



## COURT MARTIAL

**Citation:** *R. v. Waugh*, 2021 CM 5021

**Date:** 20211209

**Docket:** 202056

Standing Court Martial

Asticou Courtroom  
Gatineau, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private G.A.R. Waugh, Accused**

**Before:** Commander C.J. Deschênes, M.J.

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**Restriction on publication: Pursuant to section 179 of the *National Defence Act* and sections 486.4 and 486.5 of the *Criminal Code*, the Court directs that any information obtained in relation to this trial by Standing Court Martial that could identify anyone described in these proceedings as a victim or complainant, including the person referred to in the charge sheet as “M.S.”, as well as anyone described in these proceedings as the accused’s former partner, shall not be published in any document or broadcast or transmitted in any way.**

**This order does not apply to disclosure of such information in the course of the administration of justice when it is not the purpose of said disclosure to make the information known to the community.**

### **FINDING**

(Orally)

#### **Introduction**

[1] Private Waugh is facing one charge of sexual assault contrary to section 271 of the *Criminal Code*, an offence punishable under section 130 of the *National Defence Act (NDA)*. It is alleged that on or about 23 July 2019, at or near Carleton University in Ottawa, Ontario, he sexually assaulted M.S. At the outset, the defence admitted that the accused committed the alleged act as particularized in the charge sheet. Counsel also informed the Court that the defence will be seeking a verdict of non-criminally responsible for the reason that Private Waugh acted involuntarily as a result of a sleep disorder when he engaged in a sexual act with M.S. without her consent. The prosecution does not oppose the theory of the defence. During a three-day trial that started on 29 November 2021, evidence was adduced on consent to convince this Court of the appropriate finding to impose.

#### **The facts**

##### ***The facts forming the basis of the charge***

[2] The facts of this case, which were provided by counsel through Agreed Statements of Facts, can be summarized as follows. The accused is a musician in the Canadian Armed Forces (CAF), reserve Force. He and the complainant, M.S., were friends prior to the incident. They were both on tasking together with the Ceremonial

Guard in Ottawa during the summer of 2019, and had known each other since Basic Military Qualification-Land course which finished shortly before the tasking with the Ceremonial Guard. During the tasking, the accused's average sleep time was six hours per night and the night prior to the incident, he went to bed between 1:30 a.m. and 2:00 a.m. During the period in question, the accused's grandfather was dying of cancer. The latter passed away two months after the alleged sexual assault. This was also a period where Private Waugh was experiencing financial stress.

[3] During his relationship with M.S., they would spend time together in each other's rooms. On 22 July 2019, the accused was with M.S. in his room, spending some time kissing and cuddling. During this time, the complainant informed the accused that she was not interested in having sexual intercourse. Private Waugh was aware that the complainant was wearing a tampon that night. They both went to sleep together in his bed between 1:30 a.m. and 2:00 a.m. M.S. was wearing a shirt, socks and undergarments and Private Waugh was wearing only underwear. Neither he nor she had consumed drugs or alcohol that evening. M.S. was known to be a restless sleeper.

[4] Around 4 a.m., the complainant woke up to the accused kissing her, removing her clothing, and penetrating her vaginally with his erect penis. She felt pain during the penetration due to the fact that she was still wearing a tampon. Her memory of the incident is unclear on a number of details. The complainant did not consent to this act.

[5] The accused's first memory is waking up on top of the complainant. There was no penetration at that time. M.S. appeared to be scared with her body language indicating that something was wrong. When he realized what was happening, he asked the complainant if she wanted him to stop. She nodded yes. Private Waugh immediately stopped and got out of bed. The complainant heard him pacing while she stayed in the bed. He asked her if she was okay, but she did not reply. The accused then collected her clothing and placed it on a chair with a short apology note. He then left the room and went for a walk. The complainant left the room shortly after.

[6] In the apology letter, the accused wrote the following:

*"Hey, I hope you're ok. I'm sorry, I don't know how I got on top of you. I just remember waking up, looking down at you, you looked scared. Asking me to stop. Now I can't tell if you won't speak to me because your [sic] asleep or for what's happened. I desperately hope it's a bad dream. If not, I'm so sorry. I'll leave you to sleep but I'll walk around to try to remember what led up. I'm so sorry."*

[7] After the incident, the accused expressed regret and apologized several times. He struggled to sleep, eat and avoided places where the complainant might also be present. He reported suicidal thoughts.

