

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Holly C. Beard
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

BETWEEN:

<i>HIS MAJESTY THE KING</i>	)	<i>D. W. Walker</i>
	)	<i>for the Appellant</i>
	)	
	)	<i>A. C. Smith</i>
	)	<i>for the Respondent</i>
<i>- and -</i>	)	
	)	<i>Appeal heard:</i>
<i>JASPREET HUNJAN</i>	)	<i>January 26, 2026</i>
	)	
<i>(Accused) Appellant</i>	)	<i>Judgment delivered:</i>
	)	<i>September 10, 2026</i>

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BEARD JA

I. THE ISSUES

[1] The accused is appealing his convictions for voyeurism under section 162(1) of the *Criminal Code*, RSC 1985, c C-46 (voyeurism) and for distribution of or making available an intimate image without consent under section 162.1(1) of the *Criminal Code*. If the convictions are upheld, he has applied to appeal his sentence. Note that all references in these reasons to statutory provisions are taken from the *Criminal Code*.

[2] The issues on the conviction appeal are:

- (i) regarding the conviction for voyeurism, (a) was the accused's observation of the sexual assault done surreptitiously, and (b) did the observation take place in circumstances that gave rise to a reasonable expectation of privacy;
- (ii) regarding the conviction for distributing or making available an intimate image without consent, (a) did the video depict an intimate image, given its poor quality, and (b) does the act of displaying or making available a recording of the complainant meet the requirements of the offence where the recording was displayed or made available only to the complainant; and
- (iii) was the verdict unreasonable and/or a miscarriage of justice under section 686(1)(a).

[3] On the sentence appeal, the accused argues that his sentence of one year's incarceration, concurrent on both offences, was demonstrably unfit.

II. THE FACTS

[4] The only witness at the trial was the complainant. The accused signed an agreed statement of facts in which he agreed, among other things, that the events in question took place on January 1, 2022. The trial judge found that the complainant's evidence was credible and that he believed her testimony, which, he stated, was not seriously challenged on cross-examination. The following is a brief summary of the key events.

[5] The accused and the complainant were both at a New Year's Eve house party that started on December 31, 2021; as noted, the events in question occurred on January 1, 2022. While the party took place on the main floor of the house, a bedroom on the second floor was designated as a coat room for guests' coats, as well as a place where people could go to talk (the room). The accused argued that this extended use made it a common room throughout the evening, with a low expectation of privacy, rather than a private room. The complainant testified that there were LED lights in the room that changed from blues to purples.

[6] At some time after midnight, the complainant felt tired, so she went upstairs to sleep on the bed in the room. A friend of hers was already passed out on the bed (the friend). She stated that, when she awoke some time later, she was on her back and another man (the other man) was on top of her, touching her. She said that she was still wearing her bra, but her dress and panties had been removed. The accused, who was not there when she lay down, was sitting on a chair close to the bed, staring at them and fidgeting with his phone when she woke up.

[7] The complainant testified that the accused did not ask if he could watch or record her sleeping or during the sexual assault, and she would not have been comfortable with him doing so.

[8] The other man turned her over and attempted to have anal sex with her, while the accused remained in the chair. The other man then asked the accused if he wanted to try, and the accused said no.

[9] When the complainant was finally able to get up, the accused approached her, told her that he had taken a video (the video), showed her his

phone and said, “Look how much you’re having fun.” The complainant said that she could hear moans, which she said sounded like her, but the video was dark, so she could not see any faces. She testified that she could tell that it was the same room because she could see the same LED lights, and it looked like someone recorded them having sex. She asked the accused to delete the video, but he did not do so until the other man told him to.

[10] The other man gave her her underwear, which was torn, and the accused gave her her glasses, which had a broken arm. As she got dressed, the other man said that it was fun. While she was in the bathroom, the other man asked her for a blow job, which she refused. At one point, the other man said, “now it doesn’t feel good”, and, before she left the house, he said, “let’s not talk about this to anybody else.”

[11] When the complainant left at about 4:00 a.m., the friend was still passed out on the bed. She said that she was bleeding from her anus, so she went to the hospital and had a sexual assault protocol exam. She thought that the nurse called the police, who attended at the hospital to see her.

[12] During argument at trial, defence counsel (who is also counsel on the appeal) acknowledged that the accused was the person sitting in the chair in the room and observing the sexual assault. He also acknowledged that the accused was on his phone and “hit the record button of something that was in plain view.” In response to a question by the trial judge, he agreed that the accused had the phone and was recording.

[13] Further, in response to the trial judge’s question about whether the complainant consented to the recording, defence counsel stated that everyone was taking pictures that night, and they expected that they would be shared.

[14] At the appeal hearing, defence counsel acknowledged that, when the accused went into the room, there were two people sleeping or blacked out on the bed and that the accused recorded the sexual activity that occurred.

[15] Following his conviction of the accused, the trial judge rejected both a conditional discharge and a conditional sentence and sentenced the accused to one year in prison on each offence, to be served concurrently.

III. SECTION 162(1)—VOYEURISM

(i) The Law and the Issues

[16] Section 162(1) states as follows:

Voyeurism

162(1) Everyone 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;

Voyeurisme

162(1) Commet une infraction quiconque, subrepticement, observe, notamment par des moyens mécaniques ou électroniques, une personne – ou produit un enregistrement visuel d’une personne – se trouvant dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée, dans l’un des cas suivants :

a) la personne est dans un lieu où il est raisonnable de s’attendre à ce qu’une personne soit nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite;

(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

b) la personne est nue, expose ses seins, ses organes génitaux ou sa région anale ou se livre à une activité sexuelle explicite, et l'observation ou l'enregistrement est fait dans le dessein d'ainsi observer ou enregistrer une personne;

(c) the observation or recording is done for a sexual purpose.

c) l'observation ou l'enregistrement est fait dans un but sexuel.

[17] The offence can be committed by either observing or recording; both are not required.

[18] Further, the offence can be committed in three different situations. Section 162(1)(a) focusses on the place where the observation or recording took place, section 162(1)(b) focusses on the activity that was being observed or recorded, and section 162(1)(c) focusses on the purpose for the observation or recording. (See *R v Downes*, 2023 SCC 6 at paras 32-35.) The Crown stated, both in argument at trial and at the appeal hearing, that, while its position was that this offence was committed under both sections 162(1)(a) and 162(1)(b), section 162(1)(b) was a better fit in these circumstances, and it was not arguing that section 162(1)(c) was applicable. Given the Crown's position, I will focus on section 162(1)(b).

[19] As set out in *R v Trinchi*, 2019 ONCA 356 at para 12, the elements of section 162(1)(b) are as follows:

(i) the accused observed or recorded the complainant;

- (ii) the accused's observation or recording was done surreptitiously;
- (iii) the complainant was in circumstances that gave rise to a reasonable expectation of privacy;
- (iv) the complainant was nude or exposing sexual parts of her body or engaging in sexual activity; and
- (v) the observation or recording of the complainant was done for the purpose of recording them in such a state.

[20] Absent an error in the trial judge's findings of fact, the question of whether those facts are sufficient to establish any of these elements involves the application of the facts to the law. In the criminal context, applying the facts to the law generally raises a question of law and is reviewed on the standard of correctness. (See *R v Shepherd*, 2009 SCC 35 at para 20; see also *R v DNS*, 2016 MBCA 27 at para 32.)

[21] Given that the accused has admitted that he observed the complainant and the other man in the bed while the sexual assault occurred, it is not necessary to determine, for the purposes of the voyeurism appeal, whether the video was sufficiently clear to constitute a visual recording within the meaning of section 162(1).

[22] Further, given the positions of the accused and the Crown, the two issues on the conviction appeal are (i) whether the trial judge erred in finding that the observation was done surreptitiously, and (ii) whether the observation

occurred in circumstances that gave rise to a reasonable expectation of privacy.

(ii) *Surreptitiously*

The Background

[23] The trial judge found:

[The complainant] fell asleep and when she awoke, she was being filmed and stared at by [the accused] while [the other man] was assaulting her. She could not consent to being either recorded or watched while she was sleeping, and I agree with the Crown that it meets the definition of surreptitiously.

[24] The accused argued at the appeal hearing that, in order for his activity to be surreptitious, it must be done “by stealth, clandestinely, or undercover”. He offered as examples an accused observing or recording through a peephole, over or under a partition, with a hidden camera, or from a distance, using a telephoto lens. He argued that, in this case, the accused entered the room openly, he sat in the chair out in the open and close to the bed, and he was openly holding his phone in his hand while he made the recording, all in plain view. His position was that, in these circumstances, neither his observations nor his recording was done surreptitiously.

[25] Relying on *Trinchi*, the Crown argued at the appeal hearing that “surreptitiously”, as it is used in section 162(1), should be interpreted broadly, in keeping with the purpose of the legislation, which is to prevent an intrusion of privacy and to protect sexual integrity. It pointed out that the Ontario Court of Appeal held that a surreptitious action requires that an accused intended that the subject be unaware that the accused was observing or recording them.

It argued that this would cover the facts in this case, where the complainant was unaware of, and did not consent to, the observation. It further pointed out that the provision relates to all sexual activity and is not limited to sexual assault.

The Law

[26] The interpretation of the requirement for a surreptitious observation or recording was resolved by the Ontario Court of Appeal in *Trinchi*. In that case, the accused and the complainant were engaging in intimate webcam video chats in which both parties were naked (see *ibid* at para 1). Unbeknownst to the complainant, the accused took screenshots of the webcam views and preserved nude shots of her as still photos and, after the relationship ended, the accused emailed the nude photos to many people (see *ibid* at paras 2-3).

[27] The accused was convicted of voyeurism (see *ibid*), and one of his grounds of appeal was that the trial judge erred in finding that he acted surreptitiously. His position was that voyeurism requires proof that an accused intended to act surreptitiously, and that the trial judge erred by considering the situation from the complainant's perspective, rather than focussing on his state of mind. He argued that the complainant willingly posed nude in front of the webcam for transmission to him, and it is well-known that screenshots can readily capture any image. He stated that, because she did not ask him not to take any screenshots and he never said that he would not do so, there was no evidence that he intended to act surreptitiously (see *ibid* at para 4).

[28] The accused's argument in *Trinchi* was rejected. The Court differentiated between an interpretation that focussed on the accused's actions (i.e., what he did) and one that focussed on the accused's intention, stating (*ibid* at para 49):

. . . The word "surreptitiously" refers not to what the accused does, but to the state of mind with which he does it. The required criminal intent for the "surreptitiously" element in s. 162(1) has been proven where the Crown establishes that the accused intended the complainant be unaware he was observing or recording her.

[29] The Court explained that "an accused's state of mind may be based on evidence of secretiveness or stealth, or may be inferred from the relevant circumstantial evidence" (*Trinchi* at para 47). It goes on to say that (*ibid*):

. . . 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.

[30] Applying the law to the facts, the Court found (*ibid* at para 55):

. . . . The [accused's] state of mind could be inferred from the circumstantial evidence. The complainant did not know the screenshots were being taken. The [accused] never told the complainant he was taking screenshots . . . These facts supported the trial judge's inference that the [accused] had intended that the complainant not know he was taking screenshots of her.

Analysis

[31] The accused's position, in the present case, that whether he acted surreptitiously must be determined by asking whether the acts of observing or recording were done by stealth, clandestinely or undercover was specifically rejected by the Court in *Trinchi* (see para 47). That Court found that the Crown was required to prove that the accused intended that the complainant be unaware that he was observing or recording her (see *ibid* at para 49). While evidence that the accused acted clandestinely would be relevant to determining the accused's intention, so would evidence that the complainant was unaware of, and did not consent to, the observation or recording. The ultimate issue, after taking into account all of the evidence, was whether the accused intended that the complainant be unaware that he was observing or recording her (see *ibid* at para 47).

[32] In my view, the trial judge in the present case did not err in finding that the accused was observing the complainant surreptitiously. This finding was based on his factual findings that the complainant was asleep when the accused both observed and recorded the sexual activity in which she was involved, and that she did not and could not consent. These factual findings, which the accused has not appealed, are supported by the evidence and by the accused's admissions made at trial and on appeal. The trial judge implicitly rejected the accused's argument that a surreptitious observation or recording had to be done by stealth, clandestinely or undercover and, in my view, he did not err in doing so.

[33] For these reasons, I would reject the accused's argument that the trial judge erred in finding that his observation of the sexual assault was done surreptitiously.

(iii) Circumstances That Give Rise to a Reasonable Expectation of Privacy

The Law

[34] In *Trinchi*, the Court referred to this as the third element of section 162(1)(b) (see para 19 herein). In *R v Jarvis*, 2019 SCC 10 at para 28, Wagner CJC, for the majority, explained:

[C]ircumstances that give rise to a reasonable expectation of privacy for the purposes of s. 162(1) are circumstances in which a person would reasonably expect not to be the subject of the type of observation or recording that in fact occurred. The inquiry into whether a person who was observed or recorded was in such circumstances should take into account the entire context in which the impugned observation or recording took place.

[35] Chief Justice Wagner then set out a “non-exhaustive list” of specific circumstances (factors) that “may” assist a court in determining whether a complainant was in such circumstances (*Jarvis* at para 29), but he emphasized that the list was non-exhaustive and that not every factor would be relevant in every case (see *ibid* at para 30). He explained that “[t]he inquiry is a contextual one, and the question in each case is whether there was a reasonable expectation of privacy in the totality of the circumstances” (*ibid*). Those factors are (see *ibid* at para 29):

- (1) The location the person was in when they were observed or recorded.

- (2) The nature of the impugned conduct, that is, whether it consisted of observation or recording.
- (3) Awareness of or consent to potential observation or recording.
- (4) The manner in which the observation or recording was done.
- (5) The subject matter or content of the observation or recording.
- (6) Any rules, regulations or policies that governed the observation or recording in question.
- (7) The relationship between the person who was observed or recorded and the person who did the observing or recording.
- (8) The purpose for which the observation or recording was done.
- (9) The personal attributes of the person who was observed or recorded.

[36] The reference to location, in the first factor, applies in the same way to charges under each of sections 162(1)(a)–162(1)(c). Section 162(1)(a) also includes an additional element related to specific places that is not an element of either section 162(1)(b) (which has its own added element related to specific activities) or section 162(1)(c) (which has its own added element related to sexual purpose). While the underlying facts related to location may overlap with those related to place in section 162(1)(a), the two are separate concepts that should not be confused. (See *Downes* at paras 32-35.)

The Parties' Positions

[37] The accused stated, at the appeal hearing, that *Jarvis* requires a court to take into account the totality of the circumstances in order to determine whether there was a reasonable expectation of privacy. His position was that the trial judge erred in his assessment and weighing of the factors. He argued that, when the *Jarvis* factors are considered and weighed in the context of the evidence, they lead to the conclusion that there was no reasonable expectation of privacy at the time of the observations and recording.

[38] The Crown's position at the appeal hearing was that it had reviewed the *Jarvis* factors during submissions at trial, relying on factors 3, 4, 5 and 7. It argued that the trial judge did not err in finding that the evidence established that the observation was made in circumstances that gave rise to a reasonable expectation of privacy.

Analysis

[39] As the Supreme Court of Canada stated in *R v REM*, 2008 SCC 51 at para 16, and has repeated on many occasions since:

[A trial judge's] reasons should [be] read . . . as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered . . .

[40] At trial, both parties set out and reviewed each of the *Jarvis* factors in the context of the evidence, and both acknowledged that not all of the factors were relevant. In his reasons, the trial judge noted that the Crown had reviewed each of the factors and commented on four of them. He also noted

that the defence had referred to the *Jarvis* factors, and he found that “[t]he complainant had a reasonable expectation of privacy based on the criteria in *Jarvis*.” In my view, the trial judge indicated that he was aware of the *Jarvis* factors and that he had considered the parties’ positions. He was not required to repeat all of the arguments or to go through each of the factors; he was only required to deal with the issues that were raised by the parties.

[41] At the trial, the accused focussed many of his submissions on whether the room was a common room and whether the quality of the video was so poor that it could not be considered a video at all. He took the position that the main piece of evidence related to the voyeurism charge was the video, and that, without the video, he should be acquitted of that charge. To the extent that the trial judge focussed more on those two issues, he did so in response to the accused’s submissions. In my view, he did not err in doing so.

[42] The trial judge made the following findings related to this element:

... I accept the complainant’s evidence that she fell asleep and when she awoke, she was being filmed and stared at by [the accused] while [the other man] was assaulting her. She could not consent to being either recorded or watched while she was sleeping, and I agree with the Crown that [this] meets the definition of surreptitiously.

It also meets [section 162(1)]’s intent regarding the reasonable expectation of privacy. I also find that this was a bedroom, and while there were some comings and goings in that room during the evening, at the material time, there was a reasonable expectation of privacy, as there was no one else in the house but the four individuals in the room. She went into the bedroom to sleep, and there was someone else in the bedroom already sleeping, which is a further indication regarding expectation of privacy.

The complainant had a reasonable expectation of privacy based on the criteria in *Jarvis*. This was not a close case. The fact that it occurred in a bedroom, at a friend's house who she knew, where she went to go to sleep, and did in fact fall asleep. The accused was looking at her and recording her while she slept and awakened from her sleep to find herself being sexually assaulted. She did not consent and could not consent. We do not know how long the recording is, but I accept the complainant's evidence that the part of the video she saw was before she awoke. I am satisfied the video depicts the complainant and [the other man] engaged in non-consensual sexual activity. There is a strong expectation of privacy in the circumstances.

[43] These findings addressed the accused's submissions at trial, and they address *Jarvis* factors 1-5. At trial, the parties acknowledged that factors 6-9 were of little or no relevance.

[44] Further, related to consent, the trial judge addressed the accused's trial argument that there was implicit permission to take pictures because everyone was taking photos at the party and the complainant had consented to having her photo taken earlier. He rejected that argument when he stated that taking a picture of people bringing in the New Year at a house party does not compare to recording a sexual assault.

[45] In my view, consent relates to the specific activity for which the consent is given. I would agree with the trial judge that consent to being photographed while fully clothed and awake does not constitute consent to being video recorded later, while asleep or passed out and involved in any kind of sexual activity.

[46] The accused's general position at the appeal hearing was that the trial judge should have come to different conclusions regarding a number of

the factors. In my view, those arguments related to the trial judge's factual findings and factual inferences regarding the *Jarvis* factors. All factual findings and inferences are reviewed on the deferential standard of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 10, 23, 25). I am of the view that those findings and inferences are all supported by the evidence, and the trial judge made no reversible errors.

[47] Finally, the trial judge specifically asked defence counsel to respond to the Crown's argument that voyeurism can be committed by observing, separately from making a visual recording. In answer, defence counsel argued that the accused was in the room and the incident came to him, he did not go to it, and that he had no duty to leave the room. He stated that the offence is intended to capture a person looking through a peephole or using a hidden camera, not someone who happens to witness sex unfolding before him. His position was that this was not sufficient to constitute an observation under section 162(1).

[48] The trial judge described this as an argument of "simply [being] in the wrong place at the wrong time". He found that the accused was more than a passive observer because he was recording what occurred, and he showed it to the complainant with the comment, "Look how much you're having fun".

[49] In effect, the trial judge concluded that the action of recording while observing distinguished this accused from a passive observer. I agree. While creating a visual recording constitutes a separate way of committing the offence, it can also be a factor related to observing, where the two are done together. In my view, the trial judge did not err in concluding that the accused was more than a simple observer and, for this purpose, it does not matter

whether the recording was successful in clearly capturing the sexual activity. It is the act of recording while observing that captures the accused's actions. I would note that this conclusion is based on the facts of this case and should not be read as necessarily requiring something beyond observation to meet the requirements of the offence. Each case will depend on its own circumstances.

[50] For these reasons, I am of the view that the trial judge did not err in finding that the complainant was in circumstances that gave rise to a reasonable expectation of privacy, and I would reject the accused's argument that the trial judge erred in so finding.

(iv) Conclusion

[51] Having concluded that the trial judge did not err in finding that the observation was done surreptitiously and that it occurred in circumstances that gave rise to a reasonable expectation of privacy, I would dismiss the appeal of the voyeurism conviction under section 162(1).

IV. SECTION 162.1—DISTRIBUTION OF, OR MAKING AVAILABLE, AN INTIMATE IMAGE WITHOUT CONSENT

(i) The Law and the Issues

[52] Section 162.1 states as follows:

Publication, etc., of an intimate image without consent
162.1(1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises

Publication, etc. non consensuelle d'une image intime
162.1(1) Quiconque sciemment publie, distribue, transmet, vend ou rend accessible une image intime

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, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years[.]

...

Definition of *intimate image*

162.1(2) In this section, *intimate image* means a visual recording of a person made by any means including a photographic, film or video recording,

(a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;

(b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and

(c) in respect of which the person depicted retains a reasonable expectation of

d'une personne, ou en fait la publicité, sachant que cette personne n'y a pas consenti ou sans se soucier de savoir si elle y a consenti ou non, est coupable :

a) soit d'un acte criminel passible d'un emprisonnement maximal de cinq ans[.]

...

Définition de *image intime*

162.1(2) Au présent article, *image intime* s'entend d'un enregistrement visuel – photographique, filmé, vidéo ou autre – d'une personne, réalisé par tout moyen, où celle-ci :

a) y figure nue, exposant ses seins, ses organes génitaux ou sa région anale ou se livrant à une activité sexuelle explicite;

b) se trouvait, lors de la réalisation de cet enregistrement, dans des circonstances pour lesquelles il existe une attente raisonnable de protection en matière de vie privée;

c) a toujours cette attente raisonnable de protection en matière de vie privée à l'égard de l'enregistrement

privacy at the time the	au moment de la
offence is committed.	perpétration de l'infraction.

[emphasis in original]

[53] The requirement that what is distributed or made available must be an intimate image is an element of the offence. Determining the underlying facts and factual inferences relevant to that finding, such as the contents and quality of a visual recording and the circumstances surrounding its creation, involves findings and inferences of fact that are reviewed on the standard of palpable and overriding error (see para 46 herein). However, determining whether those facts and inferences by the trial judge meet the statutory requirements for an intimate image, as set out in section 162.1(2), is an application of the facts to the law. This raises a question of law and is reviewed on the standard of correctness (see para 20 herein).

[54] The accused raises two issues regarding his conviction for this offence: (i) that the video does not constitute an intimate image because it was of such poor quality that it did not show either the complainant or any explicit sexual activity, and (ii) that the offence does not include transmission to the person who is shown in the intimate image.

[55] Section 162.1(1) is closely related to section 162(1). Both are sexual offences and they share some elements; for example, both deal with visual recordings in which “a person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity”. In *Jarvis*, Wagner CJC stated that Parliament’s object in enacting section 162(1) was “to protect individuals’ privacy and sexual integrity, particularly from new threats posed by the abuse of evolving technologies” (at para 48).

Chief Justice Wagner found that a narrow reading of the provision would not achieve the purpose of the legislation (see *ibid* at para 52).

[56] Chief Justice Wagner also looked at the broader legal context of the legislation. He noted that personal and informational privacy are of particular importance in our society (see *ibid* at para 64). He stated that there is a strong connection between personal privacy and human dignity (see *ibid* at para 65), and that the safeguarding of information about oneself is closely tied to individual dignity, both of which are of paramount importance in our society (see *ibid* at para 66).

[57] Of particular importance to the present case, Wagner CJC found that the privacy analysis necessarily requires “a contextual assessment that takes into account the totality of the circumstances” (*ibid* at para 60).

[58] The statement of legislative purpose enunciated by Wagner CJC in *Jarvis* was adopted by Gillese JA, for the majority, in *R v Walsh*, 2021 ONCA 43, when interpreting the phrase “visual recording” in section 162.1(2). She concluded that “the language of s. 162.1 is intentionally broad”, including a wide range of conduct and visual recordings “made by any means” (*Jarvis* at para 65). She went on to conclude that “[g]iving ‘visual recording’ a broad and inclusive interpretation best accords with the objects of s. 162.1 and Parliament’s intention in enacting it” (at para 70).

[59] The Supreme Court again adopted a broad interpretation of provisions dealing with visual recordings in its later decision in *Downes*. In that case, the Supreme Court gave a broad interpretation to the requirement in section 162(1)(a) that “the person is in a place in which a person can reasonably be expected to be nude” (*Downes* at para 32), finding that the

Crown did not have to prove that nudity was reasonably expected at the specific time that the photos were taken (see *ibid* at para 54).

[60] From this, I conclude that, in determining the two issues in the present case regarding section 162.1, the legislation is to be given a broad interpretation.

(ii) Was There a Visual Recording of an Intimate Image?

The Background

[61] In deciding whether the video constituted an intimate image under section 162.1, the trial judge applied his findings regarding visual recording under section 162(1), wherein he accepted the following summary of the complainant's evidence regarding the video:

. . . She said he showed her his phone. He said, "Look how much you're having fun". When he showed the phone to her, she said she heard moans. It sounded like herself. It was dark, so she could not see faces.

It looked like some sort of sexual video. She could tell it was [the other man's] room. There was the same LED lights. The video was dark. She said it looked like someone recorded [them] having sex. She did not believe the video was taken while she was awake.

[62] The trial judge then found:

. . . I accept the complainant's evidence that the part of the video she saw was before she awoke. I am satisfied the video depicts the complainant and [the other man] engaged in non-consensual sexual activity.

Regarding the defence argument that this did not constitute a video recording because one could not see anything on the video and you

could just hear sound, I disagree with that submission based on the evidence of the complainant. She saw herself being recorded, and she could tell to a degree what was on the video. There were some lights in the room. She could only tell it was a silhouette. However, as the accused told her it is a recording of her having fun, the only inference I can draw from his comment is that it was in fact a video of her and [the other man] on the bed. It meets the definition of video recording in Section 162(2).

[63] The accused argued at the appeal hearing that the video did not constitute an intimate image because it was only a few seconds long, it was dark, it showed only silhouettes such that the complainant could not identify herself in it, and there was no sexual activity or nudity.

[64] The Crown's position is that the evidence, as a whole, supports the finding that the video was of explicit sexual activity involving the complainant. It notes the trial judge's factual findings and also points to the accused's statement to the complainant, as he showed her the video, about how much fun she was having.

[65] The Crown further argues that defence counsel conceded, in argument at the trial, that the accused had recorded the sexual assault.

Analysis

[66] In my view, the determination of whether the video meets the requirements of an intimate image in section 162.1(2) is not limited to a consideration of what can be seen in the recording; rather, that determination requires a contextual analysis that takes into account all of the relevant evidence and circumstances. This is consistent with a broad interpretation

that best gives effect to the purpose of the legislation, being to protect an individual's privacy and sexual integrity.

[67] The analysis regarding the content of the video was hampered by the fact that it was deleted after the complainant viewed it, so the only evidence of its contents comes from the complainant. As the trial judge found, the complainant said that the video looked like there was sexual activity. She was able to identify her voice and the LED lights in the room. Further, she awoke to find the accused recording her and the other man during the sexual assault, and the accused played the video to her almost immediately after the sexual assault—in fact, while she was wearing only her bra. His words “[l]ook how much you’re having fun”, spoken as he showed her his phone immediately after the sexual assault, confirm her evidence that the video was of the sexual assault.

[68] Further, I agree with the Crown that the defence concessions in argument at the trial also confirm that the video was a recording of explicit sexual activity. While the accused also conceded that the video was of a sexual assault when he argued that its creation served the public good (see sections 162(6), 162.1(4)), which was raised as a defence, I would not consider it to be a concession regarding the contents of the video for the purpose of determining guilt (see sections 162(1), 162.1(1)). It was an alternative position in the event that his primary argument regarding the lack of discernable explicit sexual activity failed.

[69] I also note that, at the appeal hearing, on the issue of whether the recording was done surreptitiously, defence counsel stated that the accused

was not contesting that he recorded the sexual activity. His position was that the recording was done openly and not surreptitiously.

[70] Focussing only on the quality of the video to the exclusion of the rest of the evidence would base culpability on the accused's recording or photographic ability, rather than on the complainant's sexual integrity and privacy, which is inconsistent with a contextual analysis. Taking a contextual approach, based on the trial judge's factual findings and the concessions by defence counsel in argument at the trial and on appeal, I would conclude that the trial judge was correct in finding that the video was of a person (i.e., the complainant) engaged in explicit sexual activity, and that it met the requirements in section 162.1(2) for a visual recording of an intimate image.

[71] This conclusion is consistent with the finding in *Walsh*. In that case, Gillese JA found that the meaning of visual recording does not require proof that the intimate image was capable of reproduction and viewing by others (see *ibid* at paras 67, 72). The fact that it was shared once was sufficient to constitute the offence. In the present case, the person who was shown the visual recording, i.e., the complainant, was able to identify the sexually explicit activity and the parties involved from the contents and the surrounding circumstances. The meaning of visual recording and intimate image does not require that more than one person be able to identify the contents. As stated in *Walsh*, "[t]he harm is in the non-consensual sharing of an intimate image" (at para 67).

[72] For these reasons, I would reject the accused's argument that the trial judge erred in finding that the video constituted an intimate image.

(iii) Does the Offence Include Transmission to the Person Who Is the Subject of the Recording?

The Background

[73] The trial judge found that “[the accused], by showing the video to the complainant, [made] out the offence of distributing or making it available, and it [did] not matter that this distribution or making available was directly to the complainant.”

[74] The accused’s position at the appeal hearing was that the cases involve sharing an image with a third party. That was the situation in *Walsh*.

[75] While the Crown argues that there are numerous examples where a court has found that even sharing an image with the subject of the image constitutes prohibited conduct, it provided only one case where that issue was discussed, being *R v RR*, 2021 CarswellOnt 14686, 176 WCB (2d) 71, (ONCJ). Its position is that the offence is intended to criminalize conduct like that of the accused.

The Law

[76] In *RR*, the accused had possession of an intimate photograph of his wife. While they were in the throes of a separation, the accused sent a number of angry messages to his wife, ultimately attaching an intimate photograph of her and threatening repercussions if she did not respond to his messages. One of the accused’s arguments against conviction was that the offence only arose if the image was disclosed to a third party, which he did not do.

[77] The trial judge discussed the principles set out in *Jarvis* and concluded that it was necessary to take a contextual approach in applying the

legislation (see *RR* at para 56). He found that only the wife had a privacy interest in the photograph, notwithstanding that the accused had possession of it, and that only she could grant permission to transmit it. He said that the circumstances of that case, including the display of the photograph during the trial, demonstrated the indignity that could result from the non-consensual transmission of the photograph, even to the wife.

[78] The trial judge then found that transmission of the photograph to the wife, who was the subject of the photograph, was sufficient to constitute the offence and he found the accused guilty under section 162.1.

Analysis

[79] As noted, the purpose of section 162.1 is to protect an individual's privacy and sexual integrity. In *Walsh*, Gillese JA stated that “[t]he harm is in the non-consensual sharing of an intimate image” and “the act of sharing the images in the first place is an attack on the victim's privacy, basic human dignity and sense of self-worth” (at para 67).

[80] The context of sharing the video in the present case is that the accused watched and recorded as the complainant was sexually assaulted while she was sleeping. She awoke to find the other man on top of her and the accused close by, watching and fiddling with his phone. The other man attempted to force anal sex while she was telling him to stop. Immediately after he finally stopped, and while still naked except for a bra, the accused approached her, showed her the video and said that it showed her having fun. In these circumstances, particularly given that the complainant neither consented to the taking of the video nor to it being shown to her, showing the

video was a significant attack on her privacy and dignity. This is the type of behaviour that the legislation is intended to prevent.

[81] Further, as a matter of statutory interpretation, I note that the provision does not exempt the display of the intimate image to the subject of the visual recording or limit the category of recipient to third parties. Had such a limit been intended, it could easily have been included.

[82] In my view, the trial judge was correct in finding that distributing or making available the visual recording to the complainant was sufficient to meet the requirements of section 162.1. I would reject the accused's argument that it is not an offence under section 162.1 to distribute or make available a visual recording where that recording is only distributed or made available to the subject of the recording.

(iv) Conclusion

[83] Having concluded that the trial judge did not err in finding that there was a visual recording of an intimate image and that section 162.1(1) applies even where the intimate image was only distributed or made available to the subject of the image, I would dismiss the appeal of the conviction under section 162.1(1).

V. UNREASONABLE VERDICT AND/OR MISCARRIAGE OF JUSTICE

[84] The accused's ground of appeal alleging an unreasonable verdict and miscarriage of justice arose from his arguments regarding the issues set out in paragraphs 2(i) and 2(ii) herein. Having dismissed each of those arguments, I would also dismiss this ground of appeal.

VI. SENTENCE APPEAL

(i) The Parties' Positions

[85] The accused has appealed his sentence on the sole ground that it was demonstrably unfit; he has not alleged any factual errors or errors in principle.

[86] The Crown's position is that these sentences were within the range of sentences for these offences, as determined by this Court in *R v McFarlane*, 2018 MBCA 48. The Crown argues that the present case differs from *McFarlane*, in that the voyeurism sentence in *McFarlane* was for one voyeurism conviction, alone, while the accused in the present case was given concurrent sentences on two convictions, one for voyeurism and one for distributing an intimate image without consent. The Crown states that the total sentence in the present case had to ensure that there was no free ride regarding the concurrent conviction.

(ii) Analysis

[87] As summarized by Steel JA, for the Court, in *R v Sinclair*, 2022 MBCA 65 at para 18, absent an error in principle, a material misapprehension of evidence that had a material effect on the sentence, or the imposition of a demonstrably unfit sentence, an appellate court must defer to the sentencing judge's exercise of discretion regarding the sentence that was imposed.

[88] In *R v Lacasse*, 2015 SCC 64 at para 52, Wagner CJC, for the majority, explained the high threshold for a finding that a sentence was demonstrably unfit as follows:

It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is “demonstrably unfit”: “clearly unreasonable”, “clearly or manifestly excessive”, “clearly excessive or inadequate”, or representing a “substantial and marked departure” (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.

[89] In *McFarlane*, this Court considered the issue of sentencing for offences that involve the use of technology and its effects on personal privacy and sexual integrity. In that case, the accused made a complete confession upon arrest (see *ibid* at para 10), and he was convicted of voyeurism under section 162(1)(c), distribution of an intimate image under section 162.1(1) and extortion under section 346(1) (see *McFarlane* at para 2). The last two offences were sentenced concurrently, but consecutively to the voyeurism conviction (see *ibid* at para 14).

[90] This Court concluded that the primary sentencing objectives for distribution of an intimate image without consent would be deterrence and denunciation (see *ibid* at para 24). In my view, this conclusion would also apply to the offence of voyeurism, because it, too, is intended to address what this Court in *McFarlane* referred to as “the pernicious effects that the misuse of technology can have on personal privacy and sexual integrity” (at para 1).

[91] This Court in *McFarlane* further stated that the range of sentence for a first-time offender on a guilty plea for voyeurism would be between a discharge and 12 months’ incarceration (see para 25). This Court also indicated that the typical sentence for distribution of an intimate image

without consent would be one of incarceration, and it described a concurrent sentence of six months for that offence in that case as being at the low end of the range (see *ibid* at para 24).

[92] In my view, the total sentence imposed in the present case of one year's incarceration is within the range set out in *McFarlane*. While it is at the top end of that range for voyeurism, alone, the accused was convicted after trial of two offences, and the total sentence imposed covers both. As this Court has often stated, an accused is not to get a free ride for concurrent sentences, and a sentence should reflect the increased culpability (see *ibid* at para 23).

[93] For these reasons, I would find that the sentence imposed does not meet the very high threshold that applies when an appellate court is reviewing the fitness of sentence and, as a result, I would conclude that the total sentence was not demonstrably unfit.

[94] The accused did not apply for leave to appeal his sentence, notwithstanding the requirement of section 675(1)(b). As the Crown did not raise this issue, I would grant the accused leave to appeal his sentence; however, I would dismiss his sentence appeal.

VII. DECISION

[95] For the above-noted reasons, I would dismiss the accused's appeals of his convictions for voyeurism under section 162(1) of the *Criminal Code* and for distributing or making available an intimate image without consent under section 162.1(1) of the *Criminal Code*. I would grant leave to appeal his sentence, but I would dismiss his sentence appeal.

Beard JA

I agree: leMaistre JA

I agree: Simonsen JA
