File No.: 38739

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

BETWEEN:

KEN CHUNG

APPELLANT
(RESPONDENT)

AND

HER MAJESTY THE QUEEN

RESPONDENT
(APPELLANT)

APPELLANT'S FACTUM

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. For a very brief period of time, over a very short stretch of a major inner-city street, Mr. Chung accelerated from a speed of 50 km/h which he had been driving for multiple city blocks to 140 km/h, before almost immediately braking and colliding at 119 km/h with a left-turning vehicle in the intersection. Dr. Hui, the driver of the left-turning vehicle died almost instantly in the collision.

2. Mr. Chung was charged with dangerous driving causing death. The Crown alleged that Mr. Chung's speed, as well as evidence of inattention and other reckless acts, established that he was driving dangerously and caused the death of Dr. Hui. The defence submitted that there was no evidence that Mr. Chung was not paying attention or that his driving was in any other way reckless, but the issue for the Court was whether or not the very brief period of excessive speed was sufficient in the circumstances of this case to constitute a "marked departure" from the standard of care. After a thorough review of the evidence and the law Mr. Chung was acquitted on the basis that there was "at least a reasonable doubt that such conduct amount to a marked departure from the standard of a reasonably prudent driver."

3. The Crown appealed the acquittal to the Court of Appeal for British Columbia asserting that the trial judge had made errors of law. Ultimately, the Court of Appeal concluded that the trial judge erred in law by conceiving that "a principle exists that a brief period of speeding (no matter how excessive the speed) cannot satisfy the *mens rea* requirement"; this was an error not alleged by the Crown, not raised by the Court during the oral hearing and not addressed by the respondent in the court below. Curiously, the Court of Appeal also characterized the acquittal as "manifestly unreasonable" notwithstanding that this does not give rise to an error of law; an unreasonable acquittal cannot be appealed by the Crown.

4. The appellant submits that the trial judge never did misconceive the test for dangerous driving and certainly did not articulate or comprehend any principle that a brief period of speeding could not establish the *mens rea* for dangerous driving. However, the Court of Appeal made this error, except in reverse: discerning that there was a principle of law that driving at a grossly

excessive, no matter how briefly, would always result in a conviction for dangerous driving. With respect, no such principle of law exists.

5. The Court of Appeal entered a verdict of guilty, giving rise to an appeal as of right to this court. It is respectfully submitted that the verdict of acquittal must be restored. The trial judge made no errors of law. His findings of fact were reasonable. His assessment and analysis of the law unimpeachable. He applied the standard of proof to the facts and to the elements of the offence and was left unpersuaded that the Crown had proven the offence of dangerous driving beyond a reasonable doubt. The fact that others might thing the acquittal manifestly unreasonable permits of no remedy. The sufficiency of proof is a question for the trial judge and is not a question of law.

B. Statement of Facts

6. It has never been suggested that the trial judge made any factual errors in his decision to acquit the appellant; the Crown did not make any arguments that the trial judge misapprehended any evidence. In any event, it could never be suggested that the trial judge made factual errors as the Crown cannot appeal on questions of fact. For this reason, the following statement of the facts is based on the facts as found by the trial judge.

7. On November 24, 2015, there was a car accident at the intersection of 41st Avenue and Oak Street (the "Intersection") in Vancouver. At approximately 8:54 on a Saturday morning, the appellant's vehicle, a silver Audi RS4 (the "Audi") collided at high speed with a vehicle, a red Suzuki (the "Suzuki"), driven by Dr. Alphonsus Hui. Dr. Hui died almost immediately.

8. The Intersection is a major arterial intersection in Vancouver. Oak Street runs north to south and 41st Avenue runs east to west. There are at least two lanes of travel in each direction on 41st Avenue, with extra lanes closer to the Intersection to accommodate south and north turning traffic. Oak Street has three lanes of travel in each direction and an additional left turning lane in each direction beginning close to the Intersection. The traffic that morning was light. The roads were damp but it was not raining. It was daylight and the visibility was good (Trial Reasons, at para.55, Applicant's Record ("A.R."), Vol. 1, p.13).

9. The Intersection is a mixed commercial and residential area. There are two gas stations, a Jewish Community Centre and a nursing home at the corners of the Intersection. The posted speed limit along Oak Street is 50 km/h (Trial Reasons, at para.72, A.R, Vol.1, p.18).