### ***Personal history related to the existence of a sleep disorder***

[8] The accused has a personal history showing indicia of a sleep disorder. His mother and grandmother witnessed numerous episodes of him sleepwalking and suffering from sleep terrors starting when he was about four years old. When his mother found him sleepwalking, she found that he was difficult to awaken, but he would sometimes follow simple instructions to lead him back to bed. She also witnessed incidents of sleep eating and sleep talking. She observed that often if he fell asleep in the car or on the couch, she could not wake him and would need to physically carry him to bed. These episodes continued through his adolescence. When he was a teenager, the accused was so difficult to awaken that his mother had concerns leaving him at home alone due to the unlikelihood of him waking if the fire alarm were to sound. She sought medical help on two occasions for his sleepwalking and night terrors and was informed he would "grow out of it."

[9] The accused has always demonstrated complete amnesia resulting from his sleepwalking episodes. He is usually difficult to awaken during these episodes. He suffers from daytime drowsiness when he is not active. He also suffers from snoring,

and from dry mouth in the morning. Sleepwalking and sleep terrors are reported to increase in frequency during stressful periods, for example during school exam periods. There was also an anecdote reported by his mother, where his father, who had left the family when Private Waugh was only two years old, contacted him when he was an adolescent. The father then ceased contact after a month. This event left Private Waugh feeling devastated. His mother reported increased occurrences of sleepwalking and sleep terrors in the months that followed this life event.

[10] Three former partners reported having sexual activities with the accused while he was asleep, with one where alcohol was involved. One of these three partners who frequently shared a bed with him during an approximately six-year period, reported having at least ten episodes of sexual intercourse with the accused while he was asleep. During these episodes, she initially believed he was awake. The accused stated having no memory of the event the next morning. These incidents would generally occur a few hours after sleep onset and were more frequent during times of stress. That same partner found he was hard to awaken and was confused when waking up. She also observed that he was a frequent sleep talker, a restless sleeper, and would suffer from sleep terrors where he would describe people attacking or chasing him. Another former partner he had a relationship with for a three-and-a-half-year period had similar experiences three or four times when sharing a bed with the accused. On those occasions, approximately two hours after sleep onset, the accused would make physical sexual advances towards her. She described him as “handsy”. She would simply roll him over and he would go back to sleep. Private Waugh stated to her that he had no memory of these events in the morning.

#### ***Family history of sleep disorders***

[11] There is a history of sleep disorders within the accused’s family that goes back several generations. His mother also suffered from sleep disorders. She had frequent episodes of sleepwalking and sleep terrors as a child. She fell down stairs three times during sleepwalking episodes. She was eventually enrolled by her mother in a study on sleepwalking and sleep terrors in children at the University of New Brunswick in the 1980s. The accused’s grandmother also suffered from sleepwalking and sleep terrors. When she was a child, she was found leaving the house in the middle of the night and on one occasion got as far as a nearby river. Her parents had to block her door with a chair to prevent her from sleepwalking out of her room. She also suffered from frequent snoring. The accused’s grandfather also suffered from snoring and sleep talking. He experienced sleep terrors as an adult that would cause him to swing or lash out in his sleep. The accused’s great-grandmother also suffered from sleep terrors and snoring into adulthood.

#### ***Expert report***

[12] Dr Mark Pressman is a psychologist mandated by the defence to assess whether Private Waugh suffered from a sleep disorder at the material time and if he did, the role that this condition may have played when he engaged in a sexual activity with M.S. Dr Maureen Ceresney, who has previously been qualified as an expert in sleep disorders, was retained by the prosecution and reviewed Dr Pressman’s report. She found it to be thorough, logical and sound. She found the family history and corroborated sleep-related sexual behaviour persuasive, and likely would have arrived at the same conclusions had she completed a full report.

#### **The issue**

[13] The Court must first determine if, on a balance of probabilities, the defence has proven that Private Waugh acted involuntarily when he engaged in a sexual act with M.S. on the night of 22-23 July 2019. Should the Court answer in the affirmative, it must determine if his actions were the product of a mental disorder, thereby rendering him non-criminally responsible.

#### **The evidence**

[14] The prosecution introduced an Agreed Statement of Facts describing the commission of the act. The defence introduced an “Agreed Statement of Facts re: *mens rea* and NCR-MD defence”, where more detailed circumstances surrounding the commission of the sexual act involving M.S. are described, and where information regarding the accused’s personal and family history in relation to the existence of signs and symptoms of parasomnia was provided.

