



COURT MARTIAL

Citation: *R. v. Vu*, 2021 CM 4012

Date: 20211105

Dossier: 202051

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.T. Vu, Accused

Before: Commander J.B.M. Pelletier, M.J.

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, I direct that any information obtained in relation to the proceedings of this Standing Court Martial of Corporal Vu including any related hearing or applications which could identify anyone as a victim or complainant including the person referred to in the charge sheet as “S.B.” shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

Introduction

[1] Corporal Vu is facing four charges under section 130 of the *National Defence Act* (NDA), in relation to contact of a sexual nature which occurred between him and the complainant, identified as S.B. on the charge sheet, following a party in barracks on base. The first charge alleges sexual assault contrary to section 271 of the *Criminal Code*. The three other charges relate to an audio/video recording that was made by Corporal Vu during the sexual contact subject to charge one, alleging at charge two that the making of that audio/video recording constitutes the offence of voyeurism contrary to subsection 162(1) of the *Criminal Code*. It is also alleged that the subsequent showing of that audio/video recording to a colleague constitutes the offences of

distributing, transmitting, making available or advertising both a voyeuristic recording (charge three) and an intimate image of S.B. (charge four) contrary to subsection 162(4) and section 162.1, of the *Criminal Code*.

[2] This Standing Court Martial was convened naming Private Vu, who has been promoted since charges were preferred. In these findings however, I will refer to Corporal Vu by the rank he had at the time of the alleged offences, private, in relation to the facts as related by witnesses, to facilitate comprehension. Also, the identity of the complainant is protected by a publication ban ordered at the outset of proceedings and I will henceforth refer to her as S.B. as she is identified in the charge sheet.

Overview of the evidence

[3] The prosecution called four witnesses in support of its case. S.B. testified that she had very little memory of the party and no memory at all of the contact of a sexual nature that followed, the alleged sexual assault. Two military colleagues, Aviators Stanutz and Leblanc, present at the party, testified as to their involvement in bringing S.B. back to her own room, after she had shown signs of severe, alcohol-induced intoxication at the party. They described the state S.B. was in at the time, essentially unable to stand or walk on her own. They entered her room accompanied by Private Vu and left her fully dressed in her bed while she was apparently sleeping. Private Vu remained with her. Aviator Stanutz said that when she came back into that room, Private Vu was performing oral sex on S.B. as she was still apparently asleep. Private Vu was pulled off his position at the foot of the bed and expelled from the room, not before he had the opportunity to recover his smartphone which he had placed at an angle on the bedside table before the sexual activity had begun. A fourth witness, Private Power, testified that the morning following the party he was informed by Aviator Stanutz that his friend Private Vu had in all likelihood sexually assaulted S.B. the evening before. Shortly thereafter, Private Vu took him to Tim Horton's to get breakfast. Private Power then confronted Private Vu about the sexual assault allegations that had been communicated to him, which Private Vu denied, showing him a video on his phone in an attempt to demonstrate that S.B. had consented to the sexual activity that had taken place, the recording terminating shortly after a number of persons had barged into the room.

[4] In addition to the evidence of witnesses, the prosecution introduced a number of exhibits in support of its case, most notably the audio/video recording of the alleged sexual assault, which the defence admitted was taken by Private Vu. The audio/video recording shows the face of Private Vu asking more than once whether S.B. wants him to "eat" her and allows hearing the affirmative verbal responses provided by S.B. who cannot be seen throughout the audio/video recording, with the exception of body parts such as a knee, an arm and the side of her face showing for very brief moments. Other exhibits included text messages exchanged between Private Vu and S.B. the day following the alleged assault, including one text from S.B. which appears to indicate that S.B. remembered the contact of a sexual nature which had occurred and consented to it. Other exhibits included drawings and pictures to assist in understanding the

environment pertinent to the alleged offence of sexual assault, including a video re-enactment of what was described by the prosecution as the journey between the location of the party on the first floor of the barracks and S.B.'s room on the second floor, in another wing of the barracks. The prosecution also entered in exhibit a video recording of a cautioned interview given to a military police investigator of the Canadian Forces National Investigation Service (CFNIS) by Private Vu on 11 March 2020. The defence consented to the admission of that interview, including a transcript thereof, admitting that the statement was voluntary. The defence submits that the police interview provides Private Vu's side of the story while the prosecution alleges that it contains a number of admissions of facts.

[5] The defence made a number of admissions in writing at the outset of the trial, thereby dispensing the prosecution to prove the identity of the accused, the place and time of the alleged offences, as well as the sexual nature of the contact between Private Vu and S.B.

[6] Following the close of the prosecution's case, the defence elected to call no evidence.

[7] I will now analyze the law and the facts as they relate to the four charges, in the order they appear on the charge sheet. I will describe the evidence of witnesses and the content of exhibits as required in the course of my analysis.

The applicable standard of proof

[8] Before discussing the charges in detail, it is important to mention the standard that the proof must meet before I can find the accused guilty of the offences.

[9] Indeed, underlying the analysis of charges by any court is the constitutional requirement for the prosecution to prove its case beyond a reasonable doubt. The accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that, before an accused can be convicted of an offence, the judge must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence.

[10] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. It is not sufficient for me to believe the accused is probably guilty or likely guilty. In those circumstances the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand, I must keep in mind that it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so.

[11] It is worth noting that reasonable doubt applies to issues of credibility. On any given point, I may believe a witness, disbelieve a witness, or not be able to decide. I am entitled to accept all, some or none of the testimony of any witness. If I have a reasonable doubt about the guilt of the accused arising from the credibility of the witnesses, then I must find him not guilty.

[12] The charges can be proven through direct or circumstantial evidence. For instance in this case, due to the consumption of alcohol, S.B. has little recollection of the events and no memory of the sexual activity subject of charge one. In addition to the video recording of the sexual activity in question, the prosecution has presented circumstantial evidence relating to the degree of intoxication of S.B., relevant to the issue of capacity to consent. Like any other element of any other offence, absence of consent in a sexual assault prosecution can be established through circumstantial evidence. The burden on the prosecution in a circumstantial case is to prove beyond a reasonable doubt that guilt is the only reasonable inference to be drawn from the evidence (*R. v. Griffin*, 2009 SCC 28, [2009] 2 S.C.R. 42 at paragraph 34). There is no burden on the defence to persuade me that there are other more reasonable or even equally reasonable inferences that can be drawn. A reasonable doubt may be logically based on a lack of evidence (*R. v. Villaroman*, 2016 SCC 33, [2016] 1 SCR 1000 at paragraph 36). The question is “whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty” (*Villaroman*, at paragraph 38). If so, then the accused must be acquitted.

The first charge of sexual assault

What needs to be proven?

[13] The first charge alleges that Private Vu did commit a sexual assault on S.B. In addition to the identity, time and place of the offence which have been admitted, the prosecution is required to prove beyond a reasonable doubt the following elements:

- (a) as it pertains to the *actus reus*, that Private Vu:
 - i. applied force to S.B.;
 - ii. in circumstances of a sexual nature; and
 - iii. where S.B. did not consent to the touching;
- (b) as it pertains to the *mens rea*, that Private Vu
 - i. had the intention to apply force to S.B.; and,

- ii. knowing that she had not affirmatively communicated her consent by words or conduct or being reckless or wilfully blind in this regard.

[14] As mentioned, there has been an admission to the effect that there was a contact of a sexual nature between the accused and S.B. This contact is in part shown on the audio/video recording in evidence, hence the first and second *actus reus* elements I just listed are proven; Private Vu applied force to S.B. in circumstances of a sexual nature. What is contested as it pertains to the *actus reus* of the offence is whether the prosecution has proven beyond a reasonable doubt the absence of consent on the part of S.B.

[15] In addition, the defence submits that the *mens rea* has not been proven to the required standard.

[16] I will examine these contested elements in turn.

First contested element: was non-consent proven at the required standard?

The law

Consent

[17] The question of consent is relevant to all forms of assault, including sexual assaults. Parliament, at subsection 265(3) of the *Criminal Code*, delineated where consent cannot be found to exist, namely where the complainant submitted or did not resist by reason of the application of force, threats or fear of the application of force, fraud or the exercise of authority.

[18] As it pertains to sexual assault, section 273.1 of the *Criminal Code* defines consent to be the “voluntary agreement” to engage in the sexual activity in question. Subsection (2) also outlines where consent is not obtained. The full text is as follows:

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.

(1.1) Consent must be present at the time the sexual activity in question takes place.

(1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.

(2) For the purpose of subsection (1), no consent is obtained if
(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(a.1) the complainant is unconscious;

(b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[19] Despite this legislative initiative, the law still grappled with what is meant by “voluntary agreement to engage in the sexual activity in question”. More information has been learned on the meaning of consent through court decisions, starting with *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the seminal Supreme Court of Canada (SCC) ’s decision on the elements the Crown or prosecution is required to prove in a sexual assault trial. The decision cemented the demise of implied consent and reinforced the necessity of focusing on the subjective state of mind of the complainant to determine if he or she did not consent to the sexual touching. Justice Major, for the majority, wrote at paragraph 26:

The absence of consent, however, is subjective and determined by reference to the complainant’s subjective internal state of mind towards the touching, at the time it occurred.

[Citations omitted.]

Consent and communication

[20] As consent is entirely an inquiry into the subjective state of mind of the complainant, it follows that what she did or did not communicate, while relevant, is not necessarily determinative, at least as it pertains to the *actus reus* of the offence, understanding that it may be determinative at the *mens rea* stage. (*R. v. Al-Rawi*, 2018 NSCA 10 paragraphs 42 and 48-49).

[21] This is an important nuance here, where objective evidence from the audio/video recording of the alleged sexual assault shows Private Vu obtaining several affirmative verbal responses from S.B. to his questions as to whether she wants him to perform oral sex on her, the specific sexual activity forming the charge. These exchanges, and the affirmative responses from S.B., will be referred to using the terms “apparent agreement” in these reasons.

