Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20230227

Docket: CMAC-621

Citation: 2023 CMAC 2

CORAM: **CHIEF JUSTICE BELL**
MCVEIGH J.A.
TROTTER J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

PRIVATE D.T. VU

Respondent

Heard at Ottawa, Ontario, on September 23, 2022.

Judgment delivered at Ottawa, Ontario, on February 27, 2023.

REASONS FOR JUDGMENT BY: CHIEF JUSTICE BELL
TROTTER, J.A.

DISSENTING REASONS BY: McVEIGH J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20230227

Docket: CMAC-621

Citation: 2023 CMAC 2

CORAM: **CHIEF JUSTICE BELL**
MCVEIGH J.A.
TROTTER J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

PRIVATE D.T. VU

Respondent

Order restricting publication: The order of the Court Martial issued pursuant to section 179 of the *National Defence Act*, R.S.C. 1985, c N-5 on 21 April 2021 remains in effect. No person shall publish or broadcast or transmit in any way any information that could identify any person described in these proceedings before the Court Martial Appeal Court of Canada as being a complainant.

REASONS FOR JUDGMENT

BELL C.J. and TROTTER J.A.

I. Introduction

[1] The Respondent, the accused at trial, performed oral sex on S.B. on January 10, 2020. Both the Respondent and S.B. had, earlier that evening, attended a party where they participated in a "drinking game". The Appellant, His Majesty the King, contended at trial that S.B. was incapable of consenting to the sex act by reason of advanced intoxication. The Military Judge concluded the Crown had not proven that part of the *actus reus*, which requires proof beyond a reasonable doubt, of a lack of subjective consent. He acquitted the Respondent.

[2] The Appellant contends that the Military Judge erred in finding that the prosecution had failed to prove a lack of consent or capacity to consent. The submission rests on the proposition recognized in *R v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197 [*J.M.H.*], that the Military Judge committed a legal error by failing to consider the entirety and cumulative effect of the evidence in reaching his conclusion on this issue. We disagree. The Military Judge's review of the evidence was thorough, if not painstaking.

[3] In our view, at its core, the Appellant's position amounts to an assertion that the acquittal was unreasonable. Canadian appellate courts have no power to set aside acquittals on this basis. In *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33, Arbour J. said, "as a matter of law, the concept of 'unreasonable acquittal' is incompatible with the presumption of innocence

and the burden which rests on the prosecution to prove its case beyond a reasonable doubt." See also *J.M.H.*, at para. 27.

II. Factual Overview

[4] It is not necessary for us to summarize the evidence in this case because our colleague, McVeigh J.A., has carefully and fairly summarized the evidence from the Court Martial in her dissenting reasons, at paras. 44-52. Moreover, the Military Judge's reasons are also comprehensive and detailed. Neither of the parties takes issue with their accuracy.

III. Decision of the Military Judge

A. *Observations regarding the applicable legislation and jurisprudence and framing of the issue*

[5] The decision under appeal is reported as *R v Vu* 2021 CM 4012 (CanLII). The Military Judge's instructions to himself, with respect to the law, constitute a stellar example of the current state of the statute law as set out in ss. 265(3), 271, 273.1 of the *Criminal Code* R.S.C., 1985, c. C-46 and the jurisprudence set out in leading cases, such as *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; *R. v. Al-Rawi* 2018 NSCA 10 (CanLII), 359 CCC (3d) 237; 44 CR (7th) 148; *R. v. G.F.* 2021 SCC 20; *R. v Barton* 2019 SCC 33, [2019] 2 S.C.R. 579. The trial judge also properly instructed himself with respect to the jurisprudence that he can believe some, all or none of a witnesses' evidence (*R v. W.(D.)*, [1991] 1 S.C.R. 742).

[6] The Military Judge was fully cognizant of the fact that an unconscious complainant lacks the capacity to consent. Citing *R v G.F.* 2021 SCC 20, 459 D.L.R. (4th) 375 the Military Judge opined at para. 27 of the decision as follows:

> Knowing that a complainant must have the capacity to consent to the sexual activity in question, the obvious issue that will need to be resolved in this case on the basis of the submissions of counsel is whether S.B. was incapable of consenting because of her intoxication. If that is the case, her apparent agreement for Pte Vu to perform oral sex on her would be ineffective to constitute subjective consent. The assessment of this question will need to be made on the basis of the legal test developed by courts throughout the years to assist in determining the question of capacity to consent, most recently revisited by the SCC in G.F. That said, the exact dividing line between capacity and incapacity is very much a question of applications [sic] of the facts to the law.

[7] After quoting extensively from Karakatsanis, J. in *G.F.* in the two previous pages of his decision, the Military Judge at para. 33 sets out the subjects he considered most relevant for purposes of disposing of the criminal charge against Pte Vu. He observed:

> […] First, she explains at paragraph 63 that it is not necessary that the entire course of sexual activity be blanketed with a single finding of consent, non-consent, or incapacity. The finding can change with the changes in sexual activity being examined. Second, [Justice Karakatsanis] mentions at paragraph 65 that the fact that a complainant may remember the events or not does not answer the incapacity question one way or another. The ultimate question of capacity must remain rooted in the subjective nature of consent. The question is not whether the complainant remembered the assault, retained her motor skills, or was able to walk or talk. The question is whether the complainant understood the sexual activity in question and that she could refuse to participate.

B. *The Military Judge's analysis and credibility findings*

[8] The first task undertaken by the Military Judge was to express the disgust he felt while watching the crude images of Pte Vu performing oral sex "on an invisible partner who is obviously intoxicated". He further opines that, there is something fundamentally inappropriate in having "sexual activity with a person who [sic] one barely knows and is drunk to the point of having difficulties to walk, as evidenced here". We agree with his observations. Pte Vu's actions were reprehensible. However, the Military Judge rightly concludes that it is not for him, nor, we suggest, is it for this Court, to pass moral judgment. The unwavering focus must be on whether a crime had been committed. After careful consideration, the Military Judge had a reasonable doubt, which he explained in great detail.

[9] In assessing whether a crime had been committed, the Military Judge notes that a video recording begins with a close up view of "a visibly intoxicated Pte Vu". As indicated, *supra*, both had participated in a drinking game at a party the evening of the alleged offence. There was evidence that Pte Vu was intoxicated to an 8 on a scale of 1 to 10. S.B. was intoxicated to a 9 or 10 on a scale of 1 to 10. The Military Judge was in a better position than this Court to assess the degree of intoxication of Pte Vu at the time of the offence since he saw Pte Vu in the video and saw him sober at the trial.

[10] The Military Judge says he played and re-played the video "uncountable" times. There was no Agreed Statement of Facts as to exactly what was said by S.B. and Pte Vu during the recording. However, the Military Judge made use of an *aide memoire* prepared by defence counsel, which purported to reflect the utterances of Pte Vu and S.B.[1]

[1] The Military Judge should have made this document an exhibit in order to protect the integrity of the record: *R. v. MacIsaac*, 2017 ONCA 172, 347 C.C.C. (3d) 37, at para. 57 and *R. v. Ranglin*, 2018 ONCA 1050, 370 C.C.C. (3d)

[11] The recording commences with Pte Vu saying, “You want me to eat you?”. The Military Judge concluded that the video conforms to what Pte Vu told Military Police in his voluntary statement; namely, that there had been a prior conversation which led to a request or a proposition for oral sex. For 50 seconds of a 4 minute and 27 second video of verbal communication and sexual activity, one hears Pte Vu ask on 8 occasions whether S.B. agrees to having him perform oral sex on her. The trial judge, at paras 48-49 describes the 50-second exchange as follows:

> [48] A careful listening of the words exchanged in the 50 seconds of the pre-sexual activity phase reveals that Private Vu makes eight requests to S.B. seeking affirmative confirmation of her agreement that he engage in performing oral sex on her. These requests are almost all immediately followed by an affirmative response in the form of a “yeah” from S.B. or, in the case of the third request, an interruption by the word “please” repeated twice, leading to a fourth request by Private Vu, the exchange developing as follows from there:
>
> Private Vu: “Is that what you want?
>
> S.B.: Yeah!
>
> Private Vu : With your permission?
>
> S.B.: Yeah! Just eat me… Come…”
>
> [49] Following this exchange, S.B. is heard mumbling mostly indiscernible words, although the words “pussy” and “right now” are discernable. Private Vu says again at 39 seconds “You want me to eat you? That is your permission?” The immediate reply from S.B.: “Yeah”. Private Vu then formulates one last question: “You’re give me fully permission right now (sic)?” The immediate reply from S.B.: “Yeah” followed by a few words, including the word “pussy” said twice.
>
> [Emphasis added].

477, at para. 69. While it may have been helpful to this Court in deciding this appeal, fortunately, its absence did not hamper our ability to engage in meaningful appellate review of the decision. In the future, such documents should be made exhibits.

[12] The Military Judge clearly states that he does not consider the number of requests as demonstrative that the apparent agreement is "more likely to constitute subjective consent". Rather, the immediate nature of S.B.'s responses was, for him, a relevant factor to consider in determining whether S.B. "had an operating mind just before the touching subject of the charge began".

[13] The Military Judge then makes findings related to the sex act, which start immediately after the last response by S.B. He notes that as Pte Vu is making an up and down motion suggestive of "licking", S.B. lifts her head thereby gaining a "direct line of sight to Corporal Vu", at the time saying what appears to be "Piew, you're onto my pussy right now right? Tasty?". The Military Judge then concludes that S.B. pronounces four syllables ending with "right now" before making a "loud moaning sound". The Military Judge says that by referring to a "loud moaning sound", he is not suggesting S.B. experienced pleasure, as that is not relevant to his analysis. He simply points out that, coupled with his line of sight observations, S.B.'s utterances would potentially be relevant in his assessment of whether S.B. had an operating mind at the time of the touching.

[14] The Military Judge then meticulously dissects the video recording, breaking it down into relevant segments, which quite frankly, greatly assists us in determining the disposition of the within appeal. He stated, at para. 52:

> "There is mumbling and moaning throughout the first part of the sexual activity, including loud moaning when one of S.B.'s knee (sic) appears to be repositioned near Private Vu's face, appearing on the screen on two occasions at 1 minute 33 and 1 minute 39. There is a period of silence of 38 seconds between 2 minutes 35 and 3 minutes 13 when S.B. moans again. Another period of silence from S.B. of 16 seconds occurs between

> 3 minutes 53 and 4 minutes 09. The silence is interrupted by Private Vu saying words which appear to be "You like that?" or "like that?" which are immediately followed by moaning from S.B. The prosecutor has agreed when this portion of the audio/video recording was played at my request during submissions that the moaning from S.B. did appear to be in reaction or response to the words uttered by Private Vu immediately before.

[15] In addition to the video, the Military Judge also considered a voluntary statement provided to Military Police by Pte Vu and the testimony of 4 individuals; namely, S.B., Aviator Stanutz, Aviator Leblanc and Pte Power and documentary evidence admitted during their testimony. The Military Judge had little assistance from the witnesses called by the prosecution. S.B.'s last memory of the evening is sitting beside Pte Vu. The Military Judge concluded that Aviator Stanutz was "significantly challenged as to her recollection of the events". The Military Judge observed that at the outset of her cross-examination, Aviator Stanutz "was caught having lied in her direct examination about her underage drinking". She also had to admit in cross-examination that she had heard S.B. saying to Pte Vu at the party that she wanted him to "come back to her room". The Military Judge observed that Aviator Stanutz had significant difficulties in cross-examination in answering questions about "details of her journey to S.B.'s room" and "why she had to leave Pte Vu alone with S.B." and why she had to take Aviator Leblanc with her downstairs to recover her phone.

[16] While Aviator Leblanc was not caught in direct lies, as was the case with Aviator Stanutz, his testimony did not fare well. The Military Judge observed that Aviator Leblanc had difficulties relating a logical sequence of events, even in direct examination. The Military Judge observed that Aviator Leblanc left Pte Vu alone with S.B. all the while saying he (Aviator Leblanc) did not trust Pte Vu to be alone with her. While the Military Judge's assessment of

Aviator Leblanc's direct testimony is significantly less than flattering, cross-examination fared even worse. The Military Judge concluded the cross-examination "[…] revealed significant inconsistencies, gaps and illogic propositions which he did not try to explain". For example, he could not explain how S.B. "could have been handled as he described" given the challenges faced during the journey to her room. He also could not explain how his description of events after S.B. had been left alone in the room, "would work", given the timing revealed in the video. As for Pte Power, he admitted that his recollection of events on the night of the incident was foggy. Most of his testimony related to discussions about a gathering of the principal actors in this scenario, which occurred the following morning.

[17] The Military Judge found S.B. to be credible. He accepted her version of events to the extent she could recollect them. He even accepted her explanation that she misled Pte Vu the next morning when she texted him to say "it's OK I wanted it". Pte Vu apparently experienced some relief upon reading that text. However, the Military Judge accepted her evidence that she had no recollection of events and sent the text to Pte Vu in an attempt to "move on and forget about the unfortunate incident of the night before".

[18] As already mentioned, Aviator Stanutz and Aviator Leblanc did not fare nearly as well as S.B. as it relates to their credibility and reliability. Importantly, the Military Judge concluded their evidence, the only witnesses, other than Pte Vu, who could be helpful in assessing S.B.'s capacity to consent, "raised significant credibility and reliability" issues. Aviator Stanutz lied in direct examination and, on cross-examination, admitted that someone else had bought alcohol for her. The Military Judge concluded that her description of Pte Vu holding a phone to the side of

his face to record “himself while performing oral sex on S.B. was so far removed from reality” that he questions the reliability of her recollection of other events of that evening. The Military Judge concluded she had a dangerous propensity to embellish her testimony. Aviator Leblanc provided significantly different details about the journey from the party to S.B.’s room. While the Military Judge acknowledged that it is not unusual for witnesses to have differing recollections of events, Aviator Leblanc demonstrated the least confidence in his recollection of events. This, despite the fact he was sober at the time. The Military Judge was particularly troubled with Aviator Leblanc’s testimony about S.B.’s apparent fall in the staircase and the implausibility of his recollection of events after leaving S.B.’s room. With respect to both Aviator Stanutz and Aviator Leblanc, the Military Judge concluded it would be dangerous to rely upon anything they said in court to convict Pte Vu unless supported by other credible evidence.

[19] The Military Judge refers to the voluntary statement provided by Pte Vu to the Military Police. In that statement, Pte Vu describes S.B. being dragged or carried to her room. The Military Judge appears to accept this version of how S.B. arrived at her room over the evidence offered by Aviators Stanutz and Leblanc. We will have more to say about Pte Vu’s statement below.

[20] Pte Vu also describes S.B. as being, at times as “far up to ten” on an assessment of her level of intoxication on a scale of 1 to 10, while settling on a level of eight to nine, while he was alone with her. The Military Judge considered Pte Vu’s frankness to Military Police as demonstrative of his credibility, bearing in mind that his version was not tested under cross-examination.

[21] In assessing capacity to consent, the Military Judge noted that S.B.'s deterioration of motor skills and balance were a considerable focus of the Crown's arguments. He considered S.B.'s description of her state of intoxication that night. He placed considerable weight on the video, especially S.B.'s immediate responses to questions posed by Pte Vu, as well as S.B.'s other context-appropriate utterances, right up until the moment that others walked in, to conclude S.B. had capacity to consent and continued to consent throughout the sex act.

[22] The Military Judge's doubt about proof of the *actus reus* remained even following the testimony from Aviator Stanutz and others that S.B. was asleep when they barged into the room. The Military Judge's doubts remained after he considered Pte Vu's statements to Military Police that S.B.'s eyes were closed. However, there is more.

[23] The Military Judge did not rely solely upon his conclusion regarding the failure of the prosecution to prove each element of the *actus reus* of the offence. In his closing paragraphs, he provided an alternative path to acquittal. In his closing paragraph, relating to the allegation of sexual assault, the Military Judge stated:

> [105] I wish to state that even if I had been convinced beyond a reasonable doubt that S.B. had entered into a state of reduced mental presence, which would have made her lose consciousness or her operating mind… I would still have found Private Vu not guilty of the offence of sexual assault. Indeed, from his position at the foot of the bed performing oral sex on S.B., with his head between her legs, it could not be demonstrated beyond a reasonable doubt that Private Vu knew that S.B. had ceased to consent to the sexual activity underway at the time, especially that she was still making moaning noises.
>
> [106] In light of the evidence of agreement to the sexual activity, the movements, words and noises made by S.B. in the course of the activity including moaning until the very end of the touching

> and beyond, the position of Private Vu and his statement to police to the effect that he only noticed that S.B. had her eyes closed and had potentially passed out after he had been interrupted by the entry of people in the room, I could not conceivably have found that Private Vu knew or should have known or was reckless or wilfully blind as to a risk that S.B. had ceased to consent to the sexual activity going on at the time.
>
> [107] I would have been left with a reasonable doubt as to the *mens rea* and would have found Private Vu not guilty nevertheless.
>
> [Citations omitted].

C. *Grounds of Appeal*

[24] In the Notice of Appeal, the Appellant sets out only one ground of appeal; namely, "the Military Judge erred in concluding that the complainant had the capacity to consent to the sexual activity in question". In his Memorandum of Fact and Law, the Appellant amends those grounds of appeal, as is permitted by Rule 7(3) of the *Court Martial Appeal Court Rules* (SOR/86-959), as they then were. The grounds now read:

> 1. Did the military judge err in concluding that the complainant was capable of consenting to this sexual activity? This question can be separated in three sub-issues: Did the military judge err by:
>
> i: Failing to give legal effect to the facts found in the video recording;
>
> ii: Relying on improper inferences;
>
> iii: Failing to resolve material evidentiary questions?
>
> 2. Did the military judge err in his obiter dictum by failing to consider the totality of the circumstances in his assessment of the defence of honest but mistaken belief in consent?

D. *Analysis*

[25] At the hearing of the appeal, the Appellant relied heavily on the submission that the Military Judge erred in law by not considering the entirety of the evidence. The Supreme Court of Canada has affirmed that it is an error of law for a trial judge to fail to consider the whole of the evidence in relation to the ultimate issue of guilt or innocence: *R. v. Morin*, [1992] 3 S.C.R. 286, 76 C.C.C. (3d) 193; *R. v. Walker*, [2008] 2 S.C.R. 245, 2008 SCC 34, *and J.M.H, supra.* However, as Cromwell J. cautioned in *J.M.H.*, at para. 32: "A trial judge is not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed." Similarly, in *Walker*, Binnie J. warned, at para. 2: "[…] Caution must be taken to avoid seizing on perceived deficiencies in a trial judge's reasons for acquittal to create a ground of 'unreasonable acquittal' which is not open to the court under the provisions of the Criminal Code." This was followed by the statement of principle in *Biniaris*, mentioned at the beginning of our reasons – Canadian law does not recognize the concept of an unreasonable acquittal.

[26] The Appellant faults the Military Judge for not having placed sufficient emphasis on the pre-video recording evidence and the post-video recording evidence. We disagree. That the Military Judge focused on the video is undisputed. However, there is evidence of "capacity" immediately prior to the sexual activity that militates against this argument. The only witnesses who could testify to events leading up to, and immediately after the sex act, Aviators Stanutz and Leblanc were found to be unreliable by the trial judge. It is not the role of an appeal court to resurrect unreliable evidence or rehabilitate unreliable witnesses.

[27] The Appellant also raises concerns about the Military Judge's failure to fully consider the statement provided to the Military Police by Pte Vu, particularly his references to S.B. having

"passed out". However, a trial court is presumed to have considered all of the evidence (*Solis Mendoza v. Canada (Citizenship and Immigration)*, 2021 FC 203 (CanLII), 2021 CarswellNat 626 at para. 37). Moreover, a trial court need not recite all of the evidence: *J.M.H.*, at para. 32.

[28] The Military Judge made reference to Pte Vu's statement on several occasions. He was keenly aware of its relevance to the issues in dispute, especially as it related to the complainant's degree of intoxication. He acknowledged that Pte Vu referred to the fact that S.B. appeared to be unconscious at the end of the sex act, when others barged into the room. That was, in effect only the second time Pte Vu appears to have "looked up" after beginning the sex act. On the first occasion when he looked up, he had enquired about S.B.'s enjoyment. Her response was immediate. On the second occasion, when he looked up, his attention was first drawn to the door and people entering. When Aviator Stanutz asked him, angrily, what he was doing, Pte Vu, in a matter of fact tone, told them that he was performing oral sex on S.B. According to Pte Vu's statement, he did not know that S.B. was unconscious at any time during the sex act. There was no evidence that Pte Vu knew S.B. was sleeping prior to the moment he raised his head as the door was opened. At that point the sex act had ended. Whether S.B. was asleep immediately prior to the door opening is questionable given that the same type of responsive sounds can still be heard coming from her immediately prior to the door being opened.

[29] We acknowledge that the Military Judge did not consider Pte Vu's statement to the extent that our colleague does in her dissenting reasons. Although we might have given Pte Vu's statement greater weight, or used it in a different way, we cannot agree that the Military Judge failed to consider the statement in his assessment of the evidence. In our view, the Military

Judge's treatment of this evidence did not give rise to the legal error in *J.M.H.* and the other cases in this line of authority. Accordingly, we would dismiss this ground of appeal.

[30] There is another reason why this appeal must be dismissed. As we have noted above, the Military Judge entertained a doubt about whether Pte. Vu had a culpable state of mind at the relevant time. We have reproduced his reasons on this issue in para. 23, above. Although his thinking on the issue was not fully developed in his reasons (understandably, because of his *actus reus* finding), the Military Judge also entertained doubt about Pte. Vu's state of knowledge at the relevant time. It is clear from his reasons reproduced in para. 23 of these reasons, the Military Judge found that Pte Vu did not know, nor should he have known, nor was he reckless or wilfully blind as to a risk that S.B. had ceased to consent. As stated by Justice Moldaver for the majority in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, it is clear that the defendant's knowledge, recklessness, or wilful blindness as to the complainant's lack of consent is required:

> 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*. […] 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).

[31] We see no error in the Military Judge's analysis of this issue. In the circumstances, the Military Judge refused to equate brief moments of silence during the sex act with unconsciousness. Given the short period of time the sex act was being performed, the brevity of the periods of silence (38 seconds and 16 seconds respectively), the consent at the beginning, the nature of the sex act and the fact it did not change from that consented to, the Military Judges' reasonable doubt about proof of *mens rea* cannot be faulted.

[32] We would dismiss this ground of appeal.

[33] Although this is sufficient to dispose of this appeal, we wish to endorse two of the observations made by our colleague in her dissenting reasons.

[34] First, we agree with our colleague's observation that the Military Judge improperly engaged in speculation about whether S.B. feigned sleep when other military personnel barged into her room and removed Pte Vu from the bed. This proposition was not put to S.B. during her testimony. She never had a chance to respond; although given her lack of memory about the entirety of the event, she may not have been able to offer a response. Nonetheless, this theory makes little sense in view of the fact that she was found in a prone position, with her genitals exposed. If she were attempting to avoid embarrassment, one would not have expected the complainant to feign sleep while exposed in this manner.

[35] We also share our colleague's concern regarding the Military Judge's musings about S.B.'s level of alcohol consumption that night, and the lack of adverse effects (i.e., lack of a hangover, vomiting, etc.) the following day. These were non-issues. All of the evidence, including Pte. Vu's statement, supported the conclusion that S.B. was seriously intoxicated. Relatedly, we share her criticism of the Military Judge's comments about the lack of evidence that might corroborate S.B.'s level of intoxication, speculating about what expert toxicology evidence might have contributed to the case. While expert evidence is sometimes adduced in cases like this, it is not a pre-condition to a successful prosecution. Complainants are capable of self-authenticating their own level of intoxication.

[36] However, we do not view these passages in the Military Judge's reasons as consequential. Assuming they could be characterized as legal errors, they must be reasonably thought to have a material impact on the acquittal. As set out in *R v Graveline* 2006 SCC 16; [2006] 1 S.C.R. 609 at para. 14:

> […] It is the duty of the Crown, in order to obtain a new trial, to satisfy the appellate court that the trial judge's error might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal.

[37] In our view, these observations by the Military Judge did not undermine his fundamental finding that the Crown had failed to prove a critical feature of the *actus reus* of sexual assault beyond a reasonable doubt. The decision was reached after a thorough review of the evidence. The Military Judge's reasoning is clearly explained and free from stereotypical thinking about complainants in sexual assault cases.

IV. Conclusion

[38] In conclusion, we are satisfied that the Military Judge made no legal error in his analysis leading to Pte Vu's acquittal. Although we have taken issue with some of the Military Judge's findings (as discussed in paras. 34 and 35, above), they had no bearing on the verdict that he reached. In the event we are incorrect when we conclude the Military Judge made no legal error, we would rely upon s. 241 of the *National Defence Act*, R.S.C., 1985, c. N-5, which states: "Notwithstanding anything in this Division, the Court Martial Appeal Court may disallow an appeal if, in the opinion of the Court, to be expressed in writing, there has been no substantial miscarriage of justice". We would dismiss this Crown appeal.

"B. Richard Bell"

Chief Justice

"Gary Trotter"
J.A.

McVEIGH, J.A. (Dissenting Reasons)

I. Introduction

[39] The Respondent, Pte Vu, was acquitted of four charges of sexual assault, voyeurism, and non-consensual publication of an image under s. 130 of the *National Defence Act*, R.S.C. 1985, c. N-5. The Appellant, His Majesty the King, appeals only the acquittal of one count of sexual assault.

[40] On the night of January 10, 2020, a party took place in a member of the Personnel Awaiting Training ("PAT") Platoon's room, where alcohol was consumed and drinking games were played. The complainant, S.B., showed signs of severe alcohol-induced intoxication at the party. Shortly thereafter, Aviators Stanutz and Leblanc dragged S.B. back to her room. When the Aviators left the room, Pte Vu began recording and performed oral sex on S.B. Approximately five minutes into the video recording, Aviator Stanutz returned with colleagues, who physically removed Pte Vu from the room.

[41] At trial, the Appellant alleged that S.B. was incapable of consenting to the sexual activity due to her state of intoxication. Alternatively, the Appellant argued S.B. was unconscious for portions of the sexual activity. The Military Judge was left with a reasonable doubt that S.B. was

incapable of consenting or unconscious during the acts and acquitted the Respondent: *R. v. Vu*, 2021 CM 4012, 2021 CarswellNat 9938.

[42] In this appeal, the Appellant alleges that the Military Judge erred by: (i) finding S.B. capable of consenting to sexual activity; and (ii) failing to analyze the totality of the context in assessing Pte Vu's honest but mistaken belief.

[43] For the reasons that follow, I would allow the appeal and order a new trial.

II. Facts

A. *Background*

[44] S.B. arrived at Borden in early January 2020 and was a member of the PAT Platoon. In her first few days she made acquaintance with Pte Vu, who was also a member of the PAT Platoon.

[45] The night of January 10, 2020, a party took place in a room on the ground floor of the T-115 shacks. Pte Vu invited S.B. to come to the party and he obtained alcohol for both of them. At the party, approximately ten soldiers were present and most played a drinking game. Another soldier consumed too much alcohol and after throwing up went to sleep in his bed in the room the party was in. S.B. participated and became increasingly intoxicated. Her last memory of that evening was talking to Pte Vu, as the room was spinning and she felt that she needed to sit down or go to bed. Her next memory is waking up at 3am the following morning.

[46] Vu's evidence was that S.B. "started blacking out". At some point she fell off her chair and could not stay on it, which prompted Aviators Stanutz and Leblanc to take her back to her room with "significant assistance". Both testified that S.B. had difficulty using her legs, resulting in them carrying her, and Pte Vu stated that S.B. was "dragged" to her room. While the Aviators were carrying S.B. to her room, Pte Vu followed behind but did not assist.

[47] Once in S.B.'s room, the Aviators placed her into bed. Aviator Stanutz removed her shoes and then covered her up with a blanket. Both testified that she was not moving and her eyes were closed.

[48] Prior to the Aviators leaving S.B.'s room, Pte Vu expressed concern about being left alone with S.B. because he remembered his Operation Honour training.

[49] Pte Vu's voluntary statement to the Military Police indicated that, within a few minutes of being alone in the room with S.B., she asked him to perform oral sex on her. It was at this point that he began to video record the events in the room with his phone. Pte Vu explained that, in light of his Operation Honour training, he wanted to record S.B.'s apparent consent. S.B. had no knowledge of the video recording.

[50] The video recording shows Pte Vu asking multiple times if S.B. consents to the sexual act he is about to perform. While S.B.'s vocalizations sound mumbled, slurred, and faint in the video, the Military Judge identified at least eight affirmative responses from S.B. to the different

inquiries made by Pte Vu. In the video, he alone removes her pants, contrary to his statement that she helped him.

[51] The sexual activity ended when, approximately five minutes after the start of the recording, several colleagues returned to the room. Immediately they became angry about what they were witnessing. S.B. appeared to be asleep or unconscious at that time and did not stir during the commotion when her colleagues returned.

[52] A blanket was placed over S.B.'s exposed genitals and Pte Vu was physically removed from the bedroom. Before they could remove him, he recovered his cellphone, which was still recording.

B. *Reasons of the Military Judge*

[53] The prosecution called four witnesses: S.B., Aviator Stanutz, Aviator Leblanc, and Pte Power, who Pte Vu showed the video recording to. Pte Vu did not testify and no other witness testified for the defence. However, Pte Vu had participated in a voluntary interview with Military Police on March 11, 2020 and the transcript of the interview was entered as an exhibit at trial.

[54] The Military Judge explained the credibility of the witnesses in this case was not a major factor, given the determination he made about S.B.'s capacity to consent was "largely assessed on the basis of the video recording of the events". The Military Judge found S.B. credible and accepted her evidence. However, the other witnesses raised significant credibility and reliability issues for him.

[55] Although the Military Judge acknowledged that S.B. showed the indicia of impairment, it did not convince him beyond a reasonable doubt that she lacked an understanding to appreciate all the conditions of subjective consent.

[56] The Military Judge noted that, while it was not necessary to make a finding on whether Pte Vu had the requisite *mens rea*, he would nonetheless have determined this issue in his favour. The Military Judge explained, because of Pte Vu's position at the foot of the bed while engaging in oral sex, he could not have known that S.B. had ceased to consent at the time. Accordingly, the Military Judge held he could not have found that Pte Vu was reckless or wilfully blind as to a risk that S.B. had ceased to consent.

III. Issues

[57] There are three issues in this appeal:

A. Did the Military Judge fail to consider all of the evidence cumulatively?

B. Did the Military Judge assess the evidence based on a wrong legal principle?

C. What is the effect of the errors?

IV. Standard of Review

[58] The Appellant's right of appeal from an acquittal of an indictable offence is limited to "any ground of appeal that involves a question of law alone" (*National Defence Act* (R.S.C., 1985, c N-5) s. 230.1(b); *Criminal Code* (R.S.C., 1985, c. C-46) s. 676(1)(a)). The Appellant is not entitled to contest an acquittal on the basis of an error of fact or of mixed fact and law.

[59] In *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197 [*JMH*], the Supreme Court of Canada defined the proper scope of a Crown appeal from acquittal when it is based on a trial judge's assessment of the evidence. The Court recognized four, non-exhaustive grounds of appeal in which alleged mishandling of the evidence may constitute an error of law alone (at paras. 23-31):

a) Making a finding of fact for which there is no evidence;

b) The legal effect of findings of fact or undisputed fact;

c) The assessment of the evidence based on a wrong legal principle;

d) The failure to consider all of the evidence in relation to the ultimate issue of guilt or innocence.

[60] A question of whether consent was obtained pursuant to s. 271 of the *Criminal Code* has long been a question of mixed fact and law, therefore reviewable on the standard of "palpable and overriding error": *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 37. As succinctly explained in *R. v. J.C.*, 2021 ABPC 262, [2021] A.W.L.D. 4609 at para. 107, "[w]hile what constitutes consent is a question of law, whether or not the complainant consented to sexual intercourse with [an accused] is a question of fact." The *Criminal Code* provides several circumstances where there can be no consent: see ss. 265(3), 273.1(2), and 273.1(3).

[61] In recent years, Parliament has broadened and clarified circumstances where there can be no consent. In 2018, Parliament made amendments to the *Criminal Code* by enacting Bill C-51, *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act* (1st Sess, 42nd Parl, 2018 (assented to 13 December 2018), S.C. 2018, c. 29[Bill C-51]). Bill C-51 amended several sections relating to sexual

assault provisions to reflect the Supreme Court's decisions in *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440 [*J.A.*] and *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 1999 CanLII 711 (SCC).

[62] Most relevant to this case, is the amendment of s. 273.1 of the *Criminal Code*, which added ss. (1.1) and (1.2) as follows:

Meaning of consent	**Définition de consentement**
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.	**273.1 (1)** Sous réserve du paragraphe (2) et du paragraphe 265(3), le consentement consiste, pour l'application des articles 271, 272 et 273, en l'accord volontaire du plaignant à l'activité sexuelle.
Consent	**Consentement**
(1.1) Consent must be present at the time the sexual activity in question takes place.	**(1.1)** Le consentement doit être concomitant à l'activité sexuelle.
Question of Law	**Question de droit**
(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.	**(1.2) La question de savoir s'il n'y a pas de consentement aux termes du paragraphe 265(3) ou des paragraphes (2) ou (3) est une question de droit.**
No consent obtained	**Restriction de la notion de consentement**
(2) For the purpose of subsection (1), no consent is obtained if	**(2)** Pour l'application du paragraphe (1), il n'y a pas de consentement du plaignant dans les circonstances suivantes :

(a) the agreement is expressed by the words or conduct of a person other than the complainant;	**a)** l'accord est manifesté par des paroles ou par le comportement d'un tiers;
(a.1) the complainant is unconscious;	**a.1)** il est inconscient;
(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);	**b)** il est incapable de le former pour tout autre motif que celui visé à l'alinéa a.1);
(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;	**c)** l'accusé l'incite à l'activité par abus de confiance ou de pouvoir;
(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or	**d)** il manifeste, par ses paroles ou son comportement, l'absence d'accord à l'activité;
(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.	**e)** après avoir consenti à l'activité, il manifeste, par ses paroles ou son comportement, l'absence d'accord à la poursuite de celle-ci.
Subsection (2) not limiting	**Précision**
(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.	**(3)** Le paragraphe (2) n'a pas pour effet de limiter les circonstances dans lesquelles il n'y a pas de consentement de la part du plaignant.
[Emphasis added]	[Nous soulignons]

[63] Since coming into force, no court has yet to meaningfully interpret s. 273.1(1.2). Although some appellate courts have referenced the provision and recent amendments in

passing, none have engaged with an analysis as to the effect of the provision: see for example *R v Kirkpatrick*, 2020 BCCA 136, [2020] B.C.J. No. 791 (QL) at paras. 14 and 80; *R. v. Kwon*, 2020 SKCA 56, 386 C.C.C. (3d) 553, at para. 24.

[64] Turning to secondary sources, Professor Hamish C. Stewart in *Sexual Offences in Canadian Law* (Toronto: Thomson Reuters Canada Limited, 2022) [Stewart], at 3:8, suggests the preferred interpretation of s. 273.1(1.2) is the circumstances included in ss. 265(3), 273.1(2), and 273.1(3) define, as a matter of law, where there can be no consent (i.e. the complainant is incapable of consenting). Professor Stewart explains this as follows:

> It is probably best interpreted as reinforcing the general principle that neither a finding of consent nor a finding of a mistaken belief in consent cannot be based on any of the circumstances mentioned in these subsections because they define situations where, as a matter of law, there is no consent.

[65] Accordingly, in my view, s. 273.1(1.2) can be best understood as broadening the scope of where there can be no consent to reflect modern Supreme Court jurisprudence. An appellate court may review the circumstances enumerated by ss. 265(3), 273.1(2), and 273.1(3) as questions of law on the correctness standard.

[66] However, this does not open the door to an appellate court reviewing a trial judge's factual findings of whether or not the complainant consented to sexual interactions with an accused on the correctness standard. Rather, on appeal from an acquittal, the Crown remains limited to arguing discrete legal errors. Therefore, absent a legal error, an appellate court cannot interfere with the trial judge's findings and conclusion on whether consent was obtained.

[67] Before a court on appeal interferes with the decision of a trial judge, the court must also be satisfied that the trial judge's error might reasonably be thought to have had a material bearing on the verdict (*R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 at para. 14 [*Graveline*]). While, the Appellant is not required to persuade this Court that the verdict would necessarily have been different, the onus on the Appellant is a heavy one (*Graveline* at para. 15).

[68] It is through the lens of this right of appeal that the alleged errors are considered.

V. Analysis

A. *Did the Military Judge fail to consider all of the evidence cumulatively?*

(1) Failure to Conduct a Cumulative Assessment

[69] "… [T]he capacity to consent is a cumulative assessment, requiring the degree of understanding necessary to appreciate all the conditions of subjective consent" (*R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375 at para. 62 [*G.F.*]). A trier of fact must take into consideration all of the circumstantial evidence relevant to the complainant's subjective state of mind: *R. v. Al-Rawi*, 2018 NSCA 10, 359 C.C.C (3d) 237 at para. 73 [*Al-Rawi*]. *R. v. Muise*, 2016 NSCA 34, 373 N.S.R. (2d) 309 [*Muise*] dealt with a trial judge's treatment of direct and circumstantial evidence. There, the Crown appealed from an acquittal of robbery on the basis that the trial judge erred by failing to consider the evidence as a whole. The Nova Scotia Court of Appeal held that the trial judge siloed the circumstantial evidence and did not use the evidence as part of his analysis of the direct evidence (*Muise* at para. 23). In this case, I find the trial judge committed the same error for the reasons below.

[70] The Appellant submitted that the Military Judge failed to resolve issues about material evidence. The Appellant identified two problems: first, the Military Judge only made findings with respect to the witness testimony on collateral questions; second, the Military Judge did not make definitive findings of facts on material portions of the evidence.

[71] The Respondent argues that the Appellant's position amounts to an argument against the Military Judge's factual findings. I agree with the Respondent that the Appellant's characterization of the issues here amounts to a submission that Pte Vu's acquittal was unreasonable, a ground of appeal not recognized in Canadian law.

[72] However, there is a distinction to be made between factual findings and legal errors in how a trial judge treated the evidence and subjected it to the standard of proof. Like in *Muise*, this issue does not relate to the Military Judge's factual findings but instead pertains to *how* he treated the evidence cumulatively. These are two separate issues, one according deference to the trial judge that cannot be interfered with, the other raises a question of law that can be reviewed on a standard of correctness.

[73] *G.F.* is clear that an analysis on capacity to consent requires a cumulative assessment, which looks to both circumstantial and direct evidence. Although a trial judge is not required to refer to every item of evidence considered, the standard of proof must apply to the evidence as a whole: *J.M.H.* at para. 31.

[74] A cumulative assessment means considering the evidence as a whole, not subjecting individual pieces of evidence to the standard of proof.

[75] The Military Judge's reasons demonstrate that he narrowed his focus to the direct video evidence. He explicitly states that the "…subject of the first charge will be largely assessed on the basis of the video recording of the events".

[76] The Military Judge separates out his decision into several components. First, he sets out the law and extensively outlines the evidence in this case. He then comments that he will focus on the sexual activity and treat what occurred before or after as circumstantial evidence. This, in my view, is the correct approach.

[77] However, his analysis falls short of then actually following this approach. When the Military Judge turns to analyze the evidence, he explicitly acknowledges that he narrowed his focus to the video evidence. After reviewing the circumstantial evidence, he states:

> Yet this evidence pales in comparison with the key evidence in this case, namely the video recording, which provides visual and audio evidence covering the entire duration of the touching of a sexual nature between Pte Vu and S.B.

[78] An understandable temptation is to focus on the direct evidence alone where there is a video recording of the incident but "[i]t was incumbent upon the judge in this case, at some point to ask if the circumstantial evidence corroborated the direct evidence" (*Muise* at para. 34). I find the Military Judge failed to consider this question.

[79] The Military Judge's analysis on S.B.'s capacity to consent with an operating mind fails to cumulatively consider the circumstantial evidence as well as the direct evidence.

[80] In this circumstance, an assessment of the complainant's subjective state of mind cannot only look to the video evidence. The video does not show S.B.'s face and it is difficult to ascertain her subjective state of mind from the recording alone. The Military Judge approached the video evidence as if it was definitive of consent, that it alone could demonstrate an operating mind. As stated in *Al-Rawi* at para. 60, "[m]ere awareness of the activity is also insufficient to ground capacity …". This is why a cumulative assessment is vital to the determination of whether a complainant has an operating mind.

[81] In my view, the assessment of S.B.'s subjective ability to consent required a cumulative assessment. Pte Vu's statement to the Military Police should have been a key component in this analysis as well as other witnesses' evidence of S.B.'s level of intoxication. The video evidence *and* the circumstantial evidence should have been considered, as required by the prescribed cumulative assessment in *GF*.

[82] Where a trial judge fails to consider all of the evidence in relation to the ultimate issue of guilt or innocence, it will amount to an error of law: *J.M.H.* at para. 31. *J.M.H.* is clear that "[a] trial judge is not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed" (at para. 32).

[83] "There is no need to prove that the trial judge was alive to and considered all of the evidence, or answer each and every argument of counsel" (*R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 at para. 30). A reviewing court must be cautious to avoid seizing on perceived deficiencies to create a ground of 'unreasonable acquittal' (*R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245 at para. 2 [*Walker*]).

[84] I acknowledge that the Military Judge did recognize that the individual components of evidence existed. However, he did not conduct a cumulative assessment of the evidence when determining if she had an operating mind, which was the ultimate issue to be determined regarding guilt or innocence as required by *J.M.H.* at para. 31

(2) The Accused's Statement

[85] Pte Vu participated in a voluntary interview with military police on March 11, 2020. The video and transcript of this interview were entered as exhibits at trial. The Military Judge found Pte Vu's account credible, particularly his frankness with the Military Police, which at times was unflattering.

[86] Pte Vu's statements from the interview and their implications were not considered in their totality. There are at least 12 different assertions where Pte Vu clearly acknowledges that S.B. was unconscious or asleep toward the end of the sexual interaction as well as stating her high level of intoxication:

Citation	Military Police Interview
Appeal Book, Volume VII, Pages 1214-1215, Lines 18-4	MCPL Sauvé-Raiche: Ok. So [SB], where do you think she was that night? PTE Vu: That night? Nine, closer -- because, like, throughout this investigation, like, yeah, she passed out when I, like, went down on her but I didn't know she passed out at the time because she was awake when she gave me yes and she was awake when I went down on her until Stanutz walked in and she was, like "What the fuck?" and I looked up and I realized, oh, she's passed out. And Kirshin came throwing me off the bed.
Appeal Book, Volume VII, Page 1230, Lines 1-11	MCPL Sauvé-Raiche: Okay. So earlier you said out of consciousness and unconscious, right? When was she unconscious? When did she -- PTE Vu: I didn't know when she passed out because I was looking down. Doing my thing. MCPL Sauvé-Raiche: Okay. PTE VU: I realized that she was passed out when Stanutz walked in and she was, like, "What the fuck?" and then, when I looked up, I was just, like, oh, she passed out. Holy shit. And that's when Kirshin came in and pulled me off.
Appeal Book, Volume VII, Page 1230 Lines 14-23	MCPL Sauvé-Raiche: Okay. So Stanutz comes in. You look up. What do you see? Describe me [S.B.]. PTE VU: She passed out. She's sleeping. MCPL Sauvé-Raiche: Okay. PTE VU: Or what looks like she was sleeping, anyway. MCPL Sauvé-Raiche: How's her eyes? PTE VU: Closed.
Appeal Book, Volume VII,Page 1232 Lines 9-12	PTE Vu: No. So when I -- I know that when I got pulled off and then Stanutz was bitching at me and then she was passed out. Stanutz grabbed, like, a sheet of, like, a blanket and threw it over [S.B.'s] body.

Appeal Book, Volume VII, Pages 1232-1233, Lines 23-7	MCPL Sauvé-Raiche: Do you think it's possible that she passed out, like, how early do you think she passed out? Do you have any idea? Or any indication? PTE VU: Now -- now that I think of it, maybe, like, she passed out while I was going into it because I know she was making noises and moaning when I went down on her. I'm sure you saw the video. MCPL Sauvé-Raiche: M hmm PTVE Vu: But then, like, that's when I realized, like, when Stanutz walked in and she passed out. I don't -- I can't really recall or don't know what to say, like, that's when I noticed she passed out. If I knew she passed out, originally, then I would have, like, looked up and be, like, "Hey, are you okay?" I'd, like, tap her a bit. I'm like, "Hey, are you okay?" But I just didn't know she passed out.
Appeal Book, Volume VII, Page 1242, Lines 5-13	PTE VU: She could have stopped me. She could have said no. MCPL Sauvé-Raiche: Even if she was passed out? PTE Vu: Well, I didn't ask her while she was passed out. MCPL Sauvé-Raiche: Okay. PTE VU: I didn't know that she passed out at the time, too, on top of that.
Appeal Book, Volume VII, Page 1253, Lines 9-18	MCPL Sauvé-Raiche: You move the blankets. You take her pants down. PTE VU: But she also took it down. MCPL Sauve-Raiche: Okay. Is she -- at the moment where you're ready to go down on her, how's her eyes? PTE Vu: It was awake, like, it wasn't, like, fully awake but, like, it was just, like, relaxed awake, like, she was, like, she was, like, like, I don't know, like, and then that's when I asked for her permission
Appeal Book, Volume VII, Page 1265, Lines 15-19	MCPL Sauvé-Raiche: If you don't have any other questions for me – do you have any questions? PTE VU: Maybe from this night. You know at the beginning and middle, she was awake but, towards the end, she passed out and I didn't know that.

[Emphasis added]

[87] The closest the Military Judge comes to an assessment of this evidence is when he acknowledged it in isolation of other evidence that S.B.'s eyes were closed and that she had "potentially" passed out. Yet, the evidentiary record includes evidence from a number of sources, including the accused, which reveals that S.B. was passed out or asleep.

[88] As the Supreme Court said in *J.A.* at para. 3, consent requires an ongoing, conscious state of mind while the sexual activity is occurring. Unconsciousness is also an explicitly enumerated circumstance where the complainant is incapable of consenting, per s. 273.1(2)(a.1) of the *Criminal Code*.

[89] Although the Military Judge did not need to respond to every piece of evidence, he had an obligation to cumulatively assess evidence that went to the core of this case. *J.M.H.* explains that the sufficiency of the trial judge's reasons should be "measured not in the abstract, but as they respond to the substance of what was in issue" (at para. 32 citing *Walker* at para. 20).

[90] Pte Vu's statements that S.B. was unconscious had a direct bearing on the Military Judge's assessment of her capacity to consent – it was the substance of what was in issue. The Military Judge noted that the only real issue with respect to the *actus reus* was whether S.B. had an operating mind with the capacity to consent given her level of intoxication. As such, the failure to engage properly with this evidence is an error.

(3) Reasonable Doubt based on Speculation

[91] In cases where the complainant has little or no recollection of events, as is the case here, absence of consent may be established through circumstantial evidence. The burden on the Crown is to prove beyond a reasonable doubt that guilt is the "sole rational inference" to be drawn from the evidence (*R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42 at para. 34).

[92] Aviators Stanutz and Leblanc indicated that S.B. "passed out" off her chair during the party. Pte Vu said, "Power was the first guy to pass out. And then, following, was S.B. She didn't pass out but was very intoxicated". All the witnesses agreed she had to be dragged upstairs with assistance, and both Aviators said that she was sleeping in her bed when they left Pte Vu with her in her room. She remembers nothing after speaking to Pte Vu before she fell off her chair at the party. Aviators Stanutz and Leblanc also testified that they stopped at a washroom (though they disagreed on which floor it was) where S.B. required significant assistance. Pte Vu recorded parts of the journey but the evidence concerning the washroom visit was not firmly dealt with by the Military Judge.

[93] Addressing whether S.B. was unconscious at the end of the recording, the Military Judge noted her "apparent absence" of movement, suggesting that S.B. may have fallen unconscious. Notwithstanding this finding, the Military Judge also found:

> [97]…However, this is not the only possible inference. Without a view on her body or face, I cannot discount the fact that she may have moved her knee voluntarily and retreated to **a state of simulated sleep to avoid the understandable embarrassment stemming from the situation.** Given that she was conscious and responsive only seconds earlier, **it is a hypothesis that I simply cannot dismiss.**
>
> [Emphasis added]

[94] The Respondent at trial did not argue nor mention that S.B. was potentially feigning sleep. This hypothesis was not put to S.B. nor was it argued before the Military Judge – this simply was not a part of defence submissions at the trial. This speculation is first encountered in the Military Judge's decision.

[95] The Court may set aside an acquittal where the trial judge considered each component of the case in isolation, resulting in "the persuasive effect of the totality of evidence – the strength of the Appellant's case – [being] taken out of play" (*R. v. Rudge*, 2011 ONCA 791, [2011] O.J. No. 5709 (QL) at para. 66). In *R. v. Palmer*, 2021 ONCA 348, 174 W.C.B (2d) 84 at para. 61, the Court of Appeal for Ontario explained that a misapprehension of evidence may dovetail with this legal error where it prevents a trial judge from considering the totality of the Crown's evidence.

[96] This dovetailing occurs here. By failing to properly consider Pte Vu's interview statements, the Military Judge failed to appreciate the totality of the evidence on whether S.B. was asleep or unconscious at the end of the video. The Military Judge notes that the evidence suggests that S.B. "may" have fallen unconscious at the time, especially because Pte Vu told Military Police her eyes were closed. But the evidence from Pte Vu went much further than S.B. having her eyes closed. His evidence was, repeatedly, that S.B. was "passed out", which does not leave open a possibility of S.B. feigning sleep. In addition, when the colleagues returned to S.B.'s room and Pte Vu was pulled off the bed S.B. did not move nor make a sound.

[97] This distinction is paramount because the Military Judge premised his reasonable doubt on the possibility that S.B. pretended to be asleep. Because there was a possibility that S.B. was feigning sleep, the Military Judge concluded that she had "…a sufficient understanding of the activity she was engaged, the person she was engaged in the activity with and that she could refuse to participate."

[98] A reasonable doubt must be based on reason and common sense, which must be logically based upon the evidence or lack of evidence (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000 at para. 36 [*Villaroman*]; *R. v. Dipnarine*, 2014 ABCA 328, [2014] A.J. No. 1102 (QL) at para. 25). *R. v. W.L.S.*, 2019 SCC 27, [2019] 2 S.C.R. 403 at para. 4, demonstrates that where there is "no evidence, or absence of evidence, to support any reasonable inference other than non-consent" it is an error of law to make an alternative inference when it is irrational. Here, on the question of unconsciousness, it was not open to the Military Judge to search outside the evidence for speculative possibilities.

[99] It was not open to the Military Judge to disregard the accused's own evidence to speculate about alternative theories such as S.B. feigning sleep and not actually being unconscious. Recall that, when the other people returned to the room to see what was happening, S.B.'s genitals were completely exposed to a room of people who she had met mere days before while awaiting military training. She had to be covered up by Aviator Stanutz. S.B. does not stir at all during the ensuing commotion, nor when Pte Vu goes to grab his phone from the bedside table. Two witnesses and Pte Vu attested to the fact that S.B. was either unconscious or asleep.

This is not a logical inference made from an absence of evidence in light of human experience and common sense (*Villaroman* at para. 36)

[100] The Military Judge's failure to consider all of the evidence as a whole led him to speculate improperly about alternative theories. The only reasonable inference, based on the totality of the cumulative evidence before the Military Judge, was that S.B. was unable to provide subjective consent due to severe intoxication and at the end of the video was unconscious or asleep. Essentially, these errors might have reasonably had a material bearing on the verdict.

[101] Finally, I note that sexual assault law involving surreptitious video recordings appears to be an evolving area of the law: *R. v. AE*, 2021 ABCA 172, 466 D.L.R. (4th) 226 [*A.E.*]. In *A.E.*, Justice P. Martin of the Alberta Court of Appeal held in *obiter* that a recording taken without the complainant's knowledge vitiated consent as a type of fraud per s. 265(3)(c) of the *Criminal Code*. On appeal, the Supreme Court of Canada dismissed the appeal but did not address whether a surreptitious recording constitutes fraud vitiating consent: *R. v. A.E.*, 2022 SCC 4, [2022] 3 W.W.R. 335.

[102] The question of whether Pte Vu's recording of S.B. constituted a fraud vitiating consent pursuant to s. 265(3)(c) was not raised in this appeal or at the trial. Therefore, this Court is unable to consider this issue. I raise this development in the jurisprudence to provide commentary for future consideration.

B. *Did the Military Judge assess the evidence based on a wrong legal principle?*

[103] *J.M.H.* establishes that an assessment of evidence based on a wrong legal principle is an error of law (at para. 29).

[104] In concluding that he was not convinced that S.B. lacked the capacity to consent, the Military Judge "tempered" the extremity of S.B.'s intoxication with corroboration requirements. The Military Judge commented as follows:

> [90] I find that the impairment factors mentioned above can be tempered by the following considerations. First, the quantity of alcohol consumed that has been proven would not appear to be so significant as to generate the symptoms of intoxication witnessed from S.B. This is stated, of course, without the assistance of any expert in toxicology which could have shed more lights—more light on the effects of such consumption and the exact impact of the other behaviour observed on the level of impairment of S.B., especially the fact that she blacked out and whether anything can be concluded from that fact as to her level of impairment. That said, no evidence was heard about any other intoxicants being consumed the evening of the party and S.B. admitted having few symptoms of hangover the following day, unlike the other occasions when she—the other occasion when she had experienced a black out.

[105] The Appellant alleges that the Military Judge erred by relying on improper inferences and that resting a reasonable doubt on conjectures is an error of law. In my view, the error is not that the Military Judge premised his reasonable doubt on these inferences but rather that these inferences, in effect, amount to an insistence that S.B.'s intoxication had to be corroborated beyond the available evidence in this case.

[106] Neither a party nor a court can insist that a complainant's evidence be corroborated: see *R. v. Kaczmarek*, 2021 ONCA 771, [2021] O.J. No. 6127 (QL) at para. 44. There is no common law doctrine of corroboration and any statutory doctrine of corroboration has long been repealed from the law: Stewart at 7:9.

[107] Historically, the rationale underlying corroboration was that a sexual assault complainant could not be believed without further supporting evidence. In essence, it is easier to accept a complainant's evidence where there is evidence to support it (Stewart at 7:5). However, requiring corroboration resurrects myth-based reasoning about sexual assault victims as dishonest and untrustworthy, and entrenches stereotypes about complainants: see Elizabeth Sheehy, "Evidence Law and the 'Credibility Testing' of Women: A Comment on the E Case" (2002), 2 QUT L.J.J., 157-174 at 169.

[108] There can be a hazy line between evidence that is corroborative in nature, which assists a trier of fact, and a trier of fact insisting on the complainant's evidence being corroborated. The reason for this difficulty can best be understood in Professor Lisa Dufraimont's commentary about myths and stereotypes in "Myth, Inference, and Evidence in Sexual Assault Trials" (2019) 44:2 Queen's L.J. 316 at 353, where she stated:

> Repudiating myths and stereotypes means rejecting certain discriminatory lines of reasoning, but it does not make whole categories of evidence irrelevant or inadmissible. Indeed, sweeping prohibitions that would rule out any consideration of particular forms of evidence are avoided as inconsistent with the accused's right to make full answer and defence and with our overall approach to finding facts.

[109] Evidence that is corroborative should be weighed and assessed but the trier of fact should not descend into requiring corroborative evidence. This means rejecting certain lines of discriminatory reasoning, while also seeking to evaluate the evidence as a whole so as not to interfere with an accused's right to make full answer and defence.

[110] The Military Judge found S.B. credible and that she showed signs of severe, alcohol-induced intoxication. Nevertheless, the Military Judge insists on corroboration.

[111] The Military Judge's assessment was inconsistent. The Military Judge found that "the quantity of alcohol consumed that has been proven would not appear to be so significant as to generate the symptoms of intoxication witnessed from S.B." In spite of finding the quantity of alcohol S.B. consumed vague, the Military Judge went on to attempt to quantify a specific amount, finding S.B. consumed two Black Fly vodka drinks, sips of Crown Royal and Smirnoff Ice. As well, he commented on whether she had a hangover or not. Speculating about the quantity of alcohol consumed and then using that to doubt S.B.'s degree of intoxication is an insistence on corroboration, especially noting that the Military Judge largely relied on the video evidence.

[112] This approach is puzzling due to the fact that the Military Judge said he would accept the witness evidence where it was supported by other, credible evidence. The evidence of Aviators Leblanc and Stanutz, as well as Pte Vu was that S.B. was severely intoxicated. In his statement, Pte Vu estimated that S.B.'s intoxication was at a nine out of ten. There was strong evidence of S.B's degree of intoxication from several witnesses, which was corroborated by Vu's statement.

[113] The Military Judge's error in failing to consider Pte Vu's statement in assessing her operating mind also fits in with his requirement that S.B.'s evidence be corroborated. The failure to account for and cumulatively consider Pte Vu's evidence led the Military Judge to seek out further, alternate evidence to refute S.B.'s level of intoxication. However, Pte Vu's own evidence was that S.B. was so intoxicated that she was dragged back to her room and then passed out. Pte Vu said she was "Well, honestly, probably, like a nine or closer to ten…That night? Nine, closer—because, like , throughout this investigation, like yeah, she passed out when I, like went down on her but I didn't know she passed out at the time because she was awake when I went down on her…". Earlier in his statement, Pte Vu assessed S.B.'s intoxication as a "nine, nine, eight/nine" when he says she was awake in her bedroom.

[114] The Military Judge commented that S.B. was not particularly hungover the next morning. This is problematic because alcohol effects on the body are dependent on an array of factors and contexts. None of that evidence was presented at trial. Without expert evidence, the Military Judge improperly turned to this evidence to doubt S.B's level of intoxication which goes to her capacity to consent.

[115] Finally, the Military Judge relies on S.B.'s movement of her legs and knees to palliate his findings that she was unable to walk. First, he finds that S.B. moved her legs and knees close to Pte Vu's face "in a manner consistent with the facilitation of the sexual activity". Second, he relies on S.B's knee movement to suggest she made voluntary movements indicating a capacity to consent.

[116] Although the Military Judge correctly identified that "[o]nly a minimal capacity suffices in order to be capable of consenting", brief leg movements cannot be used to override his other factual findings.

[117] The Military Judge continuously sought out corroboration, despite finding S.B. credible and making factual findings that indicated S.B. was extremely intoxicated from alcohol consumption. Had the trial judge not required corroboration, his factual findings of S.B.'s significant impairment would not have been "tempered". As such, this is an error that might reasonably be thought to have had a material bearing on the acquittal.

[118] In concluding my analysis of this ground of appeal, I wish to concur with my colleagues' observation regarding the *aide memoire* prepared by defence counsel. This Court is deprived of reviewing a significant document that was referred to during submissions and then used by the Military Judge to interpret a key piece of evidence – the video. This was not raised as a ground of appeal and I do not treat it as such but I echo my colleagues' statement that in the future such documents should be entered as exhibits.

C. *Effect of Errors*

[119] I am of the view that the Military Judge's findings regarding the *mens rea* were made in *obiter,* given his comment that he "d[id] not need to comment on the arguments submitted by counsel as it pertains to the mens rea, given [his] conclusion...". Although the Military Judge briefly explained that he would have been left with a reasonable doubt on the *mens rea,* these comments do not constitute a complete analysis that is required in the circumstances.

Accordingly, this Court is not in a position where it can wholly review the Military Judge's *mens rea* analysis.

[120] The majority find that while the Military Judge's conclusion was not fully developed, it was sufficient. In their view, there was no error in his approach. As such, in my colleagues' view, even if there was an error in the Military Judge's *actus reus* analysis, it does not have a material impact on the acquittal as required by *Graveline*.

[121] I disagree.

[122] Recklessness "involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur" (*Sansregret v. The Queen*, [1985] 1 S.C.R. 570, 1985 CanLII 79 at para 22).

[123] An error of law may arise where "the legal effect of findings of fact or of undisputed fact raises a question of law" (*J.M.H* at para 28). *R. v. Morin*, [1992] 3 S.C.R. 286, 1992 CanLII 40, explains at 294:

> If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute.

[124] The Military Judge found that Pte Vu lacked the requisite *mens rea* because he did not look up from his position with his head between the S.B.'s legs and as such he could not have known that S.B. ceased to consent.

[125] Counsel for the Respondent says there was no reason for Pte Vu to check in with S.B. during the short five-minute video. But he had *every* reason to check in with her. He had witnessed S.B. become increasingly intoxicated at the party. He followed behind the Aviators, watching them as they dragged S.B. back to her room, including a bathroom stop where she needed significant assistance. He watched his colleagues put S.B. to bed. He had also expressed concern about being left alone with S.B. to Aviators Stanutz and Leblanc, fearing potential repercussions in light of Operation Honour. He asks her at least eight times for affirmation, to which she provides slurred, faint, and mumbled responses. He was aware and told the Military Police that, when he proceeded to perform oral sex on S.B., it seemed like she was not fully awake. Pte Vu was so wary of S.B.'s degree of intoxication was that he took a video of her alleged consent to "save [himself] if it would come back and hit [him] hard".

[126] Pte Vu was aware of and alert to the risk and nevertheless proceeded in the face of it. That is the very definition of recklessness. In my view, the Military Judge erred in both his *actus reus* and *mens rea* assessment and a new trial is required in the circumstances.

VI. Conclusion

[127] I recognize this was a challenging case and the Military Judge did a very good job on many aspects of this trial. But, for these reasons, I would allow the appeal, set aside the acquittal, and order a new trial.

"Glennys McVeigh"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-621
STYLE OF CAUSE:	HIS MAJESTY THE KING v. PRIVATE D.T. VU
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	SEPTEMBER 23, 2022
REASONS FOR JUDGMENT BY:	BELL, C.J. TROTTER, J.A.
DISSENTING REASONS BY:	McVEIGH, J.A.
DATED:	FEBRUARY 27, 2023

APPEARANCES:

Major Patrice Germain	FOR THE APPELLANT
Cdr Mark Létourneau Major Francesca Ferguson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Military Prosecution Services Ottawa, Ontario	FOR THE APPELLANT
Directorate of Defence Counsel Services Gatineau, Quebec	FOR THE RESPONDENT