### ***Expert evidence***

[15] Dr Pressman was qualified by the Court as an expert in sleep medicine, including sleep disorders, parasomnia and sleep-related sexual behaviours. He testified as an expert witness for the defence and, in support of his testimony, his report and curriculum vitae were introduced as exhibits, along with several articles and book excerpts in respect of his field of expertise, some of which he authored. As part of his mandate to provide an expertise for this case, he conducted a minimum of three interviews with the accused on 24 June, 14 and 15 September 2021. He also interviewed the accused’s mother, grandmother and three friends, two of whom were later described as former partners with whom the accused had a sexual relationship with prior to the allegations. As part of his assessment, Dr Pressman reviewed various sources of information including, but not limited to, the charge sheet dated 1 December 2020, the general occurrence report, a 320-page document, and a transcription of the military police interview of M.S.

[16] During his testimony, referring to the definition contained in the International Classification of Sleep Disorders which reports over eighty sleep disorders, as well as to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), Dr Pressman explained that parasomnias are undesirable physical events or experiences that occur during entry into sleep, within sleep, or during arousal from sleep. It is when at least two of the three states of consciousness, being wake, rapid-eye-movement (REM) and non-rapid-eye-movement (NREM), overlap that a disorder of arousal may occur. NREM parasomnias are disorders of arousal that include sleepwalking, where the subject may engage in various basic activities such as walking, eating or engaging in sexual acts, the latter being referred to as *sexsomnia*. Typically, sleepwalking occurs during the deep-sleep phase, which takes place within three hours after sleep onset. An event usually benign, such as a noise or a touch, must occur to trigger the onset of an episode. Dr Pressman clarifies that sleepwalking is not a psychiatric disorder; it is rather a brain disorder. Statistically, episodes of sleepwalking happen two to three times a year for an individual suffering from this disorder, thus an extended period of time generally elapses between episodes. More prevalent with children, sleepwalking decreases in adulthood.

[17] Dr Pressman testifies that during a sleepwalking episode, the prefrontal cortex, which is the part of the brain dealing with higher cognitive function, is deactivated. Therefore, sleepwalkers are unable to make decisions; they are deprived of judgement. They have no access to their memory; they do not recognize familiar faces and they generally do not know where they are, thus have limited ability to navigate in familiar spaces. They are also prone to fall. During an episode, comparing it to a black out induced by a high level of alcohol consumption, the subject cannot form a memory. Consequently, they generally suffer from amnesia of what happened during an episode once they are awake. Sleepwalkers are difficult to awaken and have a very high threshold for pain. They do not inherently adopt violent behaviour, but may, if provoked, for example by any movement of or touch by a person nearby. Dr Pressman also explains that the hyperactive motor cortex is active during sleep and wake. In a nutshell, the behaviour of sleepwalkers is primitive. Dr Pressman referred to the cognitive ability of a sleepwalker as having a reptilian brain.

[18] *Sexsomnia* is a sleep disorder recognized in the DSM-5. A trigger, such as snoring or a touch, could create the onset of an episode. The subject would react to the trigger by touching the person in proximity and going as far as engaging in a sexual activity with the person. A “perfect storm” of factors must occur simultaneously for an onset to occur, also referred to by Dr Pressman as the three “Ps”: genetic predisposition, which refers to the family history of sleep disorder in the subject’s family; priming

factors, which include the subject being sleep deprived, sometimes accompanied by the presence of stressors; and provoking or trigger factor, which is necessary for an onset to occur. The trigger factor can be composed of a simple touch by a nearby person, or any noise made including the subject's own snoring.

[19] Dr Pressman also testified being mindful of the risk of malingering when assessing subjects. Nevertheless, he specified that pretending to be affected with a sleep disorder is not an easy task for a neophyte, as subjects do not know how to provide accurate symptoms consistent with the disorder. During the evaluation of a subject when a sleep disorder is suspected, Dr Pressman considers what he referred to as direct evidence. This includes eyewitness descriptions of the actions and behaviour of the subject observed or reported by family, neighbours and victims during the episode itself. He considers the evidence found at the crime scene and whether there is any sign that would render a diagnosis of sleep disorder to be incompatible with the facts presented to him. In other words, he considers whether there was some form of planning and the existence of an intent from wakefulness, examining the actions of the subject post-episode, including whether they had a memory of the episode. He emphasizes that any conduct that could have occurred during wakefulness trumps all other evidence.

[20] He also considered indirect evidence such as the personal and family history of the subject, including whether there is polysomnographic evidence (sleep study) that may provide indicia of past concerns regarding the existence of sleepwalking.

[21] He explained that he was mandated by defence counsel to conduct an assessment to determine whether Private Waugh was going through an episode of parasomnia on the night of 22-23 July 2019 when he engaged in sexual activity with M.S. without her consent. He testified that, having followed the methodology recognized, and considering the facts provided by defence counsel, as well as the interviews he himself conducted with the accused, family members and former sexual partners, he concludes that Private Waugh was going through an episode of sleepwalking when he engaged in a sexual act with M.S. without her consent.

### **The statutory scheme for an NCRMD verdict**

#### ***General provisions***

[22] Persons who act involuntarily because they could not control their actions are innocent of any criminal wrongdoing. This is a principle of fundamental justice that is enshrined in the *Canadian Charter of Rights and Freedoms* at section 7 and paragraph 11(d) (see *R. v. Daviault*, [1994] 3 S.C.R. 63). The law presumes that the accused acted voluntarily and, therefore, if the accused claims otherwise, it is him or her who bears the burden of establishing, on a balance of probabilities, that he or she acted involuntarily by reason of automatism.

[23] The term “automatism” is the legal term used to describe one specific kind of involuntary action (see *Rabey v. R.*, [1980] 2 S.C.R. 513 at page 522, dissent referred to *R. v. Parks*, [1992] 2 S.C.R. 871 at page 896) that is “the product of a mental state in which the conscious mind is disassociated from the part of the mind that controls action” (see *R. v. Luedecke*, 2008 ONCA 716 at paragraph 54). In *R. v. Stone*, [1999] 2 S.C.R. 290, the Supreme Court of Canada defined the term at paragraph 156 as “a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action” (see also *R v Courneyea*, 2012 CM 4013 at paragraph 21). In other words, automatism is when the person committing the act is neither aware, nor able to control, their conduct.

[24] When an accused acted involuntarily because they were acting in a state of automatism and that automatism is rooted in a mental disorder, the accused will not be acquitted, but will be found not criminally responsible on account of mental disorder (NCRMD) (see *Parks* at page 896). The test to determine if an accused person acted voluntarily when they committed the act is a legal test, not a medical one, the purpose of which is normative, not diagnostic (see *R. v. Rabey*, [1977] 17 O.R. (2d) 1, at page

18; *Parks* at page 898). Evidently, expert evidence may assist the trial judge when applying the legal test.

### ***DIVISION 7 of the Code of Service Discipline***

[25] The NCRMD scheme found in the *Criminal Code* was reproduced almost in its identical form in the *NDA*. Similar to section 16 of the *Criminal Code*, section 202.13 of the *NDA* provides that an accused person shall not be held responsible for an offence in respect of an act committed while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of an act or omission, or of knowing that it was wrong. It also provides that every person is presumed not to suffer from a mental disorder so as to be exempt from responsibility. The burden to prove the contrary rests with the party raising the issue, who is required to prove it on a balance of probabilities. A verdict on this account in the military justice system is similar to the one found in the *Criminal Code* (see, for example, section 202.14 of the *NDA* with section 672.34 of the *Criminal Code* and, also, the definition of the term found at section 227 of the *NDA* which includes the meaning of NCRMD verdict at subsection 672.1(1) of the *Criminal Code*).

### ***Evidentiary basis required***

[26] Regardless of whether it is the Crown or the defence that seeks the NCRMD verdict, civilian courts have recognized when applying section 16 of the *Criminal Code* that it is critical to ensure a sufficient evidentiary basis in the record exists to meet the test set therein for putting the defence to the trier of fact. Even in circumstances where the accused seeks an NCRMD verdict which is not opposed by the Crown, the evidence must still establish all elements required under section 16 of the *Criminal Code*. (see *R. v. Benge*, 2009 CarswellOnt 6441, [2009] O.J. No. 4413 (Ont. S.C.J.), *R. v. Guidolin*, 2011 ONCA 264, and *R. v. Quenneville*, 2010 ONCA 223 at paragraph 18.)

### **The analysis**

[27] When assessing the theory of the defence that Private Waugh's actions were involuntary when he committed the sexual act on M.S. without her consent, the Court must examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The Court will also examine all other available evidence and the relevant contextual factors which may include corroborating medical and personal history of automatistic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the offence. No single factor is meant to be determinative (see *Stone* at paragraph 192).

### ***The expertise***

[28] Thus, in determining whether the accused acted involuntarily, and whether his actions were caused by a mental disorder, the Court examined the evidence provided by his expert. In his report, Dr Pressman unequivocally states that the goal of his evaluation is to determine the likelihood that, during the sexual act that occurred during the night of 22-23 July 2019, Private Waugh was in a state of parasomnia, a sleep disorder in accordance with the DSM-5 and the International Classification of Sleep Disorders. The expertise of Dr Pressman remained unchallenged; in fact, it was accepted by the prosecution and by its expert who reviewed it, Dr Ceresney, who had previously been qualified as an expert in sleep disorders.

[29] The Court finds that Dr Pressman's methodology when conducting his assessment of the accused's eligibility for an NCRMD defence was thorough and impartial. First and foremost, in his twenty-seven-page report, when assessing whether the accused was going through an episode of parasomnia while engaging in a sexual activity with M.S, he relied generally on the same facts that were provided to the Court through the agreed statements of facts. In order to ensure that he obtained as much information as possible to understand the personal and family history of Private Waugh in developing his opinion, he further interviewed the accused on at least three occasions

and conducted interviews with family members and former partners who had relevant information to provide. He took into consideration the family history which could present signs of sleep disorder, as parasomnia is known to be hereditary. He explained that as a result, Private Waugh was ten to fifty times more likely to have parasomnia if one of his parents had experienced it. Dr Pressman also considered the accused's situation prior to the event, the context of the commission of the sexual act with which he was charged, and the relationship that existed between the accused and the complainant, as well as the personal history presenting similar prior episodes that could support or deny the existence of parasomnia. He considered the emotional and physical state of Private Waugh at the time of the act, in particular his sleep deprivation, the stress he was experiencing, and the role the sleep disorder, if present, may have played when the act forming the basis of the charge was committed. He also explained that polysomnographic data was not collected in this case because of the limited value it offers, in that it would only demonstrate Private Waugh's current state, as opposed to the condition he was in two years ago. Dr Pressman paid scrupulous attention to detail, using an investigative approach in collecting facts to support his opinion. He also demonstrated a high index of suspicion about the potential for malingering.

[30] In considering that the symptoms of the sleep disorder had expressed themselves decisively enough at the critical time with the presence of the three "Ps", he opined that the symptoms of parasomnia were instrumental in bringing about the behaviour forming the basis of the charge. In particular, in addition to Private Waugh's personal and family history, he considered the approximate time the act was committed to substantiate that the accused was likely in a deep sleep phase, that a very light change in his surroundings while sleeping, such as an accidental touch by M.S. who was a restless sleeper, or his own snoring, most likely occurred and would have triggered the onset. The accused's lack of memory regarding the presence of the tampon during penetration was significant in Dr Pressman's assessment, strengthening his conclusion. He also considered that the vaginal penetration of M.S. with the accused's erect penis could have caused him some pain or discomfort that would eventually have made him pull out and woke him up. None of the evidence and observations brought to the attention of Dr Pressman was neglected or ignored. Finally, Dr Pressman took all the evidence brought to his attention in considering whether there were signs of malingering. He found none.

#### ***Other considerations***

[31] The Court notes that certain facts Dr Pressman used in his assessment were not provided in the Agreed Statement of Facts. For example, there is no mention in the latter document that there were several rough thrusting movements that happened during the vaginal penetration or that the accused had touched the tampon prior to falling asleep, only that he was made aware of its presence. These omissions are in no way determinative of my appreciation of the expertise of Dr Pressman, as they simply provide additional context to the sexual activity. Additionally, I accept his assessment that the presence of the tampon was rather a fact that "sealed the deal" or, in other words, reaffirmed his conclusion in regard to the fact that Private Waugh was experiencing an onset of parasomnia when he engaged in a sexual act with M.S.

#### ***Evidence of existence of factors that precipitated the onset***

[32] The evidence shows that the factors that must be present to trigger an onset of parasomnia were indeed present at the material time. First, the accused's family history in relation to the sleep disorders provides strong indications that he was predisposed to this condition. In this case, his mother, grandmother and grandfather as well as his great-grandmother had shown compelling signs throughout their lives that they suffer[ed] a sleep disorder, with the accused's mother falling down stairs three times during sleepwalking episodes.

[33] His personal history reveals consistent indicia of the presence of a sleep disorder at a very young age. His mother and grandmother witnessed numerous episodes of him sleepwalking and suffering from sleep terrors since he was four. These episodes were more prevalent when he was experiencing stress. Private Waugh's mother reported that

he was difficult to awaken and that he suffered amnesia of his sleep episodes. She was concerned for his safety enough to seek medical assistance but was informed the issue would resolve itself once he reached adulthood. There is also evidence to show that the accused had exhibited the same sexual behaviours towards adult peer-aged women with whom he shared an intimate sexual relationship. Three of Private Waugh's former sexual partners observed separately that he had engaged in sexual activity with them a few hours after sleep onset, with occurrences more prevalent during times he was stressed, and where he had no recollection of the events the next day. These observations and reports from both family members and former sexual partners consistently documented clear signs that the accused suffered some sort of sleep disorder throughout his young life.

[34] As for the night the sexual act took place, the accused was experiencing personal challenges at the material time thus was under a certain amount of stress, as a result of his grandfather's imminent passing. He also had financial concerns. Private Waugh was sleep-deprived during his tasking, with an average sleep time of six hours per night. The night prior to the night of the incident, he went to bed between 1:30 a.m. and 2:00 a.m. Further, M.S. was known to be a restless sleeper and the accused was known to snore during his sleep. The circumstances in which the accused found himself the night in question placed him at a high risk for an onset of parasomnia. The time the act was committed after the accused went to bed is consistent with the act being committed during his deep sleep phase.

[35] In addition, M.S. observed that when Private Waugh seem to wake up, he seemed disoriented. Private Waugh's first memory when he awoke was seeing that M.S. was scared. There was no penetration at that time. When she nodded "yes" to his question regarding whether she wanted him to stop, the accused immediately got off of M.S. and got out of bed. He enquired about her well-being and left her an apology note after taking the time to place her clothing on the chair. His conduct following the sexual act is consistent with someone who has just come to terms with having involuntarily done something wrong.

[36] The Court finds most significant the accused engaging in vaginal penetration of the complainant without first removing her tampon, an object that was susceptible to cause pain or discomfort if unremoved. Private Waugh did not remember that M.S. was wearing a tampon a few hours after becoming aware of this fact. His awakening as a result of the pain or discomfort he most likely felt when penetration occurred while M.S. was wearing a tampon is also consistent with the sexual act being committed while Private Waugh was in a state of automatism.

### ***Post-offence conduct***

[37] Private Waugh's conduct that immediately followed the sexual act, along with the longer-term conduct that included avoiding places where M.S. was likely to be found, his loss of appetite, struggle to sleep and suicidal ideations, show genuine signs of remorse and concerns for the complainant. The Court finds that the accused's actions and behaviour prior to, during, and following the act are consistent with the accused having engaged involuntarily in a sexual act with M.S.

[38] In addition to the expertise of Dr Pressman that I have accepted, parasomnia has been recognized by higher courts as fitting the legal concept of a mental disorder at section 16 of the *Criminal Code* (see *Luedecke*). Consequently, the Court finds that when Private Waugh engaged in a sexual act with M.S. without her consent on the night of 22-23 July 2019, he did so in an automatism state that is rooted in a mental disorder.

### ***Foreseeability***

[39] Although it was known to his family that the accused suffered from sleepwalking, sexsomnia was not necessarily a condition that could have previously been identified. The correlation to this sleep disorder is the proximity of the subject to the victim. Since it is common for an adult to be sharing their bed with another adult with whom they generally have a consensual sexual relationship, sexsomnia episodes



are likely to manifest themselves with a consenting sexual partner. During an onset, common way the sexual act ends or is avoided is when the partner nudges the subject, who ends up rolling over. For these reasons, sexsomnia would in all likelihood not be perceived as problematic, but more as a nuisance and would, therefore, not be brought to the attention of either a doctor or the criminal justice system. This was the case for Private Waugh, where his former partners did not present him, or did not believe him, to be a sexual predator because either a consensual sexual activity ensued or he was prompted to roll over. It is likely as a result that sexsomnia could not be detected or identified until now.

### **Effects of NCRMD finding**

[40] Having considered the above-mentioned factors and the evidence, the Court concludes that the defence has convinced the Court on a balance of probabilities that Private Waugh did not act voluntarily when he engaged in a sexual act with M.S. without her consent on the night of 22-23 July 2019, and that his actions were caused by a mental disorder as defined by the law. That said, the verdict I am about to impose is not a medical diagnosis. As stated in paragraph 7 of *Luedecke*:

The criminal law uses the concept of mental disorder very differently than the medical profession. The concept of a mental disorder in the criminal law is used to describe those accused who have committed criminal acts but because of some abnormal mental state are unable to conform their behaviour to the dictates of the criminal law. A determination that an accused suffers from a mental disorder is more a reflection of the need for a further inquiry into the dangerousness of that accused than it is an assessment of his or her medical condition.

[41] The reason for the conduct, automatism brought on by parasomnia, renders the actions of Private Waugh non-culpable in the eyes of the criminal law. Consequently, he deserves neither punishment, nor stigmatization as a criminal, for his actions. This does not mean that the Court is ignoring or intends to downplay the harm suffered by the victim as a consequence of the accused's actions. The involuntary nature of the conduct does not lessen the trauma and the real harm the victim may have suffered as a result. Nevertheless, the outcome of this case will not be punitive, but rather will be dictated by provisions that aim at ensuring the protection of the public in light of the disorder that affects the accused, while ensuring that his rights are properly safeguarded.

[42] Indeed, when an accused person faces a verdict of NCRMD whether it is under the *Criminal Code* or the *NDA*, a distinct regime applies to them. Similar to the statutory scheme found at Part XX.1 of the *Criminal Code* dealing with mental disorder, DIVISION 7 (Mental Disorder) of the Code of Service Discipline is not meant to be punitive in nature, but provides discretion for the Court, once an NCRMD verdict is pronounced, to make orders reflecting the situation of the accused person, such as an assessment order in consideration of the protection of the public from dangerous persons (see sections 202.15 and 202.16 of the *NDA*).

### ***Sex Offender Information Registration Act (SOIRA)***

[43] The NCRMD verdict nevertheless requires this Court to impose a mandatory order. Subsection 227.01(1) of the *NDA* provides that when a court martial finds the person not responsible on account of mental disorder for an offence referred to in paragraph (a) or (c) of the definition "designated offence" in section 227, it shall make an order requiring the person to comply with the *SOIRA* for the applicable period specified in section 227.02. The purpose of that order is to make available information of convicted sexual offenders, and of persons who committed a sexual act but were found NCRMD, in order to help police investigate other offences.

[44] An offence under section 271 of the *Criminal Code* is an offence within the meaning of paragraph (a) of the definition "designated offence" in subsection 490.011(1) of the *Criminal Code* that is punishable under section 130 of the *NDA*. Because courts martial proceed by indictment only, the duration of that *SOIRA* order must be for no less than twenty years since section 271 of the *Criminal Code* provides for a maximum imprisonment of not more than ten years (see *NDA* subsection

227.02(2); *R. v. Dixon*, 2005 CMAC 2 at paragraph 23; *R v Nguyen*, 2011 CM 4020 at paragraph 25, and *R. v. J.L.*, 2021 CM 2004).

**Conclusion**

[45] In considering the evidence as a whole, including the accused's medical and personal history, the context of the commission of the act, his behaviour following the commission of the act and the expert's evidence, the defence proved, on a balance of probability, that Private Waugh was acting in an automatism state when he engaged in a sexual act with M.S. without her consent. I also accept that his automatism state was rooted in a mental disorder as provided for at subsection 202.13 (1) of the *NDA*.

**FOR THESE REASONS, THE COURT**

[46] **FINDS** that Private Waugh committed the act that formed the basis of the offence charged, but was, at the time of the offence, suffering from a mental disorder so as to be exempt from responsibility.

[47] **MAKES** an order pursuant to subsection 227.01(1) of the *NDA*. The duration of that *SOIRA* order is for twenty years.

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**Counsel:**

The Director of Military Prosecutions as represented by Majors M. Reede and R. Gallant

Major F. Ferguson and Lieutenant-Commander F. Gonsalves, Defence Counsel Services, Counsel for Private G.A.R. Waugh