COURT MARTIAL

Citation: *R. v. McGown*, 2022 CM 4018

Date: 20220629
Docket: 202058

General Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Private C.J. McGown, Offender

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

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DECISION ON WHETHER THE DEFENCE OF HONEST BUT MISTAKEN BELIEF IN COMMUNICATED CONSENT WILL BE PUT TO THE COURT MARTIAL PANEL

(Orally)

[1] In this trial by General Court Martial (GCM), the accused, Private McGown, is facing one charge laid under section 130 of the *National Defence Act* (*NDA*) for sexual assault, contrary to section 271 of the *Criminal Code.*

[2] The prosecution has called three witnesses in support of its case, including the complainant "N.W.". At the close of the prosecution's case, the defence elected not to call any evidence.

[3] Immediately thereafter, in response to my query, defence counsel confirmed that the accused will seek to rely upon the defence of honest but mistaken belief in communicated consent to supplement his primary argument to the effect that the prosecution has not discharged its burden of proving beyond reasonable doubt the absence of consent.

[4] I sought the views of the prosecution on that issue. Following a break of a few hours, the prosecution adopted the position that the defence of honest but mistaken belief in communicated consent could be put to the panel of the GCM.

[5] This was not unreasonable. Aspects of this case as it pertains to consent were open to multiple interpretations. Facts suggesting absence of consent may not have been perceived by the accused in the circumstances. They could potentially ground an assertion of honest but mistaken belief in communicated consent. It was therefore conceivable that the panel could be satisfied that the complainant had not consented to some of the sexual activity which took place between her and the accused and still find that the accused honestly believed that she did.

[6] However, conscious of the trial judge's role as a gatekeeper, highlighted by a majority of the Court Martial Appeal Court (CMAC) at paragraph 12 of *R. v. Gagnon*, 2018 CMAC 1 (*Gagnon* CMAC), I became concerned about whether the defence of honest but mistaken belief in communicated consent could be put to the panel in light of the statutory limitations provided by section 273.2 of the *Criminal Code*. Specifically in relation to paragraph 273.2(b), I did ask counsel to tell me what steps the accused, in their view, took to ascertain that the complainant was consenting on the facts of this case and what circumstances were, in their view, relevant to assess whether these steps were reasonable.

[7] Following another break, the prosecution changed its position. It now objects to this defence being put to the panel. I engaged in a short hearing to discuss the issue. I now wish to provide direction to counsel as to whether this defence would be put to the panel of the GCM, in order to facilitate the preparation of final arguments by counsel.

[8] There is no need to lay out the analysis in detail of all of the facts heard in the trial at this stage of the proceedings, as I simply need to ensure that the parties understand my reasoning in relation to the specific decision I am asked to make on the availability of the defence of honest but mistaken belief in communicated consent. That being said, I do need to briefly summarize those facts that bear on the issue of consent from the version of the complainant to allow a proper understanding of my analysis and conclusion.

[9] The testimony of the complainant "N.W." is that while on basic training at the Canadian Forces Leadership and Recruit School in Saint-Jean-sur-Richelieu, she agreed to join the accused in his room late on a Saturday night to watch a movie. She had been drinking, in part with the accused, earlier at the mess. She was inexperienced, both in alcohol consumption and in matters of sexual intercourse, although the accused did not know this.

[10] "N.W." testified to the effect that after a few minutes of watching a movie shoulder to shoulder with the accused while sitting on his bed, the two started kissing. Soon, she was lying on the bed. The kissing continued, interrupted when the accused stood up. He closed his room door and shut off the light. He came back on the bed and touched her breasts underneath her shirt. She testified that she was not opposed to that but did not expect things to go that far. Shortly thereafter, the accused placed his hand in her pants and inserted a finger in her vagina. At that point she said she told him that she wanted to go back to her room to sleep. He stopped without saying anything, but she told him to continue. He did and shortly thereafter stood up to remove his pants. He also removed her pants and underwear to her ankles. He unwrapped a condom and penetrated her. She testified that the intercourse was extremely painful but did not say so, keeping her hands on her face.

[11] At one point she positioned her hands on the accused's back. She testified telling him again and again that she wanted to go back to her room to sleep but he continued. He kissed her during the intercourse, and she reciprocated the kissing, testifying that she chose to go along as she was scared, drunk and did not know what else to do. The intercourse did not last long. Once he was done, he stood up, got dressed and she did the same. He told her not to tell anyone about their encounter. She left and he closed the door behind her. After coming back to her room, she disclosed the incident to her platoon mates who alerted the authorities.

[12] As stated earlier, the accused did not testify. His version of events has not been related by other witnesses or by the admission of a statement to police which would include exculpatory portions. There were no words said by him during the intercourse and no witnesses related any words said by him to point to the belief he may have had about the consent of "N.W." during their sexual interaction.

The law

[13] The elements of the offence of sexual assault have been listed as follows by the Supreme Court of Canada in the case of *R. v. G.F.*, 2021 SCC 20:

> [25] The *actus reus* of sexual assault requires the Crown to establish three things: (i) touching; (ii) of an objectively sexual nature; (iii) to which the complainant did not consent: *Ewanchuk*, at para. 25; *R. v. Chase*, [1987] 2 S.C.R. 293. The first two elements are determined objectively, while the third element is subjective and determined by reference to the complainant's internal state of mind towards the touching: *Ewanchuk*, at paras. 25-26. At the *mens rea* stage, the Crown must show that (i) the accused intentionally touched the complainant; and (ii) the accused knew that the complainant was not consenting, or was reckless or wilfully blind as to the absence of consent:

> *Ewanchuk,* at para. 42. The accused's perception of consent is examined as part of the *mens rea*, including the defence of honest but mistaken belief in communicated consent: *R. v. Barton*, 2019 SCC 33, at para. 90.

[14] What I need to determine as the trial judge before leaving what has been qualified as a defence of honest but mistaken belief in communicated consent to the panel of the GCM involves the application of the air of reality test to the evidence of belief and to the statutory limitations provided by section 273.2 of the *Criminal Code* for sexual assault offences. The statutory limitations set in that section have been qualified by Trudel J.A. for the majority in *Gagnon* CMAC as barriers, at law, to this defence.

[15] As it pertains to the air of reality test, the Supreme Court of Canada identified the question to be answered in *R. v. Cinous*, [2002] 2 S.C.R. 3 paragraph 86, as being "whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true." This is a question of law that requires the judge to determine whether the evidence adduced at the trial is sufficient to give rise to the defence. The accused bears a threshold evidential burden rather than a persuasive burden. Defences that do not have an air of reality must be removed from consideration by the jury or panel to avoid confusing panel members and muddy their deliberations.

[16] As for the statutory limitations, section 273.2 of the *Criminal Code* provides as follows:

> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from
>
> (i) the accused's self-induced intoxication,
>
> (ii) the accused's recklessness or wilful blindness, or
>
> (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
>
> (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[17] These statutory limitations and the air of reality test are not necessarily analyzed distinctively or sequentially. In what was described as a threshold analysis, they have been captured under an air of reality umbrella in *R. v. Barton*, 2019 SCC 33 where the Supreme Court of Canada at paragraph 121 stated that:

> An accused who wishes to rely on the defence of honest but mistaken belief in communicated consent must first demonstrate that there is an air of reality to the defence,

> requiring the trial judge to consider whether there is any evidence upon which a reasonable trier of fact acting judicially could find (1) that the accused took reasonable steps to ascertain consent and (2) that the accused honestly believed the complainant communicated consent.

[18] If there is no evidence upon which the trier of fact could find that the accused took reasonable steps to ascertain consent, then the defence of honest but mistaken belief in communicated consent has no air of reality and must not be left with the jury.

[19] In paragraph 121 in *Barton*, the Supreme Court of Canada referred to its own *R. v. Gagnon*, 2018 SCC 41 decision, on appeal from the *Gagnon* CMAC decision I referred to earlier. In *Gagnon*, the Supreme Court of Canada, in a short decision by the chief justice, stated as follows:

> [1] THE CHIEF JUSTICE — We are all of the opinion that the appeal should be dismissed, substantially for the reasons of the majority of the Court Martial Appeal Court of Canada.
>
> [2] However, with respect, on the record before us, we are of the opinion that there was no evidence from which a trier of fact could find that the appellant had taken reasonable steps to ascertain that the complainant was consenting.

[20] I understand the use of the adverb "however" is aimed at pointing out the lack of evidence of reasonable steps as a key factor in refusing to grant the appeal, in addition to the reasons the majority of the CMAC. Indeed, although the majority in *Gagnon* CMAC, under the pen of Trudel J.A., had clearly stated that the decisive question in the appeal was the requirement to take reasonable steps to ascertain consent under paragraph 273.2(b) of the *Criminal Code*, its ultimate conclusion was that the reasons of the military judge did not support a finding that the exclusion under paragraph 273.2(b) for lack of reasonable steps was considered in the analysis of the air of reality test. In other words, the CMAC found that the military judge had left the issue to the panel without first asking himself whether the belief expressed by the accused in his testimony was supported by any evidence that he had taken reasonable steps to ascertain consent to each sexual act. This finding led to the court's ultimate conclusion that the military judge's reasons were insufficient to meet this obligation, hence inadequate to fulfil their function. That was enough for the majority at the CMAC to grant the appeal without having to make a final determination as to whether the evidence was sufficient to demonstrate that there was an air of reality to the assertion that the accused had taken reasonable steps to ascertain whether the complainant was consenting (see paragraph 55). The Supreme Court of Canada had no such hesitation and concluded that there was insufficient evidence of reasonable steps, a conclusion which is very much in line with the analysis made by Trudel J.A. at paragraphs 51 to 54 of *Gagnon* CMAC which strongly suggests that the accused failed to meet its evidential burden and consequently, that the defence could not, at law, be submitted to the panel.

[21] Nevertheless, the *Gagnon* appeal at the Supreme Court of Canada singled out the reasonable steps analysis, apart from the air of reality analysis. More recently, in *R. v. A.E.*, 2022 SCC 4 the Supreme Court of Canada seems to be suggesting that the

threshold analysis consists of two elements, as it did in *Barton*, when, in a brief decision, it concludes that one of the accused "assertion of an honest but mistaken belief in consent lacks an air of reality and is unsupported by any reasonable steps." [My emphasis.]

[22] Whether the analysis includes air of reality and reasonable steps separately is not as important as recognizing that a threshold analysis needs to be performed in relation to both concepts for the important purpose of keeping from the jury defences that lack a sufficient evidentiary foundation, thereby avoiding the risk that the jury might improperly give effect to a defective defence.

[23] As explained at paragraphs 53 and 54 of *Cinous:*

> 54 The threshold determination by the trial judge is not aimed at deciding the substantive merits of the defence. . . . The question for the trial judge is whether the evidence discloses a real issue to be decided by the jury, and not how the jury should ultimately decide the issue.
>
> 53 In applying the air of reality test, a trial judge considers the totality of the evidence, and assumes the evidence relied upon by the accused to be true. . . . The evidential foundation can be indicated by evidence emanating from the examination-in-chief or cross-examination of the accused, of defence witnesses, or of crown witnesses. It can also rest upon the factual circumstances of the case or from any other evidential source on the record. There is no requirement that the evidence be adduced by the accused.

[24] The application of the air of reality test to both issues has been commented upon at paragraph 27 of *Gagnon* CMAC in a quote from Professor Stewart to the effect that

> ". . . the defence of mistaken belief cannot arise until reasonable steps are taken, but that question needs to be asked twice, once by the trial judge ("Is there an air of reality to the accused's claim that he took reasonable steps?", and once more, if necessary, by the trier of fact ("Did the accused take reasonable steps?"). The defence of mistaken belief in consent is available if the accused has an honest belief in communicated consent that is not tainted by the various factors listed in ss. 273.1 and 273.2, and if he takes reasonable steps in the circumstances known to him to ascertain consent. The air of reality test applies to all of these elements: that is, before leaving the defence with the trier of fact, the trial judge must be satisfied that there is evidence on which a reasonable and properly instructed jury could find an honest, untainted belief in communicated consent and reasonable steps." [Emphasis deleted.]

Issue

[25] As mentioned earlier, in the course of the hearing to determine the question of whether the defence of honest but mistaken belief in communicated consent should be put to the panel, I solicited comments from counsel on what steps the accused, in their view, took to ascertain that the complainant was consenting on the facts of this case and what circumstances were, in their view, relevant to assess whether these steps were reasonable.

[26] I did not ask counsel to comment on the absence of evidence on the part of the accused as to his belief, directly or indirectly. During my deliberations, especially after reading the reasons of Trudel J.A. of the CMAC at paragraph 18 of *Gagno*n to the effect that the trial judge is required to assess whether the accused believed that the complainant consented to the sexual activities, I became concerned about the sufficiency of the evidence in this regard on the facts of this case. The difficulty of potentially having to instruct the panel on a belief that they have not heard the accused express, directly in court or indirectly by words heard by others dawned on me. The belief of the accused in the circumstances of this case essentially needs to be inferred. The only way this can be done is by assessing the actions of the complainant. This would require the panel to apply their views as to what the accused, the other participant in the sexual encounter, would perceive from the actions of the complainant to form a belief which the panel would subsequently need to assess for the purpose of determining whether the defence is made out. I believe it is a lot to ask of the panel.

[27] However, in the circumstances I do not need to analyze the issue of sufficiency of evidence of the accused' belief to arrive at a decision on the availability of the defence.

Position of the parties

[28] The prosecution is of the view that there were no steps taken by the accused to ascertain consent on the facts of this case and that such steps were required in the circumstances. In this regard, the prosecution mentioned the following facts: both participants were recent acquaintances who had not engaged in any meaningful exchanges before, hence had not developed expectations as to how consent should be expressed; Private McGown did initiate the progressively intrusive sexual acts on a person he knew to have been drinking; and the complainant's participation was minimal.

[29] As for the defence, counsel was unable to point to any step taken by the accused to ascertain consent. The position of the defence is that the evidence, when considered in the most favourable way for the accused, supports a conclusion that the accused did not, in the circumstances, have to ascertain whether the complainant was consenting. In submitting this argument, counsel insisted specifically on the consensual kissing which accompanied each sexual act from the beginning of the sexual interaction to during the intercourse.

Analysis

[30] I have not been convinced that in the circumstances of this case there is an air of reality to the defence's claim that Private McGown did not have to take reasonable steps to ascertain that the complainant was consenting.

[31] Indeed, it is difficult for me to divorce the facts of this case to those in *Gagnon* CMAC, a case bearing some similarities to the situation here. Indeed, Warrant Officer Gagnon initiated each progressively intrusive sexual acts or gesture towards the complainant. He testified at trial as to his belief that the complainant consented despite the absence of any discussion on consent, pointing that the complainant herself admitted that she could have been perceived to be agreeing to participate in some of these acts. At the CMAC, Trudel J.A. for the majority commented that reasonable steps had not been taken. On appeal, the Supreme Court of Canada unequivocally confirmed that observation.

[32] The reasonable steps requirement is fundamental to the law of sexual assault to avoid the risk of effectively accepting implied consent or, in other words, giving a green light to the initiation and pursuit of increasingly intrusive sexual activities as long as the partner involved does not say "no" or pushes back. The law requires consent to be obtained before engaging in specific sexual activity. On the facts of this case, this consent has not been sought by Private McGown. He forged ahead with increasingly intimate acts without inquiry as to consent. [My emphasis.]

[33] In addition, the evidence reveals that Private McGown got a red light at one point in his interaction with the complainant. Her evidence is to the effect that once he had inserted his hand in her pants, she said she wanted to go back upstairs (to her room) and sleep. She testified having said these words repeatedly afterwards. She was not challenged on that aspect of her testimony in cross-examination. Consequently, even interpreting the evidence in the most favorable light for the accused, a "no" was expressed by the complainant on the evidence.

[34] The defence pointed out that after having been given that "no", the accused stopped what he was doing and recommenced only when the complainant would have said "continue". That could exempt the accused from taking further steps to ascertain consent as to the second part of what can be described as the "fingering" activity. However, this expression of consent would not justify the lack of steps to ascertain consent to the initial actions of the accused placing his hand in the complainant's pants and inserting a finger in her vagina. It would not justify the subsequent actions of removing her pants and underwear and penetrating her with his penis without inquiring about her consent for this ultimate escalation in their sexual encounter.

[35] The question of how opposed the versions are is one of degree, but it cannot be isolated from the context of the questions the members of the panel will have to determine in the course of their deliberations. In order to even get to the question of *mens rea*, they would have to conclude that they are convinced beyond a reasonable doubt of the version of events provided by the complainant on the issue of her consent at the *actus reus* stage. That means they would have to find in all likelihood that although she consented to the initial kissing, the complainant was surprised by the increasingly intimate moves made by the accused, did not know what to do or how to react, potentially in part given her drunken state, was surprised by his actions of putting his hand in her pants and inserting a finger in her vagina, told him that she wanted to go

to her room and sleep but that he continued fingering her anyways and then engaged in intercourse without assessing her consent first.

[36] Having reached this conclusion, the members of the panel could hardly consider that the complainant was an active, eager or willing partner to a degree sufficient to allow them to conclude that no reasonable steps needed to be taken by the accused to ascertain her consent.

[37] The evidence in this case reveals that the main issue in this trial is consent. The defence will succeed if the panel has a reasonable doubt on this issue that the prosecution must prove. The determination of this issue will rest on findings the panel will make on the reliability and credibility of the complainant on whether she consented or not. Submitting the defence of honest but mistaken belief in communicated consent to the panel could detract the panel members from their primary task of deciding that important issue.

Conclusion

[38] For these reasons, I find that a reasonable panel, properly instructed and acting judiciously, could not come to a conclusion that the accused took reasonable steps to ascertain that the complainant was consenting, did not consent to the sexual activity and that the accused could honestly have had a mistaken belief about her non-consent. Therefore, I refuse to put the defence of honest but mistaken belief in communicated consent to the panel.

FOR THESE REASONS THE COURT:

[39] **FINDS** the defence of honest but mistaken belief in communicated consent will not be put to the panel.

Counsel:

The Director of Military Prosecutions as represented by Major M. Reede and Major L. Langlois

Lieutenant(N) B. Wentzell and Lieutenant Commander F. Gonsalves, Defence Counsel Services, Counsel for Private C.J. McGown