[22] To be clear, “apparent agreement” cannot be equated with “subjective consent” as this notion was recently defined by the SCC in the case of *R. v. G.F.*, 2021 SCC 20 rendered on 14 May 2021. In this decision, by Karakatsanis J. writing for the majority, the expression “subjective consent” is said to most accurately convey what is required

by the *Criminal Code* and jurisprudence for a complainant, in their own mind, to provide “voluntary agreement to the sexual activity in question”.

The assessment of consent since *G.F.*

[23] *G.F.* clarifies two related issues that have divided lower courts. The SCC makes clear that there is no legal requirement to consider consent and capacity in any particular order, and that there may be cases where the complainant is both incapable of consent and not consenting, as was the situation in *G.F.* As part of its justification for finding that non-consent need not be considered first, the Court distinguishes between factors that preclude consent from occurring and those that vitiate consent. The former prevent a condition of subjective consent from being satisfied. They are logically linked to what subjective consent requires. In contrast, the latter factors recognize that even if the complainant has permitted the sexual activity in question, there are circumstances in which that subjective consent will be vitiated — deemed of no force or effect.

[24] This second aspect to “consent” for the purposes of the *actus reus* of sexual assault, requiring that consent be also be effective “as a matter of law”, includes factors that vitiate a consent for policy reasons. Those are found in subsection 265(3) (“force, threats, fraud, and the exercise of authority”) and at paragraph 273.1(2)(c) (“abusing a position of trust, power or authority”). We are not concerned with those in this case. What we are concerned with are factors that prevent subjective consent to occur.

[25] These factors include unconsciousness, under what is now paragraph 273.1(2)(a.1) and incapacity under paragraph 273.1(2)(b), another provision of the *Criminal Code* clarifying what courts had decided for years. Like unconsciousness, incapacity deprives the complainant of the ability to formulate a subjective agreement. An incapacitated complainant cannot provide voluntary agreement to the sexual activity in question and therefore cannot provide subjective consent.

[26] Capacity is therefore a precondition to subjective consent. As stated at paragraph 45 of *G.F.*, it provides certainty in the application of the law because it is inextricably linked to what subjective consent requires: contemporaneous voluntary agreement to the sexual activity in question. Capacity to consent requires that the complainant be capable of understanding what is required for subjective consent. If the prosecution proves beyond a reasonable doubt that the complainant did not have an operating mind capable of consenting, then it has proven a lack of subjective consent and the *actus reus* is established.

Assessment of capacity

[27] 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 Private 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 of the facts to the law.

[28] As it pertains to the law, we know that at one hand of the spectrum an unconscious complainant lacks the capacity to consent as this has been determined on numerous occasions by courts and it is now included at paragraph 273.1(2)(a.1) of the *Criminal Code*. The challenge remains to determine what impairment of cognitive ability short of loss of consciousness voids capacity to consent.

[29] On the other hand of the spectrum, it is well known that intoxication can impair judgment, causing persons to make decisions they would not otherwise make. Yet, it is not enough that the intoxication deprives the complainant of the ability to make sound decisions. The prosecution must convince the Court that incapacity has been established beyond a reasonable doubt. Only a “minimal capacity” suffices in order to be capable of consenting. In order to be found to have lacked the capability of consenting to sexual activity, the complainant must have been intoxicated to the point where they no longer had an “operating mind”. In *Al-Rawi*, Beveridge J.A. from the Nova Scotia Court of Appeal described the operating mind criteria in these words, at paragraph 60, quoted at paragraph 56 of *G.F.*:

[60] This begs the question: what constitutes an operating mind? Comatose, insensate or unconsciousness cannot qualify. Major J., in *R. v Esau*, . [...] reflected that being unconscious due to intoxication is not the only state capable of removing a complainant’s capacity to consent (para. 24). Mere awareness of the activity is also insufficient to ground capacity where the trial judge accepted that the complainant was “out of control” and “not able to say no” due to the involuntary ingestion of drugs.
[Citations omitted.]

[30] The case of *G.F.* is the most recent pronouncement by the SCC on the issue of capacity to consent, recognized as a precondition to subjective consent. Justice Karakatsanis found that the requirements for capacity are tied to the requirements for subjective consent itself. Discussing these requirements starting at paragraph 55, she writes:

... Since subjective consent must be linked to the sexual activity in question, the capacity to consent requires that the complainant have an operating mind capable of understanding each element of the sexual activity in question: the physical act, its sexual nature, and the specific identity of their partner: *Barton*, at para. 88; *Hutchinson*, at paras. 54-57.

[56] There is one further requirement. Because subjective consent requires a “voluntary agreement”, the complainant must be capable of understanding that they have a choice of whether or not to engage in the sexual activity in question: *Criminal Code*, s. 273.1(1). At the very least, a voluntary agreement would require that the complainant exercise a choice to engage in the sexual activity in question. In this narrow sense, in order to voluntarily agree to the sexual activity in question, the complainant must understand that saying “No” is an option. In *J.A.*, this Court held that consent requires that the

complainant have “an operating mind” at the time of the touching, capable of evaluating each sexual act and choosing whether or not to consent to it: paras. 36 and 43-44. Thus, an unconscious complainant could not provide contemporaneous consent. It follows that where the complainant is *incapable* of understanding that they have this choice to engage or refuse to engage, they are incapable of consenting. Accordingly, a complainant who is unable to say no, or who believes they have no choice in the matter, is not capable of formulating subjective consent.”

[Citations omitted; emphasis in original.]

[31] Consequently, for a complainant to be capable of providing subjective consent to sexual activity, they must be capable of understanding four things:

- (a) the physical act;
- (b) that the act is sexual in nature;
- (c) the specific identity of the complainant’s partner or partners; and
- (d) that they have the choice to refuse to participate in the sexual activity.

[32] All four factors must be understood. If the prosecution proves the absence of any single factor beyond a reasonable doubt, then the complainant is incapable of subjective consent and the absence of consent is established at the *actus reus* stage. There would be no need to consider whether any consent was effective in law because there would be no subjective consent to vitiate.

[33] In its application of the law to the facts in *G.F.*, Karakatsanis J. discusses two subjects that are relevant to this case. 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 the sexual activity being examined. Second, she 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.

[34] Having now reviewed the law, I will turn to the position of the parties as to how this law should be applied, in light of the circumstances of this case.

Position of the parties

Prosecution

[35] The main thrust of the prosecution’s argument on the *actus reus* of the alleged sexual assault is that S.B. was incapable of consenting to the sexual activity which took

place, namely the oral sex performed on her by Private Vu, by reason of her extreme intoxication by alcohol at the time. The prosecution submits that the absence of two of the factors of the *G.F.* case have been proven beyond a reasonable doubt, namely that S.B. was incapable of understanding the specific identity of her partner at the time; what the prosecution described as route one; and/or that she was incapable of understanding that she had the choice to refuse to participate in the sexual activity; route two. The prosecution submits that no subjective consent was therefore present at the time of the activity, in conformity with paragraph 273.1(2)(b) of the *Criminal Code*, regardless of an expression of apparent agreement by S.B. at the outset of the sexual activity.

[36] The prosecution ultimately proposes a third route for conviction under the *actus reus* for charge one, namely that S.B. was unconscious for portions of the sexual activity that was taking place, as evidenced by the audio/video recording made of the sexual activity in which no noise is heard coming from her for two periods of approximately 38 seconds and 16 seconds respectively. I am requested to infer from those periods when she was silent, that S.B. had fallen asleep, hence was unconscious and therefore unable to consent to the sexual activity under paragraph 273.1(2) (a.1) of the *Criminal Code*. Under that route to conviction, it is submitted by the prosecution that the apparent agreement to the sexual activity expressed at the outset, even if held to be sufficient to infer subjective consent, did not apply to any portion of the sexual activity which occurred when S.B. was unconscious. As decided by the SCC in *R. v. J.A.* 2011 SCC 28, consent does not extend to advance consent to sexual acts committed while the complainant is unconscious.

Defence

[37] For its part, the defence invites the Court to watch and listen to the audio/video recording in evidence carefully and pay attention to how S.B. expresses her apparent agreement to the sexual activity proposed by Private Vu, as well as the interaction between the two once sexual activity begins. For defence counsel, it shows that S.B. was not only conscious but also responsive throughout despite her intoxication which, even if severe, is not synonymous with incapacity to consent. The defence submits that the audio/video evidence alone should leave me with a reasonable doubt on the three routes to conviction suggested by the prosecution.

[38] As it pertains to the first route to conviction suggested by the prosecution, the defence submits that there is nothing in the evidence that would allow me to conclude there could have been any misunderstanding on the part of S.B. about the identity of Private Vu as her partner given that he spoke to her in his normal voice, lights were on and she had a clear line of sight, especially when she rose her head at one point. As it pertains to route two and S.B.'s capacity to understand that she had the choice to refuse to participate in the sexual activity, the defence invites me to conclude from the audio portion of the audio/video recording that S.B.'s words, before and during the sexual activity, reveal that she understood the nature of the activity and that she had the choice to refuse to participate. As it pertains to the third route suggested by the prosecution, the defence's position is that the Court cannot make the inference suggested and equate any

period of silence by S.B. to a period of unconsciousness, especially given that S.B. is not visible to the camera when she is allegedly sleeping. It is argued therefore that she could simply have chosen to remain silent for some of the sexual activity.

[39] As it pertains to my appreciation of the evidence, the defence submits that I should be very cautious about circumstantial evidence related by prosecution witnesses. It is argued that these witnesses are unreliable due to their lack of recollection of main events. The defence also brought to my attention what it considers as thin and non-compelling evidence of incapacity in this case in comparison with other cases and has highlighted several areas where additional evidence would have been useful but was not introduced.