10. At the time of the collision, the appellant was travelling northbound on Oak Street approaching the Intersection. Dr. Hui was travelling southbound on Oak Street. He stopped in the middle of the Intersection and began to make a left-hand turn eastbound onto 41st Avenue when the Audi and the Suzuki collided. The impact of the collision caused the Suzuki to spin, become somewhat airborne, and hit a fire hydrant on the southeast corner of the Intersection (Trial Reasons, at para.3, A.R. Vol.1, p.2).

11. There were two moderately different expert opinions about the speed the appellant was driving at the time of the collision. After considering this evidence, the trial judge found that the appellant accelerated from 50 km/h to140 km/h somewhere between 42nd and 41st Avenue, a distance of about 27 meters.[1] The trial judge found that, prior to the acceleration, the appellant was travelling at the speed limit between 49th and 42nd Avenue (Trial Reasons, at paras.36, 94, A.R. Vol.1 pp.9, 22).

12. The trial judge concluded that the appellant applied his brakes as he approached the Intersection. The Audi slowed down and was travelling at 119 km/h when it collided with the left-turning Suzuki. From this evidence, the trial judge concluded that the appellant was driving at an "excessive speed" at the time of the collision (Trial Reasons, at para.94, A.R. Vol.1, p.22).

The dash cam video

13. The collision was captured on dash cam video (the "Video") on a vehicle driven by another motorist, Jimmy Hsieh. He was travelling eastbound on 41st Avenue towards Oak Street. He was in the right-hand lane preparing to make a right turn south onto Oak Street. At the time of the

[1] The expert at trial testified that the appellant's model of Audi was a powerful vehicle with acceleration capabilities – the expert found that it would take the Audi 4.5 seconds to accelerate from 0 to 100 km/h (Trial Reasons, at para.43).

collision, Mr. Hseih was looking north in order to make a safe right turn against a red light onto Oak Street.

14. The Video records a viewing angle perpendicular to the colliding vehicles. It is 20-seconds in length. The Video was entered as an exhibit at trial. There was no issue as to the authenticity of the Video. The parties relied on what was depicted in the Video to support their respective positions, and it was played in court many times. In addition, the experts had access to the Video and it was the foundation for their opinions about speed. The trial judge relied on what was depicted in the Video and stated that he had viewed the Video "on numerous occasions". He found that the quality of the Video was "very good" and that it was reliable in capturing the sequence of events before, during, and after the collision (Trial Reasons, at paras.78-80, A.R. Vol.1, p.19).

15. The Video was also played at the hearing of the Crown's appeal before the Court of Appeal and it is contained within the appellant's record before this Court (A.R. Vol.2, p.122).

16. The Video shows Dr. Hui's Suzuki arriving in the south facing eastbound turning lane at Oak Street. He was preparing to make a left-hand turn going eastbound on 41st Avenue. As he began his left-hand turn, Dr. Hui yielded to another blue or grey vehicle travelling northbound on Oak Street through the Intersection. After that vehicle travelled through the Intersection, a green Toyota, is seen travelling northbound in the curb lane of Oak Street and making a right turn eastbound on 41st Avenue. As the Toyota made its right-hand turn, Dr. Hui started his left-hand turn on 41st Avenue (Trial Reasons, at para.50, A.R. Vol.1, 12).

17. During this period of time, the appellant's Audi was approaching the Intersection. He was travelling in the curb lane of Oak Street behind the green Toyota. The lights at the Intersection were green for north south traffic. The Video clearly shows that the Audi's brake lights were on just before entering the Intersection. The Video then shows the Audi driving into the Intersection and crashing into the slowly turning Suzuki (Trial Reasons, at para.52, A.R. Vol 1., p.13).

No evidence that the appellant was "inattentive" as he drove

18. In arguing that the appellant was guilty of dangerous driving, the Crown submitted that the appellant was not paying attention as he was driving up to and through the Intersection. The Crown argued that the appellant's lack of attention was demonstrated in three ways by how he was driving shortly before the collision: (1) the evidence established that the appellant was overtaking vehicles while driving in the curb lane of Oak Street prior to entering the Intersection; (2) that he came within a half-second of rear-ending the right-turning green Toyota; and (3) that he either did not see or could not have seen Dr. Hui's vehicle in the Intersection (Trial Reasons, at para.56, A.R. Vol.1, p.13).

