SUPREME COURT OF CANADA

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Case in Brief: *R. v. Vu*

Judgment of January 16, 2024 | On appeal from the Court Martial Appeal Court of Canada
Neutral citation: 2024 SCC 1

The Supreme Court confirms the acquittal of a Canadian military member accused of sexual assault.

Private D.T. Vu, a member of the Canadian military, was charged with sexual assault for allegedly performing a sexual act on a complainant, who was also a member of the military, without her consent after they both attended a party and played drinking games. The complainant became heavily intoxicated and was brought back to her room by colleagues. The accused was then left alone with the complainant. He used his phone, angled away from the complainant, to record her apparently consenting to the sexual act for approximately five minutes until colleagues came back and removed him from her room. The accused later provided a voluntary statement to the military police, in which he stated the complainant appeared to be unconscious or asleep towards the end of the act.

The accused was tried by a military judge in the standing court martial. In order to find the accused guilty of sexual assault, the Crown had to prove beyond a reasonable doubt that he performed the sexual act without the complainant's subjective consent. In cases of sexual assault, subjective consent means the complainant had the "operating mind" to agree to the sexual activity. To give such consent, the complainant must be capable of understanding the physical act, that the act was sexual in nature, the specific identity of the complainant's partner, and that the complainant had a choice to refuse to participate in the sexual activity. Subjective consent is different from "apparent agreement", or objective evidence of a complainant agreeing to a sexual act.

The military judge found that the accused was not guilty of sexual assault. In his view, the Crown had failed to prove beyond a reasonable doubt that the complainant was too intoxicated to consent to the sexual act. In other words, based on the direct video evidence, the judge thought it was possible for the complainant to have consented to the sexual act, in which case the act would not have constituted sexual assault. For this reason, the accused was acquitted.

The Crown appealed the acquittal to the Court Martial Appeal Court of Canada. It argued that the military judge did not consider the entirety of the evidence – including circumstantial evidence such as witness testimonies and the accused's statement to the military police – and its cumulative effect in concluding the Crown failed to prove lack of consent.

A majority of judges dismissed the appeal and upheld the accused's acquittal, concluding that the military judge had properly considered all the evidence. In dissent, one judge would have allowed the appeal, set aside the acquittal and ordered a new trial. In her view, the military judge focused too narrowly on the video evidence, without considering whether the circumstantial evidence corroborated it. He failed to evaluate the evidence as a whole to determine whether the complainant was able to consent at the time of the sexual activity. The dissenting judge concluded that based on the cumulative assessment of the totality of the evidence before the military judge, the only reasonable conclusion available was that the complainant had been unable to provide subjective consent because she was severely intoxicated. The Crown appealed to the Supreme Court of Canada.

The Supreme Court dismissed the appeal.

As such, the accused's acquittal was upheld.

Chief Justice Wagner read the judgment of a majority of the Court. You can watch a recording of it here.

A print version of the judgment that was read out will be available here once finalized.

Breakdown of the decision: A majority of the Court dismissed the appeal (Chief Justice Wagner and Justices Karakatsanis, Rowe, Martin, Jamal and Moreau) | In dissent, Justice O'Bonsawin would have allowed the appeal

More information: Decision | Case information

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Lower court rulings: Decision (Standing Court Martial) | Appeal (Court Martial Appeal Court of Canada)
