Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20190628

Docket: CMAC-594

Citation: 2019 CMAC 3

CORAM: **BELL, C.J.**
BENNETT, J.A.
SCANLAN, J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

SERGEANT K.J. MACINTYRE

Respondent

Heard at Halifax, Nova Scotia, on March 27, 2019.

Judgment delivered at Ottawa, Ontario, on June 28, 2019.

REASONS FOR JUDGMENT BY: BENNETT, J.A.

CONCURRED IN BY: BELL, C.J.
SCANLAN, J.A.

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REASONS FOR JUDGMENT

BENNETT, J.A.

[1] The Crown appeals the acquittal of Sgt. K.J. MacIntyre [Sgt. MacIntyre] on a charge of sexual assault by a General Court Martial on June 27, 2018. The Crown challenges the instructions to the panel relating to knowledge of the complainant's lack of consent and inadequate police investigation.

[2] For the reasons that follow, I would dismiss the appeal.

I. Background

[3] The events leading to the charges occurred in Scotland, when the complainant, Lt(N). M., and Sgt. MacIntyre were deployed as part of a team sent to support Canadian warships conducting exercises in Europe from September to November 2015. They arrived in Glasgow in the early morning of September 26, 2015.

[4] Lt(N). M. has been in the Canadian Armed Forces since 1999. She was commissioned from the ranks in 2009. Sgt. MacIntyre is a Military Police non-commissioned officer. He joined the Canadian Armed Forces in 2002.

[5] There is no dispute over what occurred in the earlier part of the evening on September 26: the group checked into a hotel and then attended at the Glasgow pier for a meeting to discuss logistical arrangements for the ships that were to arrive. Afterwards, the group returned to the hotel and then went to a restaurant, the Society Room, for dinner.

[6] At the restaurant, the group, including Chief Petty Officer 2nd Class Marcipont [Chief Marcipont], Lt(N). Eldridge (a female officer), Lt(N). M., and Sgt. MacIntyre, drank and socialized. Lt(N). M. was tired and jet-lagged. She described herself as tipsy but able to walk. There was no issue at trial with respect to her capacity to consent due to the consumption of alcohol.

[7] At around 22:30, Lt(N). M., Lt(N). Eldridge and Chief Marcipont decided to return to the hotel. They went to the hotel bar for a drink; however, Lt(N). M. said she only had water as she was tired. After 30 minutes, they left the bar and went to their rooms. Chief Marcipont got out at the 3rd floor, and Lt(N). Eldridge walked Lt(N). M. to her room. Once in her room, she started to remove her clothes, and recalled seeing Sgt. MacIntyre standing in the doorway with Lt(N). Eldridge. She went to bed and fell asleep. She testified that she woke up 20 minutes later in a panic thinking she had lost her passport. She heard a knock on the door, and Lt(N). Eldridge and Sgt. MacIntyre were there. Lt(N). Eldridge showed her where she put her passport. Lt(N). M. said she returned to bed. The other two stayed, and Lt(N). M. fell asleep. She learned from Lt(N). Eldridge the next day that the two had left her room together.

[8] Lt(N). M. testified that the next thing she remembered was someone behind her in bed, in a spooning position, naked. She felt a penis on her buttocks and a hand on top of her hip. She recognized Sgt. MacIntyre's voice and had woken when he touched her genitals. She testified that she pushed his hand away and said, "No". He continued touching her. She said she pushed his hand back 10–15 times, sometimes falling asleep between his attempts at touching her. She said she told him that she loved her husband and did not want to cheat on him. She said he rubbed his thumb across her lips five times saying, "Shh," in response to her telling him that she did not want to do this. She was worried that, as a military police officer, he was trained to neutralize resistance by using pressure-point techniques. She agreed that she was never restrained.

[9] She testified that she rolled onto her stomach to indicate that she did not want to engage in sexual activity and fell asleep again. She said she woke up, heard Sgt. MacIntyre ask her if she liked it, and felt him moving his fingers and penis inside her. She said he got rough, and she told him he hurt her, but he continued until he ejaculated. She asked if he ejaculated, and he responded that he had, but not to worry because he was "fixed".

[10] She testified that she fell asleep, and was surprised to find Sgt. MacIntyre in her bed when she woke up in the morning. She got up to have a shower, and he left.

[11] She found a large quantity of money, 250 pounds, in her room, which she assumed was his. She gave it to Lt. Commander Rowan, who also knew the money belonged to Sgt. MacIntyre. The money was not returned to Sgt. MacIntyre and was used to pay for the final dinner with the group after Sgt. MacIntyre had left.

[12] That morning, Lt(N). M. told Lt(N). Eldridge and Chief Marcipont generally what had occurred, but did not make a formal complaint until March 2016. She agreed that she was concerned that having sex with a subordinate could affect her career, although she testified that she believed what had occurred was a sexual assault.

[13] She stayed with Lt(N). Eldridge the next night and then changed rooms for the rest of their time in Glasgow.