Analysis

The issue

[40] The only real issue as it pertains to the *actus reus* of charge one is whether S.B., in the state of intoxication that she was at the time, had the capacity to consent to sexual activity with the accused. In the context where that specific activity, oral sex given by Private Vu, was and remained the same as the activity mentioned to her by Private Vu at the outset of the audio/video recording and to which she has expressed apparent agreement, the issue could also be framed as to whether that apparent agreement constituted subjective consent in law. Yet, as consent must be related to the sexual activity in question and because the only relevant period for ascertaining whether the complainant consented is while the touching is occurring, I believe it is important to focus on the sexual activity and treat what occurred before or after as circumstantial evidence assisting or not in the evaluation of whether S.B. had the capacity to consent. This approach will allow addressing the main argument of the prosecution to the effect that regardless of what she might have said at the time, including what she was recorded as saying, S.B. was incapable of consenting to sexual activity due to her state of intoxication.

[41] Framing the issue as I did will allow addressing the first two routes to conviction suggested by the prosecution in its submissions. As for the third route, referencing to two periods of silence as evidenced in the audio/video recording, it can be dismissed outright. The audio/video recording does not show any part of S.B.'s body during the two periods when the prosecution submits she would be unconscious. It would be erroneous for the Court to infer as requested that periods of silence on the part of S.B. mean she was unconscious. In the absence of any other evidence such as a lack of movement, an entirely relaxed body or facial expression such as eyes being closed, the silence of S.B. simply means she was silent as persons involved in sexual activity may well be, regardless of whether the activity is consensual or not or whether they are intoxicated or not. Noise is not a mandatory feature of sexual activity. Consequently, I am prepared at this stage to dismiss the prosecution's argument as it pertains to silence as a means to demonstrate that S.B. was asleep, hence unconscious during any part of the sexual activity which took place.

The evidence of the audio/video recording

[42] Both parties suggested that I look at the audio/video recording carefully and listen to the audio with care. That is what I have done and I am now in a position to make the following observations.

[43] The first observation that needs to be made pertains to the general feeling of disgusts that I had at watching these very crude images of Private Vu performing oral sex on an invisible partner who is obviously intoxicated. There is a sense of relief every time the recording ended given how difficult it was to watch. I fully understand the immediate reaction of those who entered the room and abruptly interrupted the sexual activity that was happening as well as their decision to expel Private Vu from the room, thankfully without excessive force. Indeed, it is reasonable to believe that there is something fundamentally inappropriate in having sexual activity with a person who one barely knows and is drunk to the point of having difficulties to walk, as evidenced here.

[44] That having been stated, my job is not to issue moral judgements, it is to assess whether the crimes alleged have been committed under our laws. In order to do that, I have had to get over my reluctance and watch the audio/video recording of the sexual activity taken with Private Vu's phone. The recording lasts approximately 5 minutes 29 seconds of which approximately 3 minutes 37 seconds show Private Vu perform oral sex on S.B., as admitted. The audio/video recording shows the entire duration of the sexual activity that took place and is consequently an extremely important piece of evidence. For that reason I watched and listened to the audio/video recording repeatedly, pressing play and pause on uncountable occasions and taking copious notes. Indeed, there is a lot more information in this audio/video recording than first meets the eyes and the ears. Both the visual and the audio aspects of the recording led the most significant and neutral information as to what transpired and is key to the findings I need to make.

[45] The audio/video recording initially shows the phone carrying the camera lens being placed by Private Vu on a table near the head of the bed at such an angle as to focus on the foot of the bed, hence not showing S.B. who, it can be inferred, is lying on her back on the bed with the phone to the left of her head. What first struck me regarding the visual aspect of the recording is that at no point S.B. can be seen to any extent that would allow recognizing her. Her face is not seen except for a moment at the 50 seconds mark as she lifts her head from a pillow, the left side of her face appearing in part, showing part of her neck, cheek, nose and some hair, without offering any possibility for recognition. At three other occasions the recording shows the side of S.B.'s neck, a knee and her left arm and hand that she lifts upwards. These observations can only be made through carefully watching the image to notice any change and then pause to decipher what has momentarily appeared on the screen.

[46] With the exception of those brief moments during the sexual activity and the moment people barge into the room, the only person seen in the audio/video recording is Private Vu. He is easily recognizable at the outset of the recording as the first images are of him speaking directly to the lens. Once he places the phone on the table, the image shows him removing some sheets from the bed and, one can infer, the pants of S.B. before going down between her legs for the sexual activity that follows, during which a viewer can see his face roughly from the nose up. At the end of the recording, other people are seen entering the room, pulling Private Vu away from S.B. and then picking him up from the floor before he comes back towards the lens to grab his phone and stop the recording. There are three phases of the audio/video video recording: *pre-sexual activity*, approximately until the 50 seconds mark; *during the sexual activity* until approximately the 4 minutes 27 seconds mark; and *after the sexual activity*, after other people enter the room until the end of the recording at approximately 5 minutes 29 seconds.

[47] The video recording begins with a close up view of a visibly intoxicated Private Vu as he says “You want me to eat you?” This reveals to me that a conversation would have taken place before the recording was initiated, a conclusion which conforms to what Private Vu told police in the video recorded cautioned interview entered as exhibit. That conversation would have in all likelihood led to a request or proposition to engage in oral sex as it is the only explanation as to why the recording would commence with such a bold statement. Private Vu explained to police that he wanted to ensure the agreement of S.B. was recorded given concerns that had been drilled in him since basic training about Operation HONOUR, the now well-known operation launched by the then CDS to eradicate sexual misconduct in the Canadian Armed Forces (CAF).

[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.

[50] I wish to mention that I am not mentioning the number of requests and affirmative responses because repetition makes the apparent agreement more likely to constitute subjective consent. What I am outlining here is the fact that questions from Private Vu appear to have been understood as they are the object of immediate responses. This information is relevant to determine whether S.B. had an operating mind just before the touching subject of the charge began.

[51] The sexual act begins immediately after the response and words of S.B. following the last question from Private Vu. As he brings his head down and forward, initiating an up and down motion suggesting he is licking, S.B. lifts her head up, thereby gaining a direct line of sight to Private Vu, at the same time saying what appears to be "Piew, you're onto my pussy right now right? ... Tasty?" Then four syllables are pronounced by S.B., ending with "right now" before she makes a loud moaning sound. I am using the word "moaning" here because the noise made by S.B. needs to be described in word and it was identified as the most appropriate word to use following consultation with counsel. By the use of this word, I am not suggesting any kind of pleasure was felt by S.B.: this is simply not relevant to my analysis which is focussed on sounds emitted as a mean of communication and response potentially relevant to my assessment of whether S.B. had an operating mind at the time of the touching.

[52] There is mumbling and moaning throughout the first part of the sexual activity, including loud moaning when one of S.B.'s knee 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.

[53] As mentioned, the portion of the audio/video recording which occurs during the sexual activity does not show S.B. with the exception of four brief moments: when she lifts her head at approximately 50 seconds, when we can see the side of her neck at 1 minute 21, when a knee can be seen for two brief moments at 1 minute 33 and 1 minute 39 and when her left arm and hand is appearing at 1 minute 58.

[54] The door of the room is opened at about 4 minutes 27 when Private Vu immediately lifts his head and moves it in the direction of the door saying "I am eating her out right now" which he repeats after Aviator Stanutz yells at him "Vu, what the fuck?!" Despite the yelling, S.B. can be heard moaning on two more occasions, at approximately 4 minutes 29 and at 4 minutes 36 while Private Vu is no longer touching her. At 4 minutes 40 seconds, her knee can be seen briefly in the screen and a short

grunting noise can be heard from her, at the exact same time as Private Vu is pulled off the bed by a male who had entered the room. It is not clear whether this movement was voluntary however, as it could have been the result of the mattress lifting up momentarily as the weight that Private Vu would have applied comes off. In any event, following that moment and despite the noise associated with Aviator Stanutz and others entering the room, S.B. does not seem to be moving: no movements which would have had the effect of placing some of her body parts in sight can be observed. Furthermore, from that moment at 4 minutes 40 seconds until the end of the recording, S.B. is not making any audible noises.

Other evidence

[55] The prosecution called four witnesses who were able to provide circumstantial evidence relevant to the issue of capacity to consent, namely S.B. herself, Aviator Stanutz, Aviator Leblanc and Private Power. A number of exhibits were produced by these witnesses, including most notably a copy of a text message sent by S.B. to Private Vu the day after the alleged assault, in which she implies that she remembers the activity and states that she “wanted it”. In addition, the video and transcript cautioned interview given to a military police investigator of the CFNIS by Private Vu on 11 March 2020 provide relevant evidence on the issue of capacity to consent.

The testimony of S.B.

[56] S.B. testified that she had joined the regular force in 2019 and arrived at Canadian Force Base (CFB) Borden early in January 2020, to be assigned to the Personal Awaiting Training platoon (PAT platoon) while waiting for her trade course to start. S.B. did not need to attend basic training prior to undergoing basic occupational training as she had graduated from a specialized program at CFB Esquimalt some time before.

[57] S.B.’s trip to Borden was only the second time she had left her remote community. She knew nobody when she arrived at CFB Borden but quickly met other people assigned to the PAT platoon including Private Vu, who had a car and helped her get around. On 10 January 2020, she was invited by Private Vu to a party that took place in the room occupied by Private Power and others. She was excited to attend the party which provided her opportunity to meet people. Her memory of the events is, however, very limited. She remembers playing a card game which involved drinking. She testified that she did not bring any alcohol to the party yet had been drinking there, mainly what she described as a 7% alcohol vodka drink called “Black Fly”. She cannot remember how many drinks she had. She remembers little interaction with other participants with the exception of Private Vu. Her last memory is to be sitting beside Private Vu.

[58] At that time, she assessed that her degree of impairment would have been an 8 out of 10 stating that her world was spinning around her, that she needed to sit down, and considered going back to her room. Things went black for her at that point. Her

testimony does not allow a conclusion to be reached as to what time she would have experienced the impairment level and feelings she described. She claims having no memory of what happened afterwards until she woke up the next morning. She testified having had one experience in her life of drinking to excess where she had no recollection of events the next day.

