Judge in relation to findings of fact, especially where those findings are supported by the evidence.

[6] How then is it that the Appellant asserts that the Military Judge erred and on what basis can the Appellant ask that the verdict of not guilty be set aside and a new trial be ordered?

[7] I am satisfied the Appellant erroneously reads the Military Judge's decision in such a manner that the Military Judge appears to make contradictory findings. The Appellant asserts the Military Judge had determined the complainant did not have the capacity to, nor did she consent, to the sexual activity in question. With that part I agree. It is a finding of fact that I would not interfere with on the appeal.

[8] The Appellant further argues, even though the Respondent was aware the complainant lacked the capacity to consent, he recklessly engaged in sexual activity on the night in question. The Appellant says s. 273.2 (a)(ii) of the *Criminal Code* was therefore triggered and the defence of honest but mistaken belief in consent was not available to the Respondent.

[9] The relevant provisions of section 273.2 are as follows:

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from

(i) the accused's self-induced intoxication,

(ii) the accused's recklessness or wilful blindness, or

...

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting...

[10] I am satisfied there was no inconsistency in the Military Judge's findings and no error in law. The Appellant has simply misinterpreted or misunderstood the words of the Military Judge and his decision. When read as the words were intended, there is no inconsistency and s. 273.2 does not apply; there was no recklessness nor did Corporal Zapata-Valles believe the complainant lacked the capacity to consent.

[11] I have quoted extensively part of the Military Judge's decision above. I now wish to refer to the portions of the decision which the Appellant is misconstruing:

Then the Court turns now to the last question concerning the essential elements of the offence to be proven: did Corporal Zapata-Valles know that the complainant did not consent to the sexual activity in question?

The prosecution must prove beyond a reasonable doubt that Corporal Zapata-Valles was aware that the complainant did not consent to the sexual activity in question. To answer this question, then the focus at this stage shifts to the mental state of the accused.

To prove that Corporal Zapata-Valles was aware of the complainant's lack of consent, the prosecution must prove one of

the following: that Corporal Zapata-Valles actually knew that the complainant did not consent to the sexual activity in question; that Corporal Zapata-Valles knew there was a risk that the-complainant did not consent to sexual activity in question and Corporal Zapata-Valles proceeded in the face of that risk; or that Corporal Zapata-Valles was aware of indications that the complainant did not consent to the sexual activity in question, but deliberately chose to ignore them because he did not want to know the truth. Any one of these is sufficient to establish Corporal Zapata-Valles' awareness of the complainant's lack of consent.

Corporal Zapata-Valles was aware of the complainant's heavy drinking that night. He offered and paid her some shots and saw her drinking Smirnoff Ice. Corporal Sokal confirmed these facts. The accused said that the complainant was drunk as he was when they had sexual intercourse. However, he said that despite being drunk, he was still able to make decisions for himself.

He was then aware that there was a risk that she became incapacitated to provide any consent regarding the sexual activity in question, but decided to proceed in the face of that risk.

Considering the evidence adduced, it is the conclusion of the Court that the prosecution proved beyond a reasonable doubt that Corporal Zapata-Valles was aware that the complainant did not consent to the sexual activity in question.

[12] I am satisfied that in each of the above quoted paragraphs the Military Judge is describing what it is the prosecution must prove in order to enter a conviction. The words "the prosecution must prove" were included in the first two paragraphs. I am satisfied those words are also implied in the remaining paragraphs. The Military Judge was simply reciting what it was the prosecution must prove, not concluding that it had been proven. The Appellant is arguing the Military Judge set out his conclusions in the last three paragraphs quoted above. I disagree.

[13] The Military Judge instead of saying the prosecution has proved those things goes on to immediately after that passage say, as I have quoted above in paragraph 4 above:

However, Caporal Zapata-Valles submitted to the court that he did not commit the alleged offence because he had an honest but mistaken belief that the complainant consented to the sexual activity in question.

[Emphasis added].

[14] The word “However” is a reference to all the paragraphs I have quoted in paragraph 11 above. The Military Judge did not accept the arguments of the prosecution. He instead went on to discuss the legal requirements to mount a successful defence of honest but mistaken belief and the facts that justify an acquittal in this case. It is worth repeating what he said in this regard:

In order to consider it, the Court must decide first if there is an air of reality to that defence. In *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29, at paragraph 86, the SCC mentioned a well-established principle regarding the application of the air of reality test:

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[Emphasis added].

Conclusion

[15] I am satisfied the Appellant is reading the Military Judges decision out of context and the Military Judge did not render an inconsistent verdict.

[16] The appeal should be dismissed.

“J. Edward Scanlan”

J.A.

“I agree.

B. Richard Bell, C.J.”

“I agree.

Deborah J. McCawley, J.A.”

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	CHIEF JUSTICE BELL MCCAWLEY J.A.
DATED:	APRIL 11, 2023

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