[14] Lt(N). Eldridge testified that after they left the hotel bar, they went back to the restaurant to drink some more and then returned to the hotel. She was with Lt(N). M., Sgt. MacIntyre and Chief Marcipont. She and Sgt. MacIntyre escorted Lt(N). M. to her room. Lt(N). M. got undressed to her underclothes and got into bed. Lt(N). Eldridge said she and Sgt. MacIntyre were stroking Lt(N). M's hair to comfort her, as Lt(N). M. was having a bit of "a spin" and ready to fall asleep. Nothing in the touching raised a red flag. She and Sgt. MacIntyre left together and then decided to go back to Lt(N). M's room to make sure she was okay. She knocked on the door, and Lt(N). M. answered. She was in a panic over misplacing her passport. They found it and Lt(N). M. went back to bed. Lt(N). Eldridge and Sgt. MacIntyre left.

[15] Lt(N). Eldridge could not recall whether Lt(N). M. told Sgt. MacIntyre that he could stay in her room.

[16] Chief Marcipont testified that he was out with the group in the evening. In his view, Lt(N). M. was more intoxicated than the rest of them. She was falling down and slurring her words. He returned to the hotel with Lt(N). M. and Lt(N). Eldridge. He did not recall if Sgt. MacIntyre was with them. He went to his room, had a shower, and then heard a knock on his door. It was Sgt. MacIntyre, who was looking for his jacket, which he had misplaced.

[17] Lt(N). M. appeared distraught the next day, and Chief Marcipont learned that Sgt. MacIntyre had been in her room in the morning. No report was made because Lt(N). M. did not want to pursue the matter at that time.

[18] Sgt. MacIntyre testified that he left the restaurant alone and reconnected with Lt(N). M. and Lt(N). Eldridge at the hotel. They went to Lt(N). M.'s room and chatted for a while. Then Lt(N). Eldridge said they should leave. He said that Lt(N). M. said he could stay, but Lt(N). Eldridge said, "No, we are going," and they left. Shortly afterwards, Sgt. MacIntyre realized he had lost his jacket with his room key, wallet, identification, and a large quantity of money. He retraced his steps, from the restaurant to other members' rooms, finally ending up at Lt(N). M.'s room. He knocked on the door, and asked if he could come in to look for his jacket. He found his jacket there, with his wallet and room key. He used the bathroom, and when he came out, they began chatting. Eventually, she laid down on the bed and he asked if he could lie down too, and she agreed. They laid together, in what was called a "spooning" position. He said he asked if he could pull over the covers because he was cold, and she put his arm over her. They fell asleep for a while. Sgt. MacIntyre testified that he then woke up and Lt(N). M. positioned her head near his. They began kissing. At one point, she said, "We should not be doing this, I am your boss". There was a brief pause, and the kissing continued. They got undressed, and the kissing continued. She turned and got on her knees, and he entered her digitally, until he thought she had an orgasm. He asked if she could "go again", and entered her with his penis. She told him not to ejaculate inside her. He testified that he ejaculated on her back. He told her he was fixed. He said they lay down again and fell asleep. When he woke up, Lt(N). M. was up and said she was going to have a shower. He said he got dressed and left.

[19] Lt(N). M. made a complaint in March 2016, approximately six months after the incident. At that point, CCTV film of the public areas, such as the restaurant, lobby and corridors that could have shed light on what occurred outside the hotel room was no longer available.

[20] The military judge refused to leave the defence of honest but mistaken belief in consent with the panel, but did instruct it that the Crown had to prove that Sgt. MacIntyre knew that Lt(N). M. did not consent. He explained that the element could be made out by full knowledge, wilful blindness or recklessness. He said that if the panel members believed the Crown's theory that Sgt. MacIntyre entered Lt(N). M.'s room uninvited, they should have "no difficulty concluding" that the element was made out. He also said that if they believed that Lt(N). M. said "no" to Sgt. MacIntyre while pushing his hand away from her, then they should have no difficulty concluding that the element was made out.

[21] In oral submissions, we learned that the panel reached a verdict after approximately one hour of deliberations.

II. Issues on appeal

[22] The Crown raises two issues with respect to the instructions to the panel:

i) Whether the military judge was correct when he instructed the panel that the Crown had to prove beyond a reasonable doubt that Sgt. MacIntyre had to know that Lt(N). M. was not consenting; and

ii) Whether the military judge erred in his instruction relating to the inadequacy of the police investigation.

III. Positions of the Parties

[23] The Crown submits that once the military judge ruled that there was no air of reality to the defence of honest but mistaken belief in consent, the essential element of the offence that Sgt. MacIntyre knew that Lt(N). M. was not consenting no longer applied. It is the Crown's position that the only *mens rea* element is whether Sgt. MacIntyre intentionally touched Lt(N). M.

[24] The Crown also says that the military judge instructed the panel that they could acquit Sgt. MacIntyre if they found that the investigation into the complaint was inadequate. They submit that there was no evidentiary foundation for this instruction.

[25] The Crown did not object to the instructions to the panel on either of these points. These issues are raised for the first time on appeal.