[59] S.B. explained that she was awakened in the late morning of 11 January 2020 by Aviator Stanutz knocking at her door, along with Private Power. She was told by Aviator Stanutz that she and others had caught Private Vu doing something sexual to her, which S.B. described not without difficulty as oral sex. She said that her colleagues were quite mad at Private Vu for what he had done. In their opinion she was obviously intoxicated at the time as she had to be taken back to her room and had difficulty walking on her own. She described being left in a state of disbelief in relation to what they were telling her.

[60] S.B. explained that after lunch she participated to a meeting in the laundry room in the barracks, involving Private Vu as well as Private Power and Aviator Stanutz. The discussion related to the events of the previous night. She was informed that an audio/video recording of the sexual activity had been made. She had no memory of having been recorded and said that she would not have consented to be recorded. She said Private Vu explained that the recording had been made to record her consent to the sexual activity that took place. She replied by asking Private Vu to delete the video. She refused to watch when Private Vu offered her the opportunity to view the recording. She believes that Private Vu showed her that he had deleted the video from his phone. She testified that she was quite upset and confused at the time but decided that it would be better to move on.

[61] A short time after the meeting in the laundry room, S.B. hung out with her friends Power, Stanutz and Vu in Private Power's room. During the time they were in the room, she exchanged text messages with Private Vu. Those were entered as exhibits. During her testimony S.B. commented on a text that she sent to Private Vu to the effect that the sexual activity, specifically the oral sex of the night before, was something she consented to engage in. Her text read "it's OK I wanted it". She explained in her testimony that she lied in the text to cheer up Private Vu who seemed to be quite depressed as he sat across from her, appearing just about to cry. She said she continued to hang out with Private Vu for about one week after that meeting.

[62] In cross-examination, S.B. was asked about her memory of the events and was challenged about a number of details of that evening. By and large, S.B. testified that she could not remember most of the evening in line with what she had said in the examination-in-chief. As it pertains to her state of intoxication, she did confirm that she was not particularly hungover in the morning. She confirmed that at the meeting in the laundry room she did not contradict Private Vu when he suggested that she had consented to the sexual activity and confirmed that at the time she had no intention of "pressing charges" against Private Vu. She agreed also that her texts forming part of the conversation in Private Power's room do not look like she was confused or scared and

that she adopted at one point a joking tone in referring to the oral sex of the night before. She denied, when pressed, having any memory of the events of the sexual activity that occurred and of the party, beyond what she described in examination-in-chief.

The testimony of Aviator Stanutz

[63] Aviator Stanutz explained that she had arrived at CFB Borden on 2 November 2019 to join the PAT platoon. She described the events of 10 January 2020, how she came to participate in a party in Private Power's room that night and described the events that unfolded during the evening. She mentioned having taken about two drinks of mixed vodka.

[64] She had known Private Vu for a while at the time of the party and noticed that he seemed affected by alcohol as he was slurring his words and could not walk straight. Although she did not know how much S.B. had consumed at the time, she said that she appeared sober when she arrived but became increasingly intoxicated as the party progressed, at one point having difficulty standing on her own, as evidenced by the fact that she had fallen off a chair, shortly after drinking hard liquor. Aviator Stanutz said she picked up S.B., tried to sit her back on the chair but S.B. was unable to stay on. It is at that point that she decided to take S.B. back to her room, located in a different wing of the building on the second floor. As S.B. was heavy, she obtained the assistance of Aviator Leblanc for what she described as "a journey" from Private Power's room on the first floor of the building to S.B.'s room on the second floor in a different wing. The journey involved a stop at a bathroom on the second floor and was quite difficult given that S.B. was agitated at times and unresponsive at others, describing occasions when she needed to be dragged as her legs were apparently not working.

[65] Aviator Stanutz explained that Private Vu was following along and assisted her in preparing the room and the bed for S.B. She explained how she pulled the sheets and the cover down, removed any obstruction and placed S.B. on her bed with the assistance of Aviator Leblanc. She described the state of S.B. when she was put in bed, eyes closed and not moving. She explained that at that point she realized she did not have her phone on her and said she wanted to be able to call emergency services if necessary given the state of S.B. Therefore, she decided to go back down to Private Power's room to recover her phone, intending to come back upstairs to S.B.'s room shortly thereafter. Aviator Leblanc came with her and Private Vu was left alone with S.B. She spent some time chatting with people downstairs. As she got back up and entered the room, she saw Private Vu perform oral sex on S.B. while filming himself, holding his phone on the side. She explained that S.B. was lying on her back, naked from the waist down with her eyes closed and that she did not move despite the commotion, appearing to be sleeping.

[66] As it concerns the events of the next day, Aviator Stanutz testified that she met with S.B. at around 11:00 in the morning and explained the events of the previous evening to her as S.B. did not remember. She confirmed having met with Private Power

shortly before her meeting with S.B. Aviator Stanutz described details of the evening to S.B. including taking her to her room, leaving her to sleep and what she had seen when she came back to her room. She acknowledged participating in the subsequent meeting in the laundry room.

[67] In cross-examination, Aviator Stanutz was significantly challenged as to her recollection of the events and confronted with prior statement she had made to police. At the outset, she was caught having lied in her direct examination about her underage drinking. She admitted having lied to police about bringing alcohol to the party and had to acknowledge that she had stated to police that she had heard S.B. at the party saying to Private Vu to come back to her room. Aviator Stanutz had significant difficulties answering questions in cross-examination about details of her journey to S.B.'s room. More importantly she could not provide an explanation as to why she had to leave Private Vu alone with S.B. to recover her phone, why she did not call emergency services once she had entered S.B.'s room and why she needed to bring Aviator Leblanc downstairs with her to recover her phone.

[68] After being shown the audio/video of Private Vu's recording of the events, Aviator Stanutz confirmed that the angle of the filming was not as she had earlier described. She also confirmed having accused Private Vu of rape during a conversation later that night and confirmed that she was mistaken in direct examination about her interaction with Private Vu the next day. She did confirm sending texts to Private Vu for dramatic effect to make him feel bad about what he had done.

The testimony of Aviator Leblanc

[69] Aviator Leblanc testified having arrived quite late yet sober at the 10 January 2020 party, at around ten p.m. He described meeting S.B. for the first time at the party and mentioned that Private Power was already appearing quite sick at the time he came in, which motivated him to stay at the party to ensure everyone was safe given that he was apparently the only person sober there.

[70] Aviator Leblanc described what he had observed of the drinking game and his observation of S.B. and Private Vu. He described Private Vu as being at 4 out of 10 in terms of intoxication and described the state of intoxication of S.B. at about a 6 out of 10 when he arrived, but mentioned that at one point she was a 9 out of 10. He said she was mumbling, was acting strangely by hugging people and calling him by an actor's name. He said that at one point S.B. fell down on her face from the chair she had been sitting on. It is at that moment that he concluded that she needed to go back to her room assisted.

[71] Aviator Leblanc testified that Private Vu had suggested that he should accompany S.B. back to her room. He did not agree with that suggestion, believing that she should be accompanied by a woman. He said he decided to assist Aviator Stanutz to carry S.B. to her room although he was unable to recall how exactly Stanutz got involved. He described in which position he carried S.B. and the journey to her room on

the second floor. However, his description of the details of the journey to S.B.'s room varied considerably from the description offered by Aviator Stanutz as it pertains to the way he was holding S.B., the location of the bathroom where they stopped on their way, the way S.B. was carried up the stairs, and the specific events that occurred while they were on their way and near her room.

[72] Indeed, Aviator Leblanc said they proceeded directly to S.B.'s room without stopping and without anyone previously entering to prepare the room. His recollection is that S.B. had her key and somehow Aviator Stanutz recovered the key to open the door. His recollection of the discussion that took place as S.B. was placed in her bed differed from Aviator Stanutz. He explained that he needed to go downstairs for a smoke and although Aviator Stanutz initially left with him "to get her or a phone" downstairs, he convinced her to go back to be with S.B. instead of leaving Private Vu alone with her.

[73] Aviator Leblanc had difficulties relating a logical sequence of the events that ensued, even in direct examination. He said he left Private Vu with S.B. despite reservations expressed by Private Vu about that because he felt he could trust Private Vu, only to change his mind a short time later. Yet he testified having been involved in bringing S.B. to her room precisely because he did not trust Private Vu. Aviator Leblanc said that when he arrived downstairs near the location of the party he heard a commotion coming from the speaker of Private MacDonald's phone. He realized that something may have happened and made his way back up to S.B.'s room where a number of people had converged. At that time, he witnesses S.B. still dressed, lying on her back, eyes closed and not moving. She appeared to be sleeping. He was subsequently informed of what had transpired in the room. Four days later, realizing that nothing had been done, he disclosed what had occurred to the chain of command with the assistance of a friend. This complaint led to the military police involvement.

[74] On cross-examination, Aviator Leblanc was challenged about his recollection of the events of the night before which revealed significant inconsistencies, gaps and illogic propositions which he did not try to explain. Specifically, 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 timings revealed of the audio/video recording. He had no idea how so many people could have gotten to the room without crossing his path in the corridors or stairways.

The testimony of Private Power

[75] Private Power also testified for the prosecution but his memory of events at the party is foggy as he said himself, which is understandable given that he was sick from drinking and in bed just after ten p.m. He did confirm his involvement in events which occurred the next morning, including meeting with Aviator Stanutz, a subsequent meeting with Private Vu and his participation in the meeting in the laundry room.

Analysis of the evidence

Credibility of witnesses

[76] The credibility of witnesses is not a major factor in this case given that the determination I have to make about S.B.'s capacity to form consent to the sexual activity subject of the first charge will be largely assessed on the basis of the audio/video recording of the events. That being stated, the prosecution has offered through its witnesses evidence of intoxication pertaining to S.B. and others, as well as details of communications following the facts, which may have an impact on the assessment I will need to make on the capacity of S.B. to consent to the sexual activity. I will therefore comment on the credibility of that evidence and on what evidence I accept.

[77] In general, testimony has credibility problems if the witness is intentionally offering, in whole or in part, false, exaggerated, or minimized information. In effect, credibility addresses whether the witness is lying. In contrast, reliability is about honest mistakes. Evidence has reliability problems if an honest witness is inadvertently offering inaccurate information. Credibility problems can arise because the witness is not a trustworthy person but generally, credibility problems are almost always contextual. In particular circumstances, witnesses may choose to offer a fabricated, exaggerated, or minimized account. As with credibility problems, some reliability problems arise from a witness's personal circumstances but are more commonly situational.

[78] First, I have to state that I find the testimony of S.B. to be entirely credible on what she remembered about the events. She stated she had a very poor memory of the events at the party and no memory of the actual sexual acts. I have no reasons to doubt her testimony on those points. S.B. impressed me as an honest person who has shown significant courage in coming to Court to testify about deeply personal matters that have profoundly hurt her. I also recognize that at the time of the events subject of the charges, in January 2020, she had been thrown in a very challenging environment as a young recruit sent to a military base where she knew nobody, in the midst of winter, far away from her home and community, in an environment socially and culturally miles from what she was accustomed to. Joining the CAF is a culture shock for anyone and I can only imagine the additional obstacles she would have had to overcome in her circumstances. The fact that she is proudly serving to this day is a testament to her extraordinary resilience and potential.

[79] I do believe and accept S.B.'s explanation as to the reasons why she texted Private Vu on 11 January 2020 to convey to him "it is OK I wanted it" suggesting she remembered the contact of a sexual nature which had occurred and consented to it. I do find plausible, in the circumstances she was in at the time, that she thought it would be better if everyone in the limited group of acquaintances she had made, by then in her six days in Borden, would move on and forget about the unfortunate incident of the night before. It is very likely as well that she felt rebuilding bridges with Private Vu was the

least negative option she was faced with. Indeed, Private Vu was the only friend she had made in Borden by then and was a source of support to her, given his acquaintances on base and in the PAT platoon as well as his past support in driving her around, something likely non-negligible for a young person in a large military installation such as CFB Borden, in January. Importantly, by then she had to rely on Private Vu's word that he had deleted the audio/video recording that she believed would be embarrassing for her. Consequently, I find her explanation to the effect that she wanted to raise the morale of a "bummed out" Private Vu by sending the text messages she sent to be credible. I do believe she lied to Private Vu in that text exchange. I will not consider the text exchange as evidence of memory or consent to the sexual activity of the night before.

[80] The evaluation of the credibility of other prosecution witnesses is entirely different. The testimony of both Aviators Stanutz and Leblanc, the only witnesses relevant to the assessment of S.B.'s capacity to form consent, raised significant credibility and reliability difficulties. Aviator Stanutz displayed significant efforts in her examination in chief to portray herself as a bright, even a top student. This character trait will no doubt serve her well in her career with the CAF, along with her obvious leadership capabilities. However, by volunteering details to signal her virtue and her apparent reliability in bringing to the fore evidence favorable to the prosecution she fell into obvious exaggeration and even, sadly, outright lies, which became quickly apparent under cross-examination by skilled counsel. Indeed, Aviator Stanutz lied when she said she did not drink before majority as it could result in trouble. She was underage at the party on 10 January 2020 and drank the alcohol that someone had purchased for her, like most other Canadian youths frequently do. In addition, her description of Private Vu holding a phone to the side to film himself while performing oral sex on S.B. was so far from the reality of what she had witnessed as evidenced from the audio/video recording that it leads me to question the reliability of her recollection. It also offers another indication of a dangerous propensity to embellish her testimony. I conclude that it would be dangerous to rely on anything she said in court to convict Private Vu, unless her evidence was supported by other, credible evidence.

[81] As it pertains to Aviator Leblanc, his recollection of events was significantly different from the testimony of Aviator Stanutz as it pertains to the details of the journey from the location of the party to S.B.'s room. In itself, it is not unusual. However, Aviator Leblanc came across as the witness who had the least confidence in his recollection of events, despite the fact that he was sober at the time. Most concerning was the illogic recollection he related, as it pertains to the anecdote of the fall of S.B. in the staircase in proximity of shovels and the implausibility of his recollection of events after he had left S.B.'s room, immediately after putting her in bed. Aviator Leblanc did not appear to make any significant efforts to reconcile his narration of events with logic and other evidence as to timings. Worse, he did not seem to care about whether his version made any sense. This reflects a lack of interest to be and appear truthful, admit weaknesses and correct misunderstandings which makes his testimony unreliable and non-credible. For him too, I conclude that it would be

dangerous to rely on anything he said in court to convict Private Vu, unless his evidence is supported by other, credible evidence.

[82] As it pertains to Private Power, my concerns are more related to the frailty of his recollection, obviously from the night of the party but also of the events of the next day, given the approximations that he conveyed in his answers to questions, especially in cross-examination.

Other evidence

[83] There is, in this case, other evidence that provides credible information. The cautioned interview by Private Vu provides credible evidence when he admits the existence of facts related by prosecution's witnesses. This is the case when he mentions the word "dragged" to describe how S.B. was carried to her room or when he describes his observation as to S.B.'s level of impairment on a scale of 1 to 10 at various moments of the evening, going as far up to 10 at one point in his interview, settling to 8 to 9 when he was with her in her room. This frankness makes the version he conveys to police credible, keeping in mind that it has not been tested by cross-examination.

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

[85] The images and sound provide, to a certain extent, indications about the level of outwardly visible effects of alcohol consumption, namely the degree of intoxication. This may not be the same thing as impairment as persons may have different levels of tolerance to alcohol, which do impact the behavioural manifestations of impairment.

[86] In this case, and this is not meant as a blame to anyone, I do not have access to evidence often found in other cases that have been brought to my attention involving impaired complainants in sexual assault cases. Indeed, as level of impairment is internal, a person's self-assessment may be useful but not always reliable. Here, S.B.'s last memory is of speaking with Private Vu, qualifying her degree of impairment as 8 out of 10 stating that her world was spinning around her and that she needed to sit down. However, it has not been determined at what time that self-assessment would have been made, hence its temporal proximity to the alleged sexual assault.

[87] Another evidential element that remains vague in this case is the assessment of the quantity of alcohol which would have been consumed by S.B. She was unable to present specific evidence on that issue. Aviator Stanutz said that S.B. would have been drinking more than two "Black Fly" drinks, two shots of Crown Royal and some vodka. Yet, on cross examination these quantities decreased to no vodka and two sips of Crown Royal with an unknown quantity of Smirnoff Ice vodka mix. In his statement to the police, Private Vu said that he gave S.B. a "couple" of "Black Fly" drinks and does not know what else she might have had. This case did not lend itself to precise post offence alcohol concentration measurements. I also did not benefit from the assistance of expert

witness(es), for instance a toxicologist, who could have explained concepts such as the relationship between intoxication and impairment, the inferences that can and cannot be made from the fact that someone experienced a black out, the potential delayed effects of alcohol etc. In any event, it is possible that such evidence would have been of limited assistance given the unknowns in this case about the consumption as well as alcohol levels. Again, these remarks are not meant as a blame on anyone.

The evidence relevant to the issue of incapacity to consent

[88] My duty is to decide the case on the basis of the evidence that I have. What I am left with in this case is inferences that I am asked to make from the outward behavioural indicia of impairment displayed by S.B. In this regard, there is evidence to suggest that S.B. was significantly impaired by alcohol:

- (a) she consumed alcohol, which I assess as two “Black Fly” vodka drinks (7% alcohol) and sips of “Crown Royal” (40% alcohol) and “Smirnoff Ice” (5% alcohol);
- (b) she described herself as being drunk at some point in the evening, as she was discussing with Private Vu, she estimated her impairment level as an 8 out of 10, mentioning that her world was spinning around her, that she needed to sit down and considered going back to her room;
- (c) she was observed at the party by two witnesses falling from a chair and having difficulties staying seated without falling, Private Vu himself admitted that she may have passed out at the party on one occasion;
- (d) she had to be taken back to her room with significant assistance from two people, who at times had to drag her because her legs and feet did not appear to be functioning;
- (e) she appeared to be sleeping when she was placed on her bed and again after people barged into the room during the sexual activity;
- (f) her voice is faint and she slurs her words on the audio portion of the video recording, mumbling incomprehensible words at times;
- (g) she experienced a significant memory loss, including blacking out at some point during the party and having no memory of the events until approximately three a.m. when she woke up in her room and went looking for her phone. She said that she had experienced memory lapses from drinking once in the past; and

- (h) she did not react when people barged into her room, suggesting that her moaning at the time, even after Private Vu had ceased touching her, may not have been conscious or that the knee seen on the screen as Private Vu is pulled away from her would not have been a voluntary movement.

[89] In contrast, the audio/video recording reveals a number of elements which would be indicative of a capacity on the part of S.B. to effect subjective consent, despite her intoxication, including the following:

- (a) she provided immediate and understandable affirmative responses to the queries of Private Vu as to whether she wanted him to engage in oral sex with her;
- (b) after expressing her consent with words such as “yeah” “please” and “come” she showed an immediate reaction to the first touching by Private Vu, lifting her head up in a manner that gives her a direct line of sight to Private Vu, at the same time saying what appears to be “Piew, you’re onto my pussy right now right? ... Tasty?” By doing so and expressing herself in a full sentence, she displayed indicia of a conscious, operating mind;
- (c) she moved her legs and knees close to Private Vu’s face in a manner consistent with the facilitation of the sexual activity that was taking place at the time; and
- (d) after a period of silence is interrupted by Private Vu saying what appears to be “You like that?” or “like that” she produces a moaning sound in reaction or response to the words uttered by Private Vu immediately before.

Analysis on the issue of capacity to consent

[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 degree of intoxication witnessed from S.B. This is stated of course, without the assistance of any expert in toxicology which could have shed 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 a hangover the following day, unlike the other occasion when she had experienced a black out.

[91] The deterioration of motor skills and balance on the part of S.B. were elements of considerable focus on the part of the prosecution. Both Aviators Stanutz and Leblanc testified that S.B.'s feet were not functioning at times during the journey to her room. Although I am of the view that this assessment may have been exaggerated, I do note that Private Vu used the words "dragged her, carried her to her room..." when asked by the police investigator how she ended up in her room. He subsequently demonstrated how S.B. was carried with one person on each side. Later during the sexual activity, S.B. appeared to move her legs and knees close to Private Vu's face in a manner consistent with the facilitation of the sexual activity that was taking place. In any event, the deterioration of motor skills is not determinative in the assessment of the capacity to consent to sexual activity. As stated by Crosbie J. in *R. v. C.P.*, 2017 ONCJ 277 at paragraph 68:

Cases where extreme intoxication have led to findings of incapacity to consent tend to be cases where the evidence of intoxication is far beyond the loss of gross motor skills and balance. These cases tend to include evidence of a loss of awareness or loss of consciousness.

[92] Indeed, the threshold that intoxication short of unconsciousness must meet to justify a finding of incapacity to form consent to sexual activity is high. The conclusions of the trial judge in *R v. Hinds* [2016] ONSC 95 illustrate that point. Despite the fact that a witness who observed the complainant shortly after the incident said she was unable to dress herself, had a vacant expression and was zigzagging, it was found that, based on the fact that a short time before the incident the complainant had been in control of her actions, had not consumed additional alcohol and was able to comprehend one of her friend's comments, the Crown had failed to prove the complainant lacked the capacity to consent due to intoxication.

[93] As Greene J. noted *R. v. M.T.*, 2016 ONCJ 614 at paragraph 94:

What stands out from all these cases, is that consent to sexual acts does not require a high level of consciousness. While the courts phrase the test as having the ability to understand the risks and consequences associated with the sexual act that he or she is engaged in as well as understanding the sexual nature of the act and the ability to realize that one can refuse, it does not require that the complainant be able to properly evaluate those risks and consequences with a clear mind unencumbered by the effects of alcohol. Bad decisions based on loss of inhibitions due to intoxication is not enough to meet the test for incapacity. Moreover, the court cannot conclude incapacity to consent from the mere fact that the complainant is effectively falling down drunk. The courts have consistently held that this alone is insufficient to confirm whether the complainant had an operating mind. In order to make a finding of incapacity to consent, the case law suggests that the court must be able to identify evidence that establishes, beyond a reasonable doubt that the complainant's cognitive capacity is sufficiently impaired by the consumption of alcohol so as to make her incapable of knowing that she is engaging in a sexual act or that she can refuse to engage in the sexual act.

[94] I would qualify that statement with the words of Karakatsanis J. of the SCC in *G.F.*, the most recent pronouncement on the issue of capacity to consent, to the following effect at paragraph 62::

... [T]he capacity to consent is a cumulative assessment, requiring the degree of understanding necessary to appreciate *all* the conditions of subjective consent. If a complainant is incapable of understanding any one of those conditions, then they are incapable of consenting.
[Emphasis in original.]

and at paragraph 65:

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.

[95] Applying this test, I am left in doubt on the two components of that question on the basis of the images and sound that I have heard and seen from the audio/video recording of the sexual activity. Indeed, Private Vu and S.B. were communicating at the outset of the recording, S.B. expressing agreement to engage in the precise sexual activity that followed. She reacted with words and actions immediately at the start of that activity, in a manner suggesting she was still in agreement and that she understood the nature of the sexual activity in question. She made noises and movements consistent with the agreement she expressed at the outset and reacted by moaning when asked if it was good. She continued to make noises consistent with agreement and participation until the very end of the touching and at no point were noises heard or movements seen which would indicate a change of heart as to the intention to participate as expressed at the outset or any reluctance to carry on with the activity. Granted that the sexual activity in question required limited movement on her part, her words and action, to the extent that could be seen or heard, reveal nothing else than continuous, conscious participation to the sexual activity and no indication revealing that she had lost the capacity to refuse to participate. I note also that there is no evidence of any confusion as to the identity of her partner and to the contrary evidence that at one point looked up and had a clear line of sight to Private Vu.

[96] Of course, S.B. showed the indicia of impairment mentioned above. However, in light of her actions during the sexual activity, the evidence of impairment is insufficient to convince me beyond reasonable doubt that she did not have the degree of understanding necessary to appreciate all the conditions of subjective consent.

[97] I remain in doubt even considering my observations of the final moments of the activity when people barge into the room, Private Vu is being pulled away and a blanket is thrown on S.B. without generating what I can positively find to be a voluntary movement on her part, including of her knee, visible on the screen for a moment. The apparent absence of movement suggest that she may have fallen unconscious at the time, especially since Private Vu told police that he noticed her eyes were closed. 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.

[98] As a result, I am not convinced that S.B. did not have a sufficient understanding of the activity she was engaged in, the person she was engaged in the activity with and that she could refuse to participate. Our law does not require me to be convinced that a crime has not been committed. It is the prosecution that has the burden of proving beyond a reasonable doubt that a crime has been committed. In light of this burden of proof, the application of the appropriate legal test to the evidence in this case, even to the period at the very end of the sexual activity, I must conclude that the prosecution has not met its burden of proving that the incapacity it alleged prevented subjective consent from occurring.

[99] The consequence of this finding is that the apparent agreement expressed by S.B. to Private Vu at the outset of the sexual activity is sufficient to constitute subjective consent as the term has been defined by the SCC in *G.F.* Consent was obtained under subsection 273.1 (1) of the *Criminal Code* in that S.B.'s agreement to engage in the sexual activity which took place was voluntary. No evidence was received to allow me to conclude that some other concern arose which would prevent effective consent to occur or be vitiated in the circumstances of this case.

[100] Therefore, the *actus reus* of the offence of sexual assault has not been proven beyond a reasonable doubt.

[101] I am aware that this is a conclusion that may come as a shock to those who find that the conduct of Private Vu was utterly unacceptable in the circumstances, regardless of what consent may have been obtained. To those, I offer the following quote from my colleague and esteemed jurist Buckle J. of the Provincial Court of Nova Scotia in the case of *R. v. Percy*, 2018 NSPC 57, submitted to my attention by counsel on both sides, where she said at paragraph 95 of her reasons:

Mere consumption of alcohol, impairment or even severe intoxication is insufficient to vitiate consent. An intoxicated person whose inhibitions are reduced may choose to have sex with people or in circumstances they would not choose if they were sober. They may have significant and painful remorse or regret when they become sober. That does not mean their consent at the time was not valid. Having sex with a severely intoxicated person may be unethical or immoral but it is not always illegal.

Conclusion

[102] For these reasons, I must conclude that the prosecution has failed to prove the *actus reus* of the sexual assault charge beyond reasonable doubt. Consequently, Private Vu must be found not guilty of that charge.

Second contentious element: the mens rea

[103] I do not need to comment on the arguments submitted by counsel as it pertains to the *mens rea*, given my conclusion that I found that the *actus reus* has not been made out at the appropriate standard.

[104] My finding to the effect that the apparent agreement obtained by Private Vu from S.B. constituted subjective consent demonstrates that Private Vu, in his own mind, had obtained consent for the sexual activity. As stated previously, my biggest area of concern stemming from the audio/video recording of the sexual activity as it pertains to capacity is the possibility that continued moaning from S.B. immediately after persons have barged into the room, as well as her absence of reaction to the commotion that had by then occurred, would indicate a possible loss of awareness or consciousness which would demonstrate incapacity to consent.

[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 for the final seconds of the touching, 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. As decided by the Court Martial Appeal Court (CMAC) in the decision of *R. v. MacIntyre*, 2019 CMAC 3, (Leave to appeal to the SCC dismissed 9 January 2020 No. 38838) the prosecution retains the burden of proving the *mens rea* of sexual assault even when the defence of mistaken belief in communicated consent is not available.

[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.

The second charge of voyeurism contrary to subsection 162.1(1) of the Criminal Code

What needs to be proven?

[108] The second charge alleges that Private Vu committed the offence of voyeurism by making the audio/video recording discussed in relation to charge one. The particulars read as follows:

“On or about 11 January 2020, at or near CFB Borden, Ontario did surreptitiously make a visual recording of S.B.”

[109] The offence alleged at charge two is found at subsection 162(1) of the *Criminal Code* which reads as follows:

162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

- (a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;
- (b) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or
- (c) the observation or recording is done for a sexual purpose.

[110] Subsection 162(1) addresses three different situations set out in paragraphs (a), (b) and (c). The application of all three paragraphs is subject to the two limitations in the opening words of the section. First, the person who is making the recording must act “surreptitiously”. Second, the person observed or recorded must be in circumstances that give rise to “a reasonable expectation of privacy”.

[111] In addition to the identity, time and place of the offence which have been admitted, the prosecution is required to prove beyond a reasonable doubt the following elements:

- (a) as it pertains to the *actus reus*, that Private Vu:
 - i. acting surreptitiously;
 - ii. made a visual recording;
 - iii. of a person who is in circumstances that give rise to a reasonable expectation of privacy; and
 - iv. one of the following circumstances applies:
 - 1. the person is in a place where she can reasonably be expected to be exposed or to be in explicit sexual activity; or
 - 2. the person is engaged in explicit sexual activity and the recording was done for the purpose of recording a person engaged in such an activity; or
 - 3. the recording is done for a sexual purpose.

- (b) as it pertains to the *mens rea*, that Private Vu intended to surreptitiously make a visual recording of a person.

[112] The surreptitious nature of the audio/video recording is at issue in this case, as well as the issue of whether the recording is even covered under the prohibition created by subsection 162(1) given that it does not show any part of the body of S.B.

Position of the parties

Prosecution

[113] Unsurprisingly, the prosecution argues that it has proven all of the essential elements of the offence, submitting that the offence in this case must be interpreted with its purpose in mind, namely to protect the personal autonomy and sexual integrity of S.B. who are at stake given that she was recorded without her consent or knowledge while engaged in sexual activity, a situation worthy of protection. As it pertains to the surreptitious nature of the recording, the prosecution submits that the element of the offence has been proven by the fact that Private Vu recorded S.B. with the intention she be unaware he was doing so.

Defence

[114] The defence submits that I should be left with a reasonable doubt as to whether Private Vu had the intention to record any part of S.B.'s body and that the evidence does not allow me to infer that he intended that she be unaware that he was recording her, hence that he acted surreptitiously.

Analysis

The evidence

[115] The evidence relevant to this third charge has already been discussed in detail in the analysis of the first charge. It consists of the audio/video recording made by Private Vu. Circumstantial evidence can also be found in the same cautioned statement provided by Private Vu to CFNIS investigators as well as in the testimony of S.B. who testified that although she had no memory of the incident, she would not have consented to being recorded while engaged in sexual activity.

[116] The evidence of Private Power is not, strictly speaking, relevant to the issue of whether the audio/video recording is a voyeuristic recording under subsection 162(1). However, it does illustrate the manner in which the privacy interests of S.B. have been engaged in the circumstances of this case.

The facts

[117] I accept the following facts from the audio/video recording, the testimony heard at trial and of the statement provided by the accused.

[118] The relevant narrative must necessarily begin with the motivation to make a recording in the first place. Private Vu told police that his conversation with S.B., after the departure of Aviator Stanutz and Leblanc from her room, led him to conclude there was a mutual desire to engage in oral sex. As notions of consent had been as he said “drilled into him” from basic training and as he perceived that engaging in sexual activity with other members of the CAF was not encouraged, he decided it would be safer to record S.B. providing her agreement to the sexual activity being envisaged then. I gather from his statement that the mean he would have privileged obtaining such recording by using a voice recorder but, as his phone was not equipped with such feature, he decided to use the video recording functionality of his phone instead. I do accept that the purpose of Private Vu in making the audio/video recording was to record the consent given to him by S.B. to sexual activity.

[119] Private Vu said that he placed the phone on a lamp on a table at the head of the bed, angled up and towards the foot of the bed so as not to show any nudity. The first images confirm this. Private Vu has evidently pressed “Record” as the phone was on the table, although he re-positioned it slightly in the first few seconds, not to touch it again until the recording stopped. At no point in the recording do the images show nudity, with the possible exception of the bare knee of S.B. seen on two occasions for a moment. Testimony was heard to the effect that Private Vu was often recording all kind of moments from daily life and the initial images suggest he is quite apt at knowing what it is that he is recording with his phone. I do accept that he purposely angled his phone in such a way that the lenses will not record nor show the image of S.B.

[120] As already mentioned, the images recorded do not show S.B. with the exception of a few moments. The most that is seen of her is approximately at 50 seconds, when the sexual activity starts and she lifts her head for a moment from the pillow, the left side of her face appearing in part, showing part of her neck, cheek, nose and some hair, without offering any possibility for recognition.

[121] The video images essentially show the upper portion of Private Vu’s face as he moves his head up and down while performing what we know is oral sex, although someone watching the video without context and sound would need some observation time before being able to conclude from the location, the removal of sheets, the positioning of Private Vu and the movement of his head that he is performing oral sex on a person lying on the bed. This is because the knees of S.B. are not visible with the exception of a few brief moments. It is the sound component which allows anyone watching the video to immediately infer what is going to happen and does, in time, occur.

[122] Private Vu told police that he did not intend to record past the point that the consent was recorded and simply forgot to stop the recording after his exchange with S.B. on the question of consent. Agreeing that Private Vu was drunk at the time, this

remains difficult to believe. He has placed the phone on the table instead of holding it. He does not appear to take a pause to separate the moment when words are exchanged and when he commences the activity. When he recovers his phone after people have barged into the room he does not seem at all surprised that it is still recording. I conclude that he made a conscious decision to keep recording during the sexual activity, focussing on himself at the foot of the bed.

[123] As it pertains to what has occurred after the recording was stopped, I accept the following facts from the testimony of Aviator Stanutz and Private Power, as well the statement of Private Vu:

- (a) Private Vu and Aviator Stanutz met briefly following the incident. She essentially accused Private Vu of rape;
- (b) Private Power met Aviator Stanutz the next morning. She told him what had transpired between Private Vu and S.B. the previous night, opining that the actions of Private Vu were unacceptable and possibly constituted sexual assault;
- (c) Private Power then met with Private Vu, got in his car to get breakfast at Tim Horton's. While in the car Private Power challenged Private Vu as to his actions the previous night;
- (d) this was a serious conversation. Private Vu contended that he had not raped S.B. because he had obtained consent before engaging in sexual activity. In order to prove his point, he took out his phone and showed the video recording to Private Power;
- (e) there is conflicting testimony as to who was handling the phone at the time. I do believe the most likely scenario is that Private Vu was holding the phone while the car was parked at Tim Horton's in a manner which allowed Private Power to see and hear;
- (f) there is also some uncertainty as to whether the whole of the recording was seen by Private Power, who testified that he believed he saw the entire recording. Given his demonstrably weak recollection of what was in the audio/video recording during his testimony (for instance Private Power initially testified that the recording showed S.B.'s face) and the fact that the middle portion of the recording is repetitive and somewhat lengthy and irrelevant to the discussion that was then happening on the issue of whether or not consent was provided, I am left in doubt on that issue. I believe the most likely scenario is that Private Vu showed the initial part of the recording in full and fast forwarded the sexual activity part to arrive at the end of the recording, perhaps showing what happened when people barged into the room;

- (g) I accept that following the trip to Tim Horton's Private Vu, Private Power, Aviator Stanutz and S.B. met in the laundry room when the events of the previous night were discussed. In the course of that meeting Private Vu did not deny that an audio/video recording was made, offered S.B. the opportunity to see the video, which she declined, and erased the video from the phone pressing the delete key and showing that it had been done;
- (h) I do accept that the video was still accessible somehow and that another opportunity to see it was offered by Private Vu to S.B. in the week that followed. S.B. once again refused; and
- (i) there is no evidence that the audio/video recording was shown to anyone other than Private Power on 11 January 2020 and Private Vu said it has not been shown to anyone. Private Vu provided the audio/video recording to police along with his phone in the course of the investigation.

The law – “visual recording of a person”

[124] Counsel could not provide any assistance as it pertains to whether there is a requirement that the audio/video recording constitute a “visual recording of a person” in the context of one of the two limitations in the opening words of subsection 162(1). I was not given any precedents either on the question of what would be the extent of such requirement if it existed. I therefore remain on my own to determine to what extent, if any, the offence at subsection 162(1) must be concerned with the visual image of a person.

[125] The only case submitted to my attention is the decision of the Supreme Court of British Columbia in the case of *R. v. Downes*, 2019 BCSC 992 which stands for the proposition that the visual images do not need to show features permitting the recognition of the subjects. In that case, the images showed parts of the body of young boys taken surreptitiously while they were getting changed. The court found that as long as the identity of the subjects could be determined through circumstantial evidence, the offence had been made out. That is useful but it remains that in this case, no part of the body of the person identified at the charge sheet were targeted nor appear for any significant period of time in the audio/video recording. When parts of the body of S.B. appear it is by accident, not by purpose. It is the audio portion of the recording which could potentially allow recognition of the largely non-visible person involved in the visual images, essentially showing Private Vu performing oral sex on a woman.

The law – “surreptitiously”

[126] The law relating to the requirement that the recording be made surreptitiously was set by the Ontario Court of Appeal in the case of *R. v. Trinchi*, 2019 ONCA 356. A quote of the relevant paragraphs of this decision would suffice to illustrate the state of the law:

[46] I am satisfied that the ordinary meaning of the word “surreptitiously” does include intent as part of its meaning. A person who observes or records with the intention that the subject not be aware that he is doing so, is attempting to avoid notice or attention. [...] The mental state required by the word “surreptitiously” in s. 162(1) is the intent the subject not be aware that she is being observed or recorded. In a prosecution under s. 162(1)(b), the Crown may prove the accused acted surreptitiously by proving that he observed or recorded the subject with the intention she be unaware he was doing so.

[47] In a case in which the accused testifies, the determination of his mental state may depend chiefly on whether he is believed or not. Where the accused is not believed or does not testify, his state of mind may be based on evidence of secretiveness or stealth, or may be inferred from the relevant circumstantial evidence. Evidence that the complainant did not consent and was not aware the accused was recording her will be relevant circumstantial evidence. This, together with evidence that supports the finding the accused knew, or was wilfully blind, the complainant was unaware he was recording her, may well provide a compelling basis for the inference the accused intended the complainant remain unaware of his action. Also, as with inferring intent for any crime, the law presumes that a person intends the ordinary consequences of his voluntary acts.

[48] Understanding the word “surreptitiously” in this way would not prevent a successful prosecution in the Crown’s example of the smartphone on the accused’s bedside table recording consensual sexual activity. In the example, the accused would have had to initiate the smart phone’s video recording mode and position the device so its camera focused on the sexual activity. Where the complainant testifies that she did not consent to being recorded and was unaware the recording was being made, and without evidence to explain the positioning and active state of the phone, the fact-finder would have an adequate basis to infer that the accused intended the complainant be unaware he was recording her.

Analysis

[127] It would appear that the law provides precedents for only one of the two issues that I have to assess, namely whether the recording was surreptitious. There does not appear to be precedents on point about the notion of “visual recording of a person”. The extract from *Trinchi* reveals that there are connections between the two issues as the positioning of the recording device and what it has in fact recorded are relevant factors to assess whether the inference can be made that the accused intended the complainant be unaware he was recording her.

[128] I will deal with the issue of the existence of a video recording of a person first as it is a condition precedent for the application of the section and the prohibition it contains. It is also a condition precedent for the analysis of the more substantial aspects of the two limitations in the opening words of the section, namely whether the person making the recording has acted “surreptitiously” and whether the person recorded was in circumstances that give rise to “a reasonable expectation of privacy”. Only the first of these two limitation is at issue here but both of these criteria were the object of authoritative judicial pronouncement, *Trinchi* for the first and the case of *R. v. Jarvis*, 2019 SCC 10 for the second.

[129] Based on the words found at subsection 162(1) of the *Criminal Code*, the question I find I need to answer therefore is whether Private Vu made a visual recording of a person as this is a condition for the prohibition of subsection 162(1) to be effective.

[130] The analysis requires that I engage in an exercise of statutory interpretation. It is trite law that the modern approach to statutory interpretation requires that “the words of an Act must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, at paragraph 26.

[131] The starting point is to determine the ordinary meaning of the text which “refers to the reader’s first impression meaning, the understanding that spontaneously comes to mind when words are read in their immediate context” and is “the natural meaning which appears when the provision is simply read through” (*R. v. Wokey*, 2016 ONCA 611 at paragraph 25.) In other words, the “plain” or “ordinary” meaning of a word is not dictated by its dictionary meaning nor is it frozen in time. “Visual recording of a person” would, from this point of view, require that the person in question be the subject or target of the recording.

[132] There is no debate on the facts of this case that Private Vu made a visual recording.

[133] However, he is charged with making a visual recording of S.B.

[134] The facts reveal that he angled the lens of the camera on his phone in such a way so as not to take an image of S.B. These actions are coherent with his statement to police to the effect that he did not intend to take images of S.B.

[135] The audio/video recording does not show images of S.B., although some parts of her body, a leg, an arm, the side of her neck and face appear on screen for brief moments, less than a second, when she moves on four or five occasions. These fleeting images, even when paused, do not allow a viewer to see any distinguishing features which would allow recognizing S.B.

[136] The audio/video recording made by Private Vu is in effect a visual recording of himself, first obtaining agreement for the sexual activity, then performing oral sex, finally being pulled away by persons barging into the room before being able to recover his phone.

[137] The prosecution asks that I go beyond semantics and engage in an interpretation of the terms “visual recording of a person” harmoniously with the scheme of the act, the object of the act, and the intention of Parliament. As the SCC found in *Jarvis* at paragraph 122, sexual offences are enacted to protect personal autonomy and sexual integrity of the person. As a viewing of the video recording as made, with sound included, seriously engages the sexual integrity and privacy of S.B., I am asked to adopt a broad interpretation of the words visual recording of a person to include the audio

portion of any visual recording. This would allow me to conclude that the visual recording is of any person which can be heard on the recording, regardless of whether they can be seen.

[138] I am not comfortable doing that. It seems to me that the words used by the legislator cannot be ignored. The privacy interest protected by the prohibition at subsection 162(1) is the visual image of a person. There is no visual image to be protected here.

[139] This conclusion is expressed in the context of the *actus reus* of the offence but it would also apply to the *mens rea*, especially in the circumstances of this case. Indeed, to be found guilty under subsection 162(1), Private Vu must have had the general intention to make a visual recording of a person. That person has been particularized as S.B. on the charge sheet. Yet the evidence mentioned above as it pertains to his positioning of the lens of the camera of his phone and his statement to police, reveal that he did not have the intention to make a visual recording of S.B. His intention was that S.B. not be seen on the recording. The fact that some parts of her body were in fact visible was the result of movements from her which did not reveal any feature which would permit to identify her. They were seen for fractions of seconds by accident, not by purpose. In the circumstances it is difficult how I could be convinced that the *mens rea* of the offence has been proven beyond a reasonable doubt.

[140] I believe it could not be argued that if Private Vu had made an audio recording only, as he said he wish he could have made if he had that function available on his phone, he could not have been charged under subsection 162(1). Indeed, there would have been no visual component to the recording. Yet the privacy interest engaged by the recording in this case involves only the audio part of the recording. It seems incongruous to me that a charge under subsection 162(1) would be viable only by reliance on the audio portion of what happens to also be a video recording. The words of the section target *visual* recording, not *video* recording. Words do matter.

[141] The prosecution brought my attention to paragraph 71 of the recent Ontario Court of Appeal decision of *R. v. Walsh*, 2021 ONCA 43, where Gillese J.A., for the majority, accepted the Crown's submission that the restrictive interpretation at trial of section 162.1 of the *Criminal Code* would base culpability on the medium used to share the intimate image, rather than on whether the conduct breached the victim's sexual integrity and privacy, leading to arbitrary and unreasonable distinctions. It has been submitted that the *Walsh* decision should be inspiring rather than authoritative. Indeed, there is a significant difference between *Walsh* and this case. In *Walsh* the pith and substance of the offence was present: there was both an act of sharing and the existence of intimate images of an undressed lady filmed vomiting in the accused bathroom. In this case, the pith and substance is missing: the alleged targeted person is not seen on the recording.

[142] With respect, I am unable to find significant inspiration to be gained in *Walsh*. Indeed, the invitation to analyze whether the conduct breached the victim's sexual

integrity and privacy instead of focusing on the medium worked in that case. Indeed, there was no debate as to what the breach was: transmission of visual images of the naked victim. That breach was fully in line with what subsection 162.1(1) prohibits: sharing of intimate images. Here the debate is not about the accessory to the conduct targeted by the offence, it is the conduct itself and the fundamental question of whether that conduct is targeted by the offence.

[143] Where I do find inspiration in the *Walsh* decision however is in the minority opinion of Miller J.A. The disagreement between him and the majority essentially rests on differing views as to what a recording is and whether a face time call involves recording. Miller J.A.’s analysis is useful as it pertains to the interpretation to be given to words in statutes. I find that in this case, what the prosecution proposes is a re-authoring of the voyeurism offence at subsection 162(1) to better achieve its purpose, the protection of human dignity and privacy. However, Parliament chooses specific means to achieve its ends. The offences of voyeurism as the word implies, are focused on visual observations and recordings. Extending this notion to alleged targets who are not visible would, in my opinion, constitute an impermissible intrusion by a court in a function reserved for the legislator. As explained at paragraph 171 of *Walsh* :

The interpretive question is not what best promotes the section’s purpose, such that courts can modify the text to best bring about that result, but rather *how* Parliament chose to promote its purpose. Courts are required to respect chosen *means* as well as ends.
[Emphasis in original.]

Conclusion

[144] In these circumstances, I am unable to find that Private Vu has committed the act proscribed at subsection 162(1) of the *Criminal Code* as he did not make a visual recording of a person. He must therefore be found not guilty of charge two.

The third charge for making available a voyeuristic recording contrary to subsection 162(4) of the Criminal Code for making available an image of S.B. contrary to section 162.1 of the Criminal Code

Necessary disposition

[145] The conclusion I have come to as it pertains to charge two to the effect that the audio/video recording made by Private Vu is not a voyeuristic recording disposes of charge three. Indeed, the offence at subsection 162(4) of the *Criminal Code* requires proof that the accused trafficked or possessed for the purpose of trafficking a *voyeuristic* recording. Consequently, Private Vu cannot be found guilty of charge three.

[146] As it pertains to charge four “to knowingly distribute, transmit, make available, or advertise an intimate image of S.B.” it cannot also result in a finding of guilty based on the finding I have made and explained in relation to charge two. Indeed, *intimate image* is defined at subsection 162.1(2) of the *Criminal Code* as “a visual *recording of a person* made by any means including a photographic, film or video recording” if three

prerequisites are met, including at (c) “in respect of which *the person depicted* retains a reasonable expectation of privacy at the time the offence is committed.”

[147] As I found in my analysis under charge two, S.B. is not *depicted* in the video recording made by Private Vu.

[148] Furthermore, the *mens rea* requirement specified in the provision creating the offence at subsection 162.1(1) requires proof that the person charged “publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing *that the person depicted in the image* did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct.” Parliament has again re-formulated the requirement that a person be visually depicted in the impugned images for the offence to be made out. *Depict* means *represent*. This is very much in line with what a voyeurism offence is – focussed on what one can see. The words used in the description of the *mens rea* requirement reassures me that Private Vu could not be found guilty of charge four.

[149] I am conscious that reasonable persons might argue that a visual recording of a person performing oral sex on another is just as much a visual recording of the person performing the act than of the person receiving it, regardless of whether that person is visually recognisable.

[150] Yet, expending the offence to include non-visible participants would, in my opinion, exceed the powers granted to me as a judge. There is a methodology intended to structure and guide judicial interpretation of statutes. It directs judges to a body of law that places primacy on understanding the intended meaning of Parliament in enacting the statutory text that it did. I believe the application of the modern principle in this case leads to the conclusion that subsections 162(1), 162(4) and section 162.1 of the *Criminal Code* cannot be applied to prohibit the making or transmission of recordings that do not show in any substantial way and were not intended to show any part of the body of the person designated as the target in the charge.

Conclusion

[151] There is no doubt that the conduct complained of in this case is reprehensible, both in engaging in sexual activity with a drunk colleague and in filming oneself engaged in that activity.

[152] Yet, as it pertains to charges two, three and four, Private Vu’s conduct did not expose a person to the view of others as prohibited by the offence alleged. The accused is not a sympathetic figure. On the facts I found, he grossly violated the dignity of S.B. He should have known what he was doing was seriously wrong. However, even if there was no criminal prohibition corresponding to the accused’s conduct, it would not be a reason to distort the meaning of the voyeurism sections of the *Criminal Code*. Moral evaluation of the accused’s conduct cannot be allowed to displace the interpretation of

the statute. Criminal offences have elements, and where those elements are not made out, judges are not authorized to substitute new ones.

FOR THESE REASONS, THE COURT:

[153] **FINDS** the accused not guilty of all charges.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois and Major P. E. Craig

Major F.D. Ferguson and Captain A. R. Feltham, Defence Counsel Services, Counsel for Corporal D. T. Vu