19. The trial judge considered and rejected each of these alleged instances of inattention. On the Crown's appeal of the acquittal to the Court of Appeal, the Crown did not argue that the trial judge erred in law in rejecting the Crown's submissions about allegations of acts of inattention.

20. The trial judge first found that the evidence simply did not establish that the appellant was overtaking vehicles before the collision. Next, while the trial judge found that the appellant "came close" to rear-ending the green Toyota, the fact remained that no collision occurred. The trial judge held, based on a "careful review" of the Video which showed the appellant behind the Toyota, that it was a "close call but not indicative of any inattention on the part of the accused" (Trial Reasons, at para.97, A.R. Vol.1, p.23).

21. Finally, the trial judge found that there was no evidence that the appellant did not see Dr. Hui's Suzuki as he approached the Intersection. To the contrary, the trial judge found that the application of the brakes by the appellant as he was approaching the Intersection was evidence capable of establishing that the appellant did see the Suzuki. Moreover, the appellant's statement to a witness right after the collision ("That was a green light") led the trial judge to conclude that the appellant saw the Suzuki, but that he did not expect that Dr. Hui would turn in front of him as he had a green light and the right of way (Trial Reasons, at paras.99-101, A.R. Vol.1, p.23).

No evidence that the appellant did not have the right of way as he approached the intersection

22. The Crown's theory of culpability was also based on the argument that the appellant's manner of driving was dangerous because the appellant had a legal duty under s.174 of the *Motor Vehicle Act,* R.S.B.C. 1996, ch.318 (the "*MVA*") to yield to Dr. Hui, who was in the Intersection making a left-hand turn. According to the Crown, Dr. Hui had the legal right of way. According to the crown, this was another fact which made the appellant's manner of driving dangerous in all the circumstances.

23. Section 174 of the *MVA* states that a person in an intersection making a left-hand turn "must" yield to approaching traffic from the opposite direction, but that the driver "may" make the left-hand turn if, having yielded to approaching traffic, they indicate their intention to make a turn.[2]

24. The trial judge rejected the submission that Dr. Hui had the right of way under the *MVA*. He found that it was the appellant who had the right of way. The trial judge found that there was insufficient evidence to establish that Dr. Hui had, in fact, "given a signal" that he intended to turn as required by the *MVA* (Trial Reasons, at para.102, A.R. Vol.1, p.24).

25. The Court of Appeal, while being somewhat critical of the trial judge's finding that the appellant had the affirmative right of way under the *MVA*, nonetheless found that "it is probably correct to say that the evidence was insufficient to establish that Mr. Chung *did not* have the right of way." Either way, the Court of Appeal held, "the Crown's right of way argument could not succeed" (Court of Appeal Reasons, at para.26, A.R. Vol. 1, p.37 – emphasis in original). (The trial judge's conclusion about who had the right of way was, in any event, a question of mixed fact and law).

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[2] Section 174 of the *MVA* states: **"**[w]hen a vehicle is in an intersection and its driver intends to turn left, the driver must yield the right of way to traffic approaching from the opposite direction that is in the intersection or so close as to constitute an immediate hazard, but having yielded and given a signal as required by sections 171 and 172, the driver may turn the vehicle to the left, and traffic approaching the intersection from the opposite direction must yield the right of way to the vehicle making the left turn"

Excessive speed

26. As noted above, the trial judge found that the appellant was travelling at an "excessive speed". Based on the expert opinion evidence, the trial judge found that the appellant accelerated to 140 km/h at some point between 42nd and 41st Avenue and, as he entered the Intersection, he applied his brakes and collided with the Suzuki at 119 km/h. Before 42nd Avenue, the appellant was travelling at the posted speed limit of 50km/h.

27. The Crown's theory at trial was that the appellant's excessive speeding was **one** factor which established that the manner of driving was dangerous in all the circumstances. The Crown submitted that the appellant was guilty of dangerous driving "for a number of reasons" and it was "not just [the appellant's] speeding". The Crown argued that the appellant's reckless manner of driving was demonstrated by his overtaking vehicles before entering the Intersection and his failure to observe the rules of the road by not yielding to the Suzