Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20231108

Docket:CMAC-628

Citation: 2023 CMAC 11

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

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

CORPORAL CROUCH

Respondent

Heard at Edmonton, Alberta, on September 6, 2023.

Judgment delivered at Ottawa, Ontario, on November 8, 2023.

REASONS FOR JUDGMENT BY: BENNETT J.A.

CONCURRED IN BY: CHIEF JUSTICE BELL
SCANLAN J.A.

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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 6 December 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

BENNETT J.A.

[1] Corporal Andrew Crouch ("Cpl. Crouch") was charged with two counts of indecent acts, pursuant to s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5 ("the Act") and s. 173 of the

Criminal Code, R.S.C., 1985, c. C-46 (“the Code”). Those acts were alleged to have occurred on 22 June 2018. He was acquitted on 24 October 2022 by a General Court Martial. Two witnesses testified at the trial: the complainant S.R. and Cpl. Crouch.

[2] The Minister of National Defence (“the Crown”) appeals the acquittals primarily on the basis that the military judge allowed inferences of myths and stereotypes relating to the complainant to go before the panel and then failed to sufficiently instruct the panel to disregard those inferences when assessing the complainant’s credibility.

[3] For the following reasons, I would dismiss the appeal.

I. Background

[4] Cpl. Crouch and S.R. met at a Canadian Forces Base in 2017, where they were both posted to the same regiment. S.R. had been transferred to a different base and her last day of work prior to her transfer was 22 June 2018. They were friends, but by the time she left the Base, the friendship had diminished.

[5] On her last workday, S.R. was offered a tank ride as a farewell gift and borrowed Cpl. Crouch’s helmet. She returned it after the tank ride.

[6] After S.R. completed her ride in the tank, S.R. and Cpl. Crouch’s versions of events completely diverge. S.R. testified that she returned the helmet around 16:00 hours and Cpl. Crouch testified that she returned it shortly after 12:00. S.R. testified that at 16:30, she

returned to her office to complete an evaluation for one of her subordinates and pack up her belongings.

[7] S.R. testified that she looked up from her workstation and saw Cpl. Crouch standing two to three feet away, masturbating his exposed penis. She asked him what he was doing and told him to leave. He put his penis back in his pants and left. S.R. said she was shocked and dumbfounded.

[8] S.R. continued packing her belongings. She took one box of her possessions out to her car. As she was walking, she testified that Cpl. Crouch drove his truck in front of her and blocked her access to the pathway leading to the parking lot. The windows of his truck were down. S.R. was about four feet from the truck. She could see into the cab of the truck. She testified that she saw Cpl. Crouch masturbating again, this time to ejaculation.

[9] Cpl. Crouch denied that any such acts occurred. He recalled lending S.R. his helmet and her returning it. Afterwards, he returned home at 12:35, barbequed outside, spent time with his dog, and watched the television show “Suits” on Netflix.

[10] S.R. reported the incidents in early 2020, providing four statements to the military police: on 6 February 2020, 13 March 2020, 29 May 2020 and 14 December 2020. The charges of indecent acts were set out in the charge sheet on 8 October 2021 and were preferred by the Director of Military Prosecution on 28 October 2021 under s. 130 of the *Act* and s. 173 of the *Code*.

[11] The grounds of appeal arise from the cross-examination of S.R. and defence counsel's closing address. I will review that evidence when considering the issues on appeal.

II. Issues

[12] The Crown raises three related grounds of appeal. It submits that the military judge: (a) erred by admitting impermissible evidence of myths and stereotypes in relation to the conduct of the complainant; (b) erred by failing to correct a statement made by the defence counsel in her closing submissions; and (c) erred by failing to properly instruct the panel in relation to the evidence and the closing submission by counsel.

III. Standard of review

[13] The Crown brings this appeal pursuant to s. 230.1(b) of the *Act*:

> 230.1 The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:
>
> …
>
> (b) the legality of any finding of not guilty;

[14] The Crown is limited to issues that raise a question of law alone. The parties agree that the grounds of appeal raise questions of law alone.

[15] The test on an appeal from an acquittal is not simply demonstrating that an error of law occurred. The Crown bears a heavy burden on an appeal from an acquittal. The Crown must

satisfy this Court that any error (or errors) in the context of the case, might reasonably have a material bearing on the acquittal.

[16] The test has been framed in a number of ways, as noted by the majority in *R. v. Graveline*, 2006 SCC 16, [2006] 1 SCR 609 at paras. 14–16:

> [14] It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.
>
> [15] This burden on the Crown, unchanged for more than half a century (see *Cullen v. The King*, [1949] S.C.R. 658), was explained this way by Sopinka J., for the majority, in *R. v. Morin*, [1988] 2 S.C.R. 345:
>
> > I am prepared to accept that the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty. An accused who has been acquitted once should not be sent back to be tried again unless it appears that the error at the first trial was such that there is a reasonable degree of certainty that the outcome may well have been affected by it. Any more stringent test would require an appellate court to predict with certainty what happened in the jury room. That it cannot do. [p. 374]
>
> [16] Speaking more recently for a unanimous court in *R. v. Sutton*, [2000] 2 S.C.R. 595, 2000 SCC 50, the Chief Justice stated:
>
> > The parties agree that acquittals are not lightly overturned. The test as set out in *Vézeau v. The Queen*, [1977] 2 S.C.R. 277, requires the Crown to satisfy the court that the verdict would not necessarily have been the same had the errors not

> occurred. In *R. v. Morin*, [1988] 2 S.C.R. 345, this Court emphasized that "the onus is a heavy one and that the Crown must satisfy the court with a reasonable degree of certainty" (p. 374). [para. 2]
>
> [Emphasis added.]

[17] The impact of the errors on the acquittal must not be a matter of speculation (*Graveline* at para. 17).

A. *Evidence of myths and stereotypes*

[18] The courts have, for many years, identified that myths and stereotypes may incorrectly affect the fact-finding process, primarily in trials for sexual assault and related offences. In addition, it was recognized that myths and stereotypes invade the sphere of common sense that juries are instructed to apply in their reasoning. For example, in *R. v. Find*, 2001 SCC 32, [2001] 1 SCR 863 at paras. 101 and 103:

> [101] The appellant also contends that myths and stereotypes attached to the crime of sexual assault may unfairly inform the deliberation of some jurors. However, strong, sometimes biased, assumptions about sexual behaviour are not new to sexual assault trials. Traditional myths and stereotypes have long tainted the assessment of the conduct and veracity of complainants in sexual assault cases - the belief that women of "unchaste" character are more likely to have consented or are less worthy of belief; that passivity or even resistance may in fact constitute consent; and that some women invite sexual assault by reason of their dress or behaviour, to name only a few. Based on overwhelming evidence from relevant social science literature, this Court has been willing to accept the prevailing existence of such myths and stereotypes: see, for example, *Seaboyer, supra*; *R. v. Osolin*, [1993] 4 S.C.R. 595, at pp. 669-71; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, at paras. 94-97.
>
> …

> [103] These myths and stereotypes about child and adult complainants are particularly invidious because they comprise part of the fabric of social "common sense" in which we are daily immersed. Their pervasiveness, and the subtlety of their operation, create the risk that victims of abuse will be blamed or unjustly discredited in the minds of both judges and jurors.

[19] The campaign against myths and stereotypes in legal reasoning was highlighted by Justice Moldaver in *R. v. Barton*, 2019 SCC 33, [2019] 2 SCR 579 at para. 1:

> We live in a time where myths, stereotypes, and sexual violence against women [footnotes omitted] — particularly Indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society. While serious efforts are being made by a range of actors to address and remedy these failings both within the criminal justice system and throughout Canadian society more broadly, this case attests to the fact that more needs to be done. Put simply, we can — and *must* — do better.
>
> [Italic emphasis in original.]

[20] There is no dispute that a trier of fact cannot rely on myths and stereotypes of how a complainant will respond to a sexual assault to make adverse findings in relation to their credibility. In particular, how a complainant will respond cannot be considered in the application of common sense. As we know, common sense can often be tainted by the same myths and stereotypes: *R. v. Seaboyer*, [1991] 2 S.C.R. 577, L'Heureux-Dubé J., dissenting in part at 679–80, 1991 CanLII 76.

[21] Simply because evidence might, in one context, be a myth or stereotype does not mean that it has those characteristics in all contexts. Nor is the evidence always inadmissible. If the

evidence is relevant to a fact in issue, the evidence generally will be admissible. In *R. v. Roth*, 2020 BCCA 240, 66 C.R. (7th) 107, the Court explained at paras. 130–131:

> [130] However, this does not mean that the evidence surrounding the driver's attendance at the home, including the complainant's conduct during that interaction, was not open for consideration in the credibility assessment and the trial judge was obliged to steer away from it. The risk of myths and stereotypes distorting a judge's fact-finding or reasoning process does not prohibit use of a complainant's behaviour for all analytical purposes (assuming the evidence surrounding that behaviour is properly before the court). Although a piece of evidence may carry the potential for impermissible reasoning, it may also have a permissible role to play as a circumstance to consider in assessing the evidence as a whole, in the context of the case's particular "factual mosaic": *R. v. D.(D.)*, 2000 SCC 43 at para. 65; *Kiss* at paras. 101–102. In my view, what *A.R.D.* and like cases warn against is the improper use of this type of evidence, not any use at all.
>
> [131] On this point, I agree with the comments of Professor Lisa Dufraimont in "Myth, Inference and Evidence in Sexual Assault Trials", (2019) 44 Queen's L.J. 316 at 353:
>
> > Criminal courts … carry the heavy responsibility of ensuring that every accused person has a fair trial. Subject to the rules of evidence and the prohibition of particular inferences, this requires that the defence generally be permitted to bring forward all evidence that is logically relevant to the material issues. 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. Outside the prohibited lines of reasoning identified as myths, relevance remains an elastic concept that leaves a wide scope for reasoning from logic and human experience.
>
> [Emphasis added in *Roth*; internal references omitted.]

B. *Inadmissible evidence*

(1) Non-reporting myth

[22] The history of Canadian criminal law demonstrates how the law evolves with changing societal attitudes. For example, prior to 1983, a complainant was expected to report a sexual assault at the first opportunity. Based on the common law doctrine of recent complaint, the Crown was permitted to tender a prior consistent statement of a complainant disclosing the sexual offence — at the first reasonable opportunity — as corroborative evidence of the offence. On the other hand, if there was no "recent complaint", the trial judge was required to instruct the jury that the absence of a recent statement told against the truthfulness of the complainant's evidence: *R. v. Boyce,* (1975) 7 O.R. (2d) 561 at 32–34, 23 C.C.C. (2d) 16 (C.A.).

[23] The doctrine of recent complaint rests on what we now know are two false premises: that complainants in sexual assault cases are more likely to lie than complainants in other cases and that all victims of a sexual assault react in the same way by telling someone at the first opportunity. For a detailed discussion of the law in relation to recent complaint, see *R. v. W.B.*, 49 O.R. (3d) 321, 2000 CanLII 5751 (C.A.) at paras. 138–155.

[24] The repeal of the doctrine came into effect on 4 January 1983 through Bill C-127, *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequences thereof,* 29-30-31Eliz. II, 1982, cl 246.5. This change to the law acknowledged that not every sexual assault victim reacts

the same and that there is no “expected” reaction without which adverse inferences may be drawn.

[25] In this case, the issue arises during the cross-examination of S.R. The following exchange occurred in cross-examination:

> Q. You said that Corporal Crouch exposed himself to you in the OR [Orderly Room] and then left?
>
> A. Correct.
>
> Q. And you didn’t call MP’s [military police] at that time?
>
> A. No, ma’am.
>
> Q. And you quickly finished packing your box?
>
> A. One of, yes.

[26] No objection was taken to that question or answer. A few moments later, the following exchange occurred in relation to the parking lot incident:

> Q. And when you went into 1 CER you would have passed the reception desk, is that correct?
>
> A. Yes, ma’am.
>
> Q. Near the front doors, correct?
>
> A. Yes, ma’am.
>
> Q And at that point you didn’t call – you didn’t ask the duty NCM [non-commissioned member] …

[27] At that point, the Crown objected to the question and submitted that the question regarding reporting to the military police was objectionable as well. After a discussion in which

the defence counsel submitted that she was trying to discover whether anyone else was present, the following questions were allowed:

> Q. After Corporal Crouch left in his vehicle, you went back into 1 CER, correct?
>
> A. Yes, ma'am.
>
> Q. And did you see anyone at the reception desk when you went in?
>
> A. No, ma'am.

[28] The Crown submits that the judge's failure to respond to the question regarding whether S.R. reported the incident right away indicates that he was not performing his "gatekeeping" function with respect to keeping myths and stereotypes away from the panel.

[29] In permitting the second question, the military judge stated:

> I'm fine with the question as long as put by your colleague, has nothing to do with her reaction to what happened and suggesting to her that she should have reacted one way or another. But if you want to explore her reaction as she explain it. Depending of the question, you may be entitled to see why.

[30] Cpl. Crouch accepts that the law is clear that failing to report an offence at the first opportunity is not a basis on which to assess the truthfulness of a sexual assault complainant, pointing to *R. v. D.D.*, 2000 SCC 43, [2000] 2 SCR 275 at para. 65, where the Court said, "A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant."

[31] Cpl. Crouch acknowledges that failing to report a sexual assault after it occurs cannot be used to undermine the credibility of a complainant. He submits that is not what occurred here. With respect to the first question, it was a fleeting question, with no follow-up or suggestion from which to draw an adverse inference based on stereotypical thinking. The second question revealed only that there was no one else present.

[32] The military judge instructed the panel, in the opening remarks, that questions asked by counsel are not evidence. He also instructed the jury that not all questions are permissible, and they were not to guess at an answer if one was not given.

[33] The Crown acknowledges that this questioning in and of itself may be of little moment but relies on the cumulative effect of the events that it says had a material impact on the verdict.

(2) Non-avoidance myth

[34] The "non-avoidance" myth arises when adverse inferences are made because a complainant has not avoided the accused after the alleged event(s). For example, in *R. v. A.R.D.*, 2017 ABCA 237, 353 C.C.C. (3d) 1 (aff'd in *R. v. A.R.J.D.*, [2018] 1 S.C.R. 218), the Court pointed out that the trial judge carefully identified the prohibition of reasoning based on myths and stereotypes and discarded some inferences against the complainant's credibility because they were based on impermissible reasoning. However, the trial judge then said:

> Having said all of that, however, given the length of time that these events occurred over, and the fact that the most serious event occurred months before [the complainant] complained, I would have expected some evidence of avoidance either conscious or unconscious. There was no such evidence. As a matter of logic and

> common sense, one would expect that a victim of sexual abuse would demonstrate behaviours consistent with that abuse or at least some change of behaviour such as avoiding the perpetrator. While I recognize that everyone does not react in the same way, the evidence suggests that despite these alleged events the relationship between the accused and the complainant was an otherwise normal parent/child relationship. That incongruity is significant enough to leave me in doubt about these allegations.
>
> Therefore, while I do not believe [the respondent], and I suspect that he did some of these things, the evidence that I do accept has failed to satisfy me beyond a reasonable doubt that he did in fact.
>
> Since the burden of proof is proof beyond a reasonable doubt and the evidence has not reached or has not met that standard, I must acquit [the respondent].
>
> [Emphasis added by Paperny and Schutz JJ.A. at para. 23.]

[35] The trial judge concluded that the complainant's failure to avoid the accused was inconsistent with her allegations of sexual assault and found that negatively affected her credibility. That was the sole reason for the acquittal (para. 31). Additionally, there was no evidence to support the finding that the complainant did not avoid the accused. The inference was not only impermissible, but based on no evidence other than the trial judge's view of how the complainant should behave: at para. 86.

[36] The Court of Appeal ordered a new trial, concluding that the presence or absence of evidence of avoidance of the accused by the complainant has no bearing on the credibility of the complainant (para. 41).

[37] On appeal, the Supreme Court of Canada upheld the order for a new trial and said:

> We would dismiss, substantially for the reasons of the majority of the Court of Appeal. In considering the lack of evidence of the

> complainant's avoidance of the appellant, the trial judge committed the very error he had earlier in his reasons instructed himself against: he judged the complainant's credibility based solely on the correspondence between her behaviour and the expected behaviour of the stereotypical victim of sexual assault. This constituted an error of law.
>
> [Emphasis added.]

[38] The non-avoidance myth and stereotype arises in this case as a result of communication between Cpl. Crouch and S.R. after the alleged incidents. The Crown submits the military judge erred in admitting evidence of email correspondence between Cpl. Crouch and S.R. after the alleged acts. During cross-examination, defence counsel asked S.R. about her interview with military police where she stated that she began blocking the accused on social media and deleting emails he sent to her personal account in April 2018. Defence counsel, in an effort to challenge S.R.'s credibility, produced emails from Cpl. Crouch that S.R. responded to in 2019. The cross-examination is as follows:

> Q. You told the military police that you started blocking the accused from your personal email and your social media in April 2018?
>
> A. Yes, ma'am.
>
> Q. Because you wanted to stop communications with him online and in real life, I imagine?
>
> A. Because of the incessant emails, ma'am.
>
> Q. So I'll just re-ask it. You wanted to stop communications between yourself and Corporal Crouch in real life?
>
> A. Yes, ma'am.
>
> Q. And in your interview with military police on May 29, 2020, do you recall that you told military police that you would just delete any emails that Corporal Crouch sent to your personal email account?

A. Yes, ma'am.

Q. Sorry, with my phrasing, just to clarify. You told military police that you would delete any emails that Corporal Crouch sent to your personal email account, correct?

A. He had four email accounts, so yes. I would try to delete which ones I caught. Some I would respond.

Q. Sorry [S.R.], I just want to be clear with my questions. So you told military police that you would just delete any emails that Corporal Crouch sent to your personal email account, correct?

A. Yes, I would.

Q. Okay. And you told military police that you wouldn't even respond to those emails, correct?

A. No, ma'am.

Q. No you did not tell military police that or?

A. Not that I recollect.

Q. Okay. Is it possible that you said you would not respond to those email?

A. In what timeframe, ma'am are you asking. Are you asking in 2018, are you asking in 2019 or are you asking in 2020.

Q. I'm asking during your interview with military police on May 29, 2020, if you said that you would not respond to those emails and I believe your answer right now is no, that's not what you said, is that correct?

A. I cannot recollect.

Q. Okay. So [S.R.] could you please look at the first page and just confirm for us that that is the transcript of your interview with military police on May 29, 2020?

A. It appears that way, ma'am.

Q. It appears or it is, sorry, just the dates on the front

A. I haven't looked through the entire transcript, but yes, it has my name on it.

Q. Okay. And I will direct you to page 17 of 24 at line 6, I will read out loud these—this is an interview between yourself and Master Corporal Brady of the military police and the following questions were asked and answers were given. At line 6 on page 17, Master Corporal Brady is speaking and he says "So as far as communications go, we know that you don't have anything from your social media or on your phone. What about emails, personal emails, work emails, etc." [S.R.] "Personal emails, no." Master Corporal Brady "Okay." [S.R.] "like, I would just like, he would send them to me I wouldn't even respond, I would just delete, delete, delete." Is that—did I accurately read that out?

A. Yes, ma'am.

Q. Those were the questions asked, answers given?

A. Yes, ma'am.

Q. And so just to re-ask my question. You said to military police that you would not respond to emails that Corporal Crouch sent you?

A. It was in regards to the newest emails that he had sent to me. Yes, I did not respond to them.

Q. Sorry, just to clarify. So you would delete emails from Corporal Crouch, sorry you would delete emails that Corporal Crouch sent to your personal email account?

A. Yes.

Q. Sorry. That's what you said. But you did respond to emails that he sent to your personal email account in 2019, correct?

A. Yes, ma'am. That's why I was asking about the timeframe.

Q. So in your interview of 2020, to clarify, you're saying that you never in the past, you never responded to his emails, but going forward you did?

A. We were talking about recent events, ma'am.

Q. Okay. So just to clarify, you did respond to emails that Corporal Crouch sent to your personal email account in 2019?

A. Yes.

Q. That's what you said, okay. And for example you responded in October of 2019 that you were happy that he got another tour for example, sorry, just verbal response?

A. I have no recollection, I don't know what email. But if my name's on it and you have that email.

Q. So I'll just ask another question. Do you recall, just if this jogs your memory, do you recall saying that you saw a picture of the accused getting on a [plane] for UNIFIER in 2019?

A. No, ma'am.

Q. Okay. I'll try and just rephrase it briefly, I don't want to spend too much time here. But, you've said that you responded to some emails to Corporal Crouch in 2019 and is it possible that you may have responded to an email saying you saw a picture of him in UNIFIER for example?

A. I can't guess at this, ma'am. I'm not sure.

Q. Okay.

PROSECUTOR: I object to the relevance of these emails, Your Honour. Again, the witness has said that she sent emails and responded to emails in 2019, I don't' know why any email with respect to events occurring in 2019 are relevant to what we are talking about today.

MILITARY JUDGE: So are you objecting to the question or the documents being shown?

PROSECUTOR: The documents being shown. I don't see any relevance of them being shown to the witness. The witness has said yes she has sent emails, yes she responded to emails, unless my friend has something deeper that she's looking to plum to that happens in 2019 that relates to these events, I would say it's irrelevant to these proceedings.

DEFENCE COUNSEL: From my perspective, Your Honour the only reason I wish to show it is just because the—[S.R.] doesn't recall specifically the answer to what I said. So I just want to clarify that and move on.

MILITARY JUDGE: Can I see the document? Thank you. So far I don't see any problem with this definitely being shown, in relation to the answer provided by the witness.

DEFENCE COUNSEL:

Q. [S.R.], just to jog your memory, before you is an email thread. Do you see your email address at the top of the page?

A. Yes, ma'am.

Q. And you see my name at the top?

A. Yes, ma'am.

Q. And do you see Corporal Crouch's email address on there?

A. One of them, ma'am.

Q. Yes. And would you agree with me—sorry, I'll let you take a quick read through?

A. M-hm.

Q. And just let me know when you are done. Would you agree with me looking at the document now, that you sent a response to Corporal Crouch on October 13, 2019?