[26] Sgt. MacIntyre submits that there was in fact an air of reality to the defence of honest but mistaken belief in consent. In any event, he says, the military judge followed the standard instruction found in Justice David Watt, *Watt's Manual of Criminal Jury Instructions*, 2nd ed. (Toronto: Carswell, 2015) [*Watt*], and thereby committed no error.

[27] Sgt. MacIntyre also submits that the military judge correctly instructed the panel in relation to the possibility of witness contamination and apparent bias.

IV. Discussion

A. *Instruction on the mens rea of sexual assault*

(1) Legislative framework

[28] Paragraph 130(1)(b) of the *National Defence Act*, R.S.C., 1985, c. N-5 [*NDA*], provides that civil offences committed outside of Canada are offences under the Code of Service Discipline:

> Service trial of civil offences
>
> 130 (1) An act or omission
>
> […]
>
> (b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament…
>
> is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

[29] The *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*] creates the offence of sexual assault by building on the more basic offence of assault:

> Assault
>
> 265 (1) A person commits an assault when
>
> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly…
>
> […]
>
> Application
>
> **(2)** This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
>
> **[…]**
>
> **Accus**ed's belief as to consent
>
> **(4)** Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall

> instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.
>
> Sexual assault
>
> 271 Everyone who commits a sexual assault is guilty of
>
> (a) an indictable offence …, or
>
> (b) an offence punishable on summary conviction …

[30] The applicable definition of consent in 2015 was set out in s. 273.1:

> Meaning of *consent*
>
> 273.1 (1) Subject to subsection (2) and subsection 265(3), *consent* means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (2) No consent is obtained, for the purpose of sections 271, 271 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[31] The *Criminal Code* provides that in certain circumstances, the defence of honest but mistaken belief in consent does not apply to sexual assaults. The section was amended in 2018, but when these events occurred, it read as follows:

> Where belief in consent not a defence
>
> 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, or
>
> (ii) the accused's recklessness or wilful blindness,
>
> (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 …

(2) Analysis

[32] The appeal turns on how three distinct and clearly settled principles of criminal law interact in the context of sexual assault.

[33] First, in my view, it is currently settled law by the Supreme Court of Canada that knowledge of the absence of consent is an essential element of the offence of sexual assault as it was of the former offence of rape. Thus, the Crown's principal submission in this case – that absent an air of reality in relation to the accused's honest but mistaken belief, the Crown does not have to prove knowledge of absence of consent – must be rejected. Because knowledge of absence of consent is an essential element of the offence, the Crown must prove it beyond

reasonable doubt. The Crown's submission that the *mens rea* of the offence is simply the intentional application of force is contrary to binding authority.

[34] That knowledge of the absence of consent is an essential element is reflected in all of the commonly used Canadian model jury instructions (see: the National Judicial Institute's *Model Jury Instructions* (revised June 2018), online: https://www.nji-inm.ca/index.cfm/publications/model-jury-instructions/offences/sexual-offences/offence-271-sexual-assault/, *Canadian Criminal Jury Instructions*, 4th ed. (Vancouver: Continuing Legal Education Society of British Columbia, 2017) and *Watt*).

[35] There has undoubtedly been some uncertainty on this point. In *R. v. Robertson*, [1987] 1 S.C.R. 918, 75 N.R. 6 [*Robertson*], Justice Wilson, writing for the Court, held that a jury need not be instructed on the knowledge component of the *mens rea* in every case. In the circumstances of that case, the burden would only have shifted to the Crown to demonstrate knowledge that the complainant was not consenting once there was an air of reality to the defence of honest but mistaken belief. In doing so, Wilson J. described "some difference of view" as to whether knowledge of lack of consent was actually an element of the offence, or if it only arose when the accused gave the defence an air of reality.

[36] That "difference of view" was not unambiguously resolved even in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 235 N.R. 323 [*Ewanchuk*], in which the Court used different language at different times to describe the *mens rea* of the offence. Justice Major, writing for the majority, said that the *mens rea* is "the intention to touch, knowing of or being reckless of or wilfully blind

to, a lack of consent, either by words or actions, from the person being touched" (*Ewanchuk* at para. 23, emphasis added). This is consistent with the standard jury instructions.

[37] However, when discussing the *actus reus*, Major J. said:

> [30] The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.
>
> [Emphasis added.]

[38] When his analysis turned specifically to the *mens rea*, Major J. said:

> [41] Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement. See *R. v. Daviault*, [1994] 3 S.C.R. 63.
>
> [42] However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, [1993] 3 S.C.R. 3. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. See [*R. v. Park*, [1995] 2 S.C.R. 836], at para. 39.
>
> [43] The accused may challenge the Crown's evidence of *mens rea* by asserting an honest but mistaken belief in consent. The nature of this defence was described in *Pappajohn* ...
>
> [44] The defence of mistake is simply a denial of *mens rea.* It does not impose any burden of proof upon the accused (see *R. v.*

> *Robertson*, [1987] 1 S.C.R. 918, at p. 936) and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including, the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.
>
> [Emphasis added.]

[39] Additionally, when discussing the question of the meaning of consent in the context of mistaken belief in consent, Major J. said:

> [46] In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.
>
> [47] For the purposes of the *mens rea* analysis, the question is whether the accused believed that he had obtained consent. What matters is whether the accused believed that the complainant effectively said "yes" through her words and/or actions. The statutory definition added to the *Code* by Parliament in 1992 is consistent with the common law:
>
> > 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> [48] There is a difference in the concept of "consent" as it relates to the state of mind of the complainant *vis-à-vis* the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea.* For the purposes of the *actus reus*, "consent" means that the complainant in her mind wanted the sexual touching to take place.
>
> [49] In the context of *mens rea* — specifically for the purposes of the honest but mistaken belief in consent — "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the

> accused. This distinction should always be borne in mind and the two parts of the analysis kept separate.
>
> [Emphasis in original.]

[40] And finally, the majority concluded:

> [51] For instance, a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see *R. v. M. (M.L.)*, [1994] 2 S.C.R. 3. Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes". As Fraser C.J. stated at p. 272 of her dissenting reasons below:
>
> > One "No" will do to put the other person on notice that there is then a problem with "consent". *Once a woman says "No" during the course of sexual activity, the person intent on continued sexual activity with her must then obtain a clear and unequivocal "Yes" before he again touches her in a sexual manner.* [Emphasis in original.]
>
> I take the reasons of Fraser C.J. to mean that an unequivocal "yes" may be given by either the spoken word or by conduct.
>
> [52] Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters". Continuing sexual contact after someone has said "No" is, at a minimum, reckless conduct which is not excusable. In *R. v. Esau*, [1997] 2 S.C.R. 777, at para. 79, the Court stated:
>
> > An accused who, due to wilful blindness or recklessness, believes that a complainant . . . in fact consented to the sexual activity at issue is precluded from relying on a defence of honest but mistaken belief in consent, a fact that Parliament has codified: *Criminal Code*, s. 273.2(*a*)(ii).

[41] *Ewanchuk* was further considered in *R. v. Handy*, 2002 SCC 56, [2002] 2 S.C.R. 908 [*Handy*], where a unanimous court held:

> [118] A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of, or wilfully blind to, a lack of consent: *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 23.
>
> [119] The respondent admits that sexual touching took place and that he intended it. He denies that it was unwanted. He therefore puts in issue the consent element of the *actus reus*: *Ewanchuk, supra*, at para. 27. Is he to be believed when he says consent was never withdrawn, or is the prosecution correct that he has a demonstrated situation-specific propensity to proceed regardless, indeed to derive heightened pleasure from being rejected and forcing sex on his sex partner? If so, was it manifested in this case?
>
> [Emphasis added.]

[42] Thus, in *Handy*, the Court affirmed the *mens rea* element of the offence as including knowledge as to lack of consent.

[43] In *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 24, the Court again affirmed that the *mens rea* element includes knowledge of, or recklessness or wilful blindness to, the absence of the complainant's consent to the sexual act in question.

[44] In *R. v. Skedden*, 2013 ONCA 49, 105 W.C.B. (2d) 486 [*Skedden*], the Court applied *Robertson* at paras. 7–8 to hold that the impugned instruction need not be given in every case. The issue in *Skedden* was consent rather than whether the accused knew or had an honest but mistaken belief in consent.

[45] Most recently, in *R. v. Barton*, 2019 SCC 33 [*Barton SCC*], the Court held that:

> [87] A conviction for sexual assault, like any other true crime, requires that the Crown prove beyond a reasonable doubt that the accused committed the *actus reus* and had the necessary *mens rea*. A person commits the *actus reus* of sexual assault "if he touches another person in a sexual way without her consent" (*R. v. J.A.*, [2011] 2 S.C.R. 440, at para. 23). The *mens rea* consists of the "intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched" (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at para. 42.

[46] The Crown's argument, contrary to the settled Supreme Court of Canada jurisprudence, is that knowledge of lack of consent is not an element of the offence, but instead only arises if there is an air of reality to an honest but mistaken belief in consent. According to this view, the element and defence are inextricably linked because each is the mirror image of the other. Instructing a jury on a knowledge element would essentially be to put the defence to the jury in the absence of an air of reality. Knowledge of lack of consent therefore would not be an element of the *mens rea* that the Crown needs to prove beyond a reasonable doubt unless there was an air of reality to the defence of honest but mistaken belief in consent. Once there was an air or reality, the burden would shift to the Crown to prove, beyond a reasonable doubt, that the accused had knowledge of lack of consent by the complainant. I do not agree with this characterization.

[47] As discussed above, it is true that the "defence" of honest but mistaken belief has been described as the negation of the *mens rea* of sexual assault rather than as a defence in its own right (*Ewanchuk* at para. 44; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120, 32 N.R. 104 [*Pappajohn*] at p. 148; Hamish Stewart, *Sexual Offences in Canadian Law*, loose-leaf (updated March 2019) (Toronto: Thomson Reuters, 2018) at 3:600. But the defence is not alone in this regard. Along with defences such as self-defence, duress and necessity, which exculpate the

accused even though the elements of the offence have been proven, there are defences such as intoxication and inability to appreciate the nature and quality of an act due to mental disorder, which instead negate an aspect of the *mens rea* itself.

[48] Consider intoxication. As a matter of law, the accused can only access the defence of intoxication for specific intent offences, which require complex reasoning that an intoxicated accused may have been unable to engage in (*R. v. Tatton*, 2015 SCC 33, [2015] 2 S.C.R. 574 [*Tatton*], at paras. 34–39). By contrast, when the accused is charged with a general intent offence, the defence is unavailable. Nevertheless, an appellate court would not be warranted in interfering if a trial or military judge were to charge the jury that the Crown must prove that general intent beyond a reasonable doubt. In *Tatton*, Justice Moldaver found that arson is an offence of general intent (at paras. 48–53). Its *mens rea* is the intentional or reckless damaging of property by fire (*Tatton*, at para. 48). Yet it would still be correct for a trial judge to charge the jury on the *mens rea* requirement even in circumstances where intoxication would be the only real way to disprove that requirement for the simple reason that intention remains an element of the offence. A trial judge can provide their view that the jury will have little difficulty in concluding that the element is met, but, ultimately, it is for the jury to decide whether it actually is.

[49] Another difficulty with the Crown's argument is the statute itself: a person commits an assault when "without the consent of another person, he applies force intentionally to that other person directly or indirectly" (emphasis added). The *Criminal Code* goes on to say in subsection (2) that "this section applies to all forms of assault, including sexual assault …." Prior to the

enactment of the sexual assault provisions in the *Criminal Code*, a male person committed rape when "he [had] sexual intercourse with a female person who [was] not his wife … without her consent …" (emphasis added). The language relating to the consent was the same and had been interpreted by the Supreme Court of Canada in *Pappajohn* and *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, 58 N.R. 123, to create a *mens rea* requirement of knowledge of lack of consent.

[50] In my view, the reasons in *Ewanchuk* do not interpret Parliament to have removed an element of the offence from the definition of sexual assault.

[51] While I understand the argument, and its appeal, in my view it is not for this Court to alter the long-standing requirement that knowledge of lack of consent is an essential element of the offence.

[52] Justice Moldaver came to an analogous conclusion in the child luring context in *R. v. Morrison*, 2019 SCC 15, 152 W.C.B. (2d) 525 [*Morrison*]. He found, for a majority of the Court, that s. 172.1(4) of the *Criminal Code*, which bars the accused from raising the defence of mistake of fact if they failed to take reasonable steps to ascertain the complainant's age, did not obviate the Crown's obligation to prove that the accused believed that the complainant was underage. In drawing this conclusion, Moldaver J. explained that the defence and essential element operate independently.

[53] The offences of child luring (s. 172.1) and sexual assault are structured similarly in a number of ways. Both have subjective belief or knowledge requirements (all three modes in

s. 172.1 require belief that the other person is underage and, as explained above, sexual assault traditionally required knowledge in lack of consent) and both prescribe that the accused cannot access the defence of mistake of fact where they did not take reasonable steps to ascertain the relevant fact (s. 172.1(4) for age and s. 273.2(b) for consent, respectively).

[54] I note that one difference between the two offences is that s. 172.1(3) prescribed a presumption (found unconstitutional in *Morrison* – see paras. 51–73) that the belief requirement is satisfied where the complainant told the accused that they were underage. Justice Moldaver referred to this presumption as a signal that Parliament considered the *mens rea* of the offence to remain an essential element regardless of the availability of the defence of mistake of age. Although Moldaver J. referred to the presumption in explaining why his view was preferable to that of Justice Abella, dissenting in part, I do not consider this difference to be particularly significant in the abstract. The real core of his reasoning was that substituting a defence for an element of an offence offends the "bedrock principle of criminal law" that the Crown must prove the essential elements of an offence beyond a reasonable doubt (*Morrison* at para. 85).

[55] There have been recent suggestions that this essential element need not be proved in cases in which there is no air of reality to the accused's honest but mistaken belief in consent. In *R. v. Barton*, 2017 ABCA 216, 354 C.C.C. (3d) 245 [*Barton ABCA*], a *per curiam* panel of the Court of Appeal of Alberta criticized that instruction at paras. 238–39. The Court explained:

> [238] The problem with current pattern jury charges extends beyond the need to clarify the meaning of consent for purposes of the *mens rea* of sexual assault. A further complication is this. What must the Crown prove where there is no live issue of mistaken belief in consent? In *Ewanchuk,* ... at para 41, Major J made the point that: "Sexual assault is a crime of general intent. Therefore,

the Crown need only prove that the accused intended to touch the complainant in order to satisfy the basic *mens rea* requirement." He then added at paras 42, 49…:

> However, since sexual assault only becomes a crime in the absence of the complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent.... *As such, the mens rea of sexual assault contains two elements*: intention to touch and knowing of, or being reckless or wilfully blind to, a lack of consent on the part of the person touched....
>
> In the context of *mens rea – specifically for the purposes of the honest but mistaken belief in consent* – "consent" means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.

[239] If the Crown must prove the *mens rea* that applies for the purposes of the honest but mistaken belief in consent defence regardless of whether mistaken belief in consent is even a live issue, then that would lead to this result. The Crown would bear the burden of disproving mistaken belief in consent in every sexual assault case even where mistaken belief is not a live issue whether because the air of reality threshold has not been met or the accused has advanced no such defence. This is another area in which we would invite further consideration by the national jury committee on how best to instruct jurors in this instance.

[Emphasis in *Ewanchuk* quotation added by Court of Appeal of Alberta; notes omitted.]

[56] The Court then included the following footnote (at note 105):

> Where mistaken belief is not a live issue, this raises the question whether a trial judge should instruct the jury (providing it is satisfied that all the required *actus reus* elements were met and the judge has properly outlined these) that: "If you are satisfied that the Crown has proven beyond a reasonable doubt that the

> complainant did not consent to that sexual activity, you should have little difficulty in concluding that the accused knew or was wilfully blind to the fact that the complainant was not consenting to the sexual activity in question or was reckless and chose to take the risk." Should more be required, then the jury instructions should identify what it is that the Crown must then prove to bring home to the accused culpability based on actual knowledge or its equivalent, wilful blindness or recklessness.
>
> [Emphasis added.]

[57] This decision raises important issues. But until the Supreme Court of Canada rules on this issue, we are bound by the law as I have described it. The decision in *Barton SCC*, did not, in my view, change the settled law, but affirmed it.

[58] The second principle that governs this case is also the law as settled by the Supreme Court. It is that the accused's honest but mistaken belief in consent is a "defence" in the sense that the jury should not be directed about it absent some foundation in the evidence for such an honest belief. This has been clear since at least the Court's judgment in *Pappajohn*. In *Barton SCC*, the Court defined the defence as the honest but mistaken belief in *communicated* consent.

[59] When Justice Dickson (as he then was) discussed honest but mistaken belief in consent in his dissent in *Pappajohn*, at p. 148, he explained the tension that gives rise to this problem:

> Mistake is a defence, then, where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.

[Emphasis added.]

[60] It follows that the issue of whether the accused has an honest but mistaken belief in the complainant's consent does not need to be considered by the jury or disproved by the Crown unless there is an "air of reality" in relation to that defence on the whole of the evidence.

[61] In my view, the military judge was correct in refusing to leave honest but mistaken belief in (communicated) consent with the panel. The evidence disclosed that this was a case of either consent or no consent; there was no room for an allegation of mistake of fact.

[62] Under the law as it stands from the Supreme Court, the Crown must prove all essential elements of the offence, including knowledge of lack of consent when there is no air of reality to honest but mistaken belief in consent. It is not, however, required to negate an honest but mistaken belief unless the accused raises that issue by pointing to evidence in the record that gives an air of reality to the defence.

[63] That brings me to the third principle. In cases in which the defence of honest but mistaken belief has no air of reality and the trier of fact is satisfied beyond a reasonable doubt that the complainant did not consent to the sexual activity, the trier of fact will have little difficulty drawing the inference that the accused knew that the complainant did not consent (or was reckless or wilfully blind to the absence of consent).

[64] In consent-or-no-consent cases (including this case, as discussed below), if the trier of fact accepts the complainant's evidence that there is no consent, the knowledge element is easily

proven. This supports the suggestion in footnote 105 of *Barton ABCA* that in the absence of a mistake of fact defence, juries may be told that if they accept the evidence of a complainant on the issue of consent, they will have little difficulty finding the element of knowledge proved.

[65] But some cases, even absent mistake of fact, may require the instruction regarding lack of knowledge of consent. Although an honest but mistaken belief in consent goes to *mens rea*, it is not the only way to disprove that *mens rea* element. For example, where there is evidence that the accused was involuntarily intoxicated, the accused may not have known that the complainant was not consenting, but would also not have an honest but mistaken belief in consent. Thus, in cases in which the accused, through no fault of their own, has no belief about the complainant's consent, failure to instruct the panel on the knowledge element of *mens rea* could deprive them of a defence.

[66] Although it has not been conclusively established, there is some opinion that involuntary intoxication short of automatism can negate the *mens rea* of a general intent offence like sexual assault (see for example: *R. v. McGrath*, 2013 ONCJ 528, 108 W.C.B. (2d) 392 (in the context of impaired driving); Kent Roach, *Criminal Law*, 7th ed. (Toronto: Irwin Law, 2018) at 303–06; Morris Manning and Peter Sankoff, *Manning, Mewett & Sankoff: Criminal Law*, 5th ed. (Markham: LexisNexis, 2015) at 477).

[67] To be clear, it would be an error for a military judge to repackage the defence of honest but mistaken belief as an element of the offence. If, for example, the military judge had pointed the panel to evidence relevant to Sgt. MacIntyre's belief in consent, the defence would have been

improperly introduced by the back door. This is no different from any other defence that is legally unavailable. Where there is no air of reality to a defence of automatism, for example, it would be a legal error for a trial judge to relate evidence of automatism to the elements of an offence. The military judge made no such error here. He made it very clear that if the panel had reached that portion of the charge, it would have no trouble convicting Sgt. MacIntyre:

> To determine Sergeant MacIntyre's state of mind, what he knew about [Lt. M.]'s consent or lack of it, you should consider all of the evidence. Take into account what Sergeant MacIntyre and [Lt. M.] did or did not do; how Sergeant MacIntyre and [Lt. M.] did or did not do it; what Sergeant MacIntyre and [Lt. M.] said or did not say.
>
> […]
>
> In this case, the versions of the two main actors is opposite as to what was done and what was said exactly. I believe it is fair to assume that if you got to this stage of the analysis, it is because you did not accept Sergeant MacIntyre's version as true. Otherwise your deliberations would be over.
>
> [Lt. M.] testified that she woke up with Sergeant MacIntyre lying naked in her bed, uninvited. The theory of the prosecution is that Sergeant MacIntyre surreptitiously entered her room using a stolen key card, undressed near the bed and sneaked into the sheets. <u>If you believe that Sergeant MacIntyre entered [Lt. M]'s room uninvited in that or any other fashion, you should have no difficulty concluding that Sergeant MacIntyre knew that [Lt. M.] did not consent to the force that he initially applied when he pressed his naked body against hers.</u>
>
> <u>In addition, if you believe that [Lt. M.] said no to Sergeant MacIntyre at least 15 times or even only once, while moving his arm away from her body, you will have no difficulty in concluding that such an expression of non-consent obliged Sergeant MacIntyre to make certain that she had truly changed her mind before proceeding with the further intimacies…Continuing sexual contact after someone has said, no is, at minimum, reckless and could lead you to conclude that Sergeant MacIntyre knew that [Lt. M.] did not consent to the force that he applied.</u>
>
> [Emphasis added.]

[68] To avoid the danger of inadvertently leaving the defence to the jury in the absence of an air of reality, trial judges may choose to give the instruction in footnote 105 of *Barton ABCA*, in appropriate circumstances, as did the judge in this case.

[69] To summarize: knowledge, wilful blindness, or recklessness as to the complainant's lack of consent is an essential *mens rea* element of sexual assault. Although trial judges cannot repackage the defence of honest but mistaken belief as the *mens rea* element when it has no air of reality, it is not an error of law to simply instruct the trier of fact on the element of knowledge of lack of consent.

(3) Application to the facts of this case

[70] Thus, in my view, the military judge committed no error when he instructed the panel that an essential element of the offence that the Crown had to prove beyond a reasonable doubt was that Sgt. MacIntyre knew that the complainant was not consenting to the sexual activity in question.

[71] If I am in error, and knowledge of lack of consent is no longer an element, in my view, regardless of that error, I would not direct a new trial. It is well established that on an appeal from an acquittal on a question of law, the Crown must demonstrate both that an error of law was made, and that there is a reasonable degree of certainty that but for the error, the result would not necessarily have been the same (*Barton* SCC at para. 160; *R. v. Nuttall*, 2018 BCCA 479, 368 C.C.C. (3d) 1 at para. 498; *Cullen v. The King*, [1949] S.C.R. 658, 94 C.C.C. 337 at p. 665; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 at paras. 14–16).

[72] In my view, if there was an error, it was of no moment and made no difference in the outcome of the trial. This case was about consent. It was not about whether Sgt. MacIntyre had knowledge of a lack of consent. If the panel concluded that there was no consent, they would have had no difficulty on the evidence, as highlighted by the military judge, finding that Sgt. MacIntyre knew Lt(N). M. was not consenting.

[73] The military judge focused on what all agreed was the main, and really only, issue in the case: whether the Crown had proven that Lt(N). M. did not consent to the sexual activity in question. He said, in relation to the element of consent, "There's no doubt—this is no doubt the most contentious issue in this case, as mentioned by counsel in their closing addresses." He then gave a comprehensive instruction on the element of consent.

[74] He did give the impugned instruction; however, in doing so, he reviewed the evidence carefully and advised the panel that if they believed the evidence of Lt(N). M., they would have no difficulty in concluding that Sgt. MacIntyre knew she was not consenting to the sexual activity.

[75] In my view, as was the case in *Skedden*, this case turned on whether the panel had a reasonable doubt about whether Lt(N). M. did not consent. If she did not consent, the evidence was overwhelming that Sgt. MacIntyre would have knowledge of the lack of consent. Thus, the error would have no material bearing on the acquittal. I would not give effect to this ground of appeal.

[76] In addition, the Crown should not be permitted two kicks at the can. This issue was not raised before the military judge. It was raised for the first time on appeal. This weighs in favour of not ordering a new trial, even if there was an error in law (see *Barton SCC* at para. 157).

B. *Instruction on the inadequacy of the investigation*

[77] The Crown also submits that the military judge instructed the panel that if they found the investigation inadequate, they could acquit. That is not the instruction given by the military judge—not even close. He said:

> Inadequate police investigation. You've heard a number of questions to witnesses suggesting that the investigation of the offence with which Sergeant MacIntyre was ultimately charged, was inadequate or biased. For instance, it was suggested that the exchanges at the beginning of the interviews conducted by Sergeant Biso with Lieutenant Eldridge and Chief Marcipont reveal that these two persons stated they were present at the interview to respectively corroborate and add to the validity of what [Lt. M] said, to which Sergeant Biso would have answered affirmatively. You have also heart Sergeant Biso's explanation about that.
>
> You have also heard evidence from Sergeant Biso to the effect that it was preferable to obtain the versions of witnesses independently to avoid what was referred to as witness contamination. You also heard from [Lt. M.] that she had been in regular contact with NIS officers on the progress of the investigation and on one occasion, had met with Sergeant Biso and was given an idea of what Sergeant MacIntyre had told the investigators. She said she was surprised about one thing that had been reported to her in relation with Sergeant MacIntyre's version. Finally, you've heard suggestions that the issue of the money found in [Lt. M.]'s room that apparently belonged to Sergeant MacIntyre, should have been investigated by the NIS and heard the explanations of Sergeant Biso about that too.
>
> It was also suggested to witnesses that taking notes or pictures or obtaining a number of items of potential evidence at certain

> moments from certain sources may have been helpful. This included obtaining the version of Sergeant MacIntyre earlier.
>
> Be careful not to speculate about evidence that may have been obtained. Your role is to consider the evidence that is before you. It is up to you to determine whether evidence about the inadequacy of the police investigation, alone or along with other evidence, causes you to have a reasonable doubt about whether Sergeant MacIntyre committed the offence charged.
>
> [Emphasis added.]

[78] The Crown focuses on the last paragraph and says that this is an instruction to acquit. I disagree. Jury instructions are to be read as a whole, and not parsed into small pieces (*R. v. Jacquard*, [1997] 1 S.C.R. 314, 207 N.R. 246).

[79] When the instruction is read as a whole, the panel could not have been confused with respect to the role of the police investigation. The panel was entitled to consider such things in the context of assessing the credibility and reliability of the witnesses. No aspersions were cast on the credibility or reliability of Lt(N). M. as a result of the police investigation.

[80] The failure of the Crown to object to the instruction demonstrates a satisfaction with it, a factor to consider on appeal. As Justice Moldaver said in *R. v. Calnen*, 2019 SCC 6, 151 W.C.B. (2d) 701[*Calnen*] at para. 38:

> In my respectful view, defence counsel's failure to object to the absence of a limiting instruction against general propensity reasoning of the kind my colleague now says was essential speaks not only to "the overall satisfactoriness of the jury charge on this issue", but also to "the gravity of any omissions in the eyes of defence counsel"; it may further be taken as an indication that defence counsel felt such an instruction would not have been in his client's interests: *R. v. Kociuk*, 2011 MBCA 85, 278 C.C.C. (3d) 1, at para. 86, cited with approval by Rothstein J. in *R. v. Mian*, 2014

> SCC 54, [2014] 2 S.C.R. 689, at para. 66; see also *R. v. R.T.H.*, 2007 NSCA 18, 251 N.S.R. (2d) 236, at paras. 98-99, per Cromwell J.A. (as he then was). As Bastarache J. explained in *Daley*, at para. 58:
>
> > … it is expected of counsel that they will assist the trial judge and identify what in their opinion is problematic with the judge's instructions to the jury. While not decisive, failure of counsel to object is a factor in appellate review. The failure to register a complaint about the aspect of the charge that later becomes the ground for the appeal may be indicative of the seriousness of the alleged violation. See *Jacquard*, at para. 38: "In my opinion, defence counsel's failure to object to the charge says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection."
> >
> > (See also *Thériault v. The Queen*, [1981] 1 S.C.R. 336, at pp. 343-44, where Dickson J. (as he then was) wrote: "Although by no means determinative, it is not irrelevant that counsel for the accused did not comment, at the conclusion of the charge, upon the failure of the trial judge to direct the attention of the jury to the evidence . . . .")

[81] In *Calnen*, defence counsel's failure to object was at issue. Where the Crown fails to do so, appellate courts must be at least as reluctant to entertain arguments on appeal that the trial judge erred in their charge (see *Barton SCC* at para. 157).

[82] In my view, when the instruction is viewed as a whole, it cannot be said that the military judge erred.

[83] I would dismiss the appeal.

"Elizabeth A. Bennett"
J.A.

"I agree.
B. Richard Bell, C.J."

"I agree.
J.E. Scanlan, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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