A. As I said I had, ma'am. Yes.

Q. And your email, you said that you saw a pic of Corporal Crouch getting on a plane for UNIFIER?

A. Yes, ma'am.

Q. And you said that it was awesome he got another tour?

A. Yes, ma'am.

Q. And you said you hope he's doing well and is happy?

A. Yes, ma'am.

Q. Okay. And hope you've picked something awesome to do for your HLTA, essentially is what you said, correct?

A. Yes, ma'am.

[Emphasis added.]

[39] The military judge permitted the Crown to question S.R. in redirect. S.R. was allowed to read from her statement where she told the military police that she had cut off contact with Cpl. Crouch in March of 2018, correcting her statement where she said she had ended her contact with him in January 2018.

[40] The Crown submits that the content and tone of the emails were not relevant to the impeachment of S.R. on her statements to military police. The Crown contends that the evidence in relation to the "friendly tone" of the emails was inadmissible because it invited the impermissible stereotypical reasoning that S.R.'s post-offence behavior was not consistent with what common sense would suggest.

[41] The defence submits that the emails were admissible and for a proper, relevant purpose.

[42] In my view, the evidence was admissible for two reasons. The first was to challenge the credibility of the complainant in relation to her evidence that she did not respond to Cpl. Crouch after March 2018 and always deleted his emails. The initial admission was not to draw an improper inference. Second, the e-mails corroborated Cpl. Crouch's evidence that he and S.R. had been on friendly terms well past the offence date and the allegations did not occur. The evidence was not permitted to draw an inference that S.R. was not credible because she was still friendly with Cpl. Crouch, but that Cpl. Crouch was credible when advancing his version of events.

[43] Had the matter ended there, no issue could arise from the admission of the evidence.

However, it did not end there. In the closing address, counsel for Cpl. Crouch said the following:

> I suggest that another inference that can be made is that they were still friends in 2019. I suggest that there was no obligation at all for the complainant to respond to an email from the accused from her personal email account. The complainant is a Sergeant, she was always of a higher rank than the accused, so this was not a case of a subordinate feeling obligated to respond to an email from a superior. [S.R.] was the superior. And it was her personal email, not her work email and they did not even work together in the same location at the time. So there was no work obligation to communicate. She could have deleted the email, ignored it. Instead she agreed that she responded to his email in October 2019 in what appears to be a friendly manner. There was certainly no obligation for the complainant to respond with several positive sentiments to Corporal Crouch as she did writing, one: she saw his picture getting on the plane for UNIFIER. Two: that it was awesome that he got another tour. Three: hoping he was doing well and was happy. And four: hoping he picked something awesome to do for his HLTA an makes the most of it.
>
> One inference you may draw is that it was a perfectly ordinary exchange of emails between friends. Another related inference is that they were exchanging friendly emails in 2019 because these two alleged incidents in June 2018 had not happened.
>
> Put another way, does it make sense that you have an incident like the one described by the complainant where in her words the accused is jerking-off and she's telling him to get the fuck out of here and calling him a fucking idiot and he's calling her a bitch and then you both stay in contact or months later the complainant writing to the accused things like, that's awesome you got another tour and hope you are doing well and happy. Does that make sense? <u>Because I suggest to you they are not reconcilable actions.</u>
>
> [Emphasis added.]

[44] The Crown could have no complaint had the closing address focused solely on Cpl. Crouch's credibility, in that the friendly tone of the emails supported his evidence that nothing

occurred. However, the last line directs the panel to draw an adverse inference about the credibility of the complainant because of her friendliness after the alleged acts.

[45] The Crown objected to the closing submission on the basis that it invited the panel to engage in impermissible reasoning in relation to S.R.'s credibility. The military judge indicated that he would take the submissions under consideration.

[46] The military judge concluded that a general instruction, as set out below, was sufficient. His reasons are as follows:

> Thank you very much, it's just a matter of recording than anything else. Okay and finally what I wanted to let you is I gave consideration to the matter raised by the–by Major Gallant, by the prosecution. I give thoughts to the question and I came to the conclusion that I won't add any additional directive as a corrective directive for some reason. And I wanted just to let you know. So it's one thing to find out while the judge is providing his instructions, but I think it is important to put on this recording the reasons.
>
> First, the prosecution was allowed to re-examine on this issue so this issue so the witness extensively had an opportunity to provide reasons regarding this email and how she reacted on this.
>
> Second, comments were not of an inflammatory nature. It was not something that I think caused an issue regarding emotion that can be brought from their perspective so I don't feel that it is necessary to correct anything from that perspective. And I don't think that was the intent either.
>
> And third, sometimes—third, making it a specific point, sometimes goes the opposite way. When you point out specifically at something you may cause more concerns for members of the panel to consider this potential issue is among other things. Especially in the context where I warned them about the fact that there's no typical reaction for a complainant or somebody charged.
>
> For sure, my comment is of a general nature, but I already addressed that issue from a general perspective not from—and I

> don't point out specifically to this question and I don't feel that it would be necessary for doing so. Otherwise, it may go the other way attracting too much and may cause concern and may confuse members of the panel.
>
> And finally, Appeal Courts and the Supreme Court of Canada asked the judge presiding at a General Court Martial or jury trial, I rely on the common sense and the good understanding of members of the panel to not go there. I don't think the suggestion was strong and so I'm fine with it.
>
> So, for all these reasons I thought it would not be necessary to provide some kind of corrective instructions. So, I will leave it as it is. I will approach this issue of reaction for a complainant from a general perspective. I won't address it otherwise.

C. *The instructions to the panel by the military judge*

[47] The military judge advised the panel at the outset of the trial that questions are not evidence and the effect of an objection raised by counsel:

> Your decision must be based only on the evidence presented in the courtroom. Evidence is the testimony of witnesses and items entered as exhibits. It may also consist of admissions. Evidence includes what each witness says in response to [a] question asked. The questions themselves are not evidence unless the witness agrees that what is asked is correct. Only the answers are evidence….
>
> …
>
> The lawyers, only their side may object to a question asked by the other side. When that happens I may ask you to leave the courtroom while we discuss the issue. An objection is not evidence. Just because someone objects and you are asked to go to your panel room has nothing to do with your decision in this case. We are not trying to hide anything from you, sometimes, however, our law may not allow particular questions to be answered. If the answer is not permitted, do not try to guess what it might have been.
>
> [Emphasis added]

[48] The military judge instructed the panel as follows regarding myths and stereotypes:

> I now want to remind you not to approach the evidence with unwarranted assumption as to what is or is not an indecent act, what kind of person may or may not be the complainant of an indecent act, what kind of person may or may not commit an indecent act, or what a person who is being, or has been subject to an indecent act will or will not do or say.
>
> There is not typical victim or typical assailant or typical situation or typical reaction. My purpose in telling you this is not to support a particular conclusion but to caution you against reaching conclusions based on common misconceptions.
>
> I remind you that you must approach the evidence with an open mind and without preconceived ideas. You must make your decision based solely on the evidence and in accordance with my instructions on the law.

[49] The military judge's instruction to the panel regarding Cpl. Crouch's position is significant:

> On behalf of Corporal Crouch, the defence counsel, Lieutenant-Commander Gonsalves, exposed to you Corporal Crouch's position. She told you that her client should be believed and that there is nothing supporting the fact that he fabricated his version of the events.
>
> Defence counsel suggested that there is a number of elements in the complainant's version of the events that shall raise a reasonable doubt. First, she put to you that it appears strange that the complainant left the orderly room's door open outside business hours just prior [to when] the alleged incident occurred, when it would usually be closed and locked in such circumstances.
>
> Second, she put to you that the timings for the tank's ride varied to the extent that it may raise concern about the time that really elapsed between he moment the complainant brought back the helmet to Corporal Crouch and [when] the alleged incident occurred.
>
> Third, she raised that the complainant showed some memory issues when she initially affirmed that it is after she carried a second box from her office to her vehicle that the alleged incident in the

> parking lot occurred, while later she conceded, after being confronted with her previous interview given to the police, that it is after carrying her first box that the alleged incident took place.
>
> Finally, the defence counsel put to you that the complainant seemed [to take] issue during her testimony with the existing friendship at the time of the alleged incident or even after. She brought to your attention about the choice made by the complainant to got to Corporal Crouch to borrow the helmet, while she said that at that time she had blocked him from any social media some months before. She also raised with you the fact that in the year following the alleged incident, the complainant confirmed that she was still respond[ing] to the accused's email despite claiming that she took distance from him.
>
> Lieutenant-Commander Gonsalves suggested that all these circumstances are sufficient for you to conclude that the complainant is not a credible and reliable narrator and as such, it should raise a reasonable doubt about if the alleged incidents did happen. Accordingly, she told you that you shall conclude that the prosecution failed to prove all the essential elements of both offences beyond a reasonable doubt and that you shall find Corporal Crouch not guilty of the charges.

[50] That instruction identified inconsistencies and difficulties in the evidence of the complainant. It did not refer to any myth or stereotype, in particular, lack of reporting or avoidance, in relation to drawing inferences about the credibility of the complainant.

D. *Conclusion on Invitation to stereotypical reasoning*

[51] Cpl. Crouch submits that the Crown has not demonstrated any errors. He submits that the question in relation to reporting to the military police did not engage, directly or inferentially, any stereotypical reasoning. The question regarding reporting to the duty officer was only that—a question. It was then reformed to ask whether anyone else was present. That question did not engage stereotypical reasoning. The email exchange was admissible for a proper purpose— to

challenge specific statements by S.R. and to corroborate Cpl. Crouch's evidence. Cpl. Crouch admits that defence counsel's closing submissions may have invited the panel to engage in myth-based reasoning. Cpl. Crouch submits that if any mistakes were made, they were remedied by the military judge's instruction to the panel both in relation to reliance on myths and stereotypes and the instruction setting out the deficiencies in S.R.'s evidence. The instructions demonstrated a route to rejecting S.R.'s evidence, apart from reliance on myths or stereotypes. Finally, the instruction did not mention any reliance by Cpl. Crouch on any myth or stereotype.

[52] The Crown submits that the cumulative effect of the three incidents is sufficient to have a material effect on the verdict, even if each individual incident would not. The Crown submits that this case relied solely on the credibility of the witnesses, and that the only reason the panel found a doubt was because they were invited to partake in impermissible reasoning grounded in myths and stereotypes and based on the conduct of S.R.

[53] In my view, asking S.R. if she reported the event to the military police, without further questioning, does not engage stereotypical reasoning. The question was irrelevant. While it would have been better if the question had not been asked, there was no suggestion that S.R. was less credible because she did not report the event at the time. The second question was a misstatement by the defence, which was properly addressed by the military judge. A proper question was asked and answered. The panel had been instructed that questions are not evidence. The panel is presumed to follow instructions.

[54] The cross-examination on the emails was conducted for a proper purpose. As noted above, evidence that may carry the potential for impermissible reasoning is admissible if it is relevant for a proper purpose. Here, the evidence was relevant to challenge the statements given by S.R. and to corroborate the defence's theory.

[55] Thus, in my view, the only invitation to stereotypical reasoning was the comment in the closing address by the defence counsel. That statement should not have been made. It was a clear violation of the legal reasoning that has developed for the past forty years, starting with the *Code* amendments in 1983.

E. *Did the error materially affect the verdict?*

[56] The remaining issue is whether that one misstep materially affected the verdict.

[57] The Crown submits that since this case turned solely on the credibility of the witnesses, the placing of impermissible evidence before the panel allowed it to draw improper inferences in relation to S.R.'s credibility, and therefore materially affected the verdict. The Crown says that the only evidence on which the credibility issue was decided by the panel was based on impermissible reasoning.

[58] Cpl. Crouch submits that even if there were errors, S.R.'s evidence overall lacked credibility. Thus, any error did not have a material bearing on the verdict of acquittal. In the context of this case, the Crown has not and cannot meet its heavy burden to overturn an acquittal.

[59] In this case, there were inconsistencies and deficiencies in the evidence of S.R., as noted in the military judge's instruction above. There was route to a reasonable doubt without reliance on myths and stereotypes.

[60] Given my conclusion that the only error arose from the closing address, there is no basis to conclude that the errors, cumulatively, were sufficient to have a material effect on the verdict.

[61] Although the military judge's instruction to the panel could have been more complete, it was sufficient to inform the panel not to make assumptions and to disregard myths and stereotypes regarding a person's response to a sexual assault. It also would have been preferable for the military judge to have intervened with a correcting instruction, at the very latest when the defence closing submission was concluded. However, as has been said many times before, there is no perfect trial, and neither the accused nor the Crown is entitled to perfection.

[62] The question in this case, that turns solely on the credibility of two witnesses, is: did the error by defence counsel have a material effect on the verdict, in light of the evidence, the instructions to the panel, and in light of the other bases on which the panel could have had a reasonable doubt in relation to the complainant's evidence? In my view, the answer is no.

[63] I would dismiss the appeal.

"Elizabeth A. Bennett"
J.A.

"I agree.
"B. Richard Bell, Chief Justice"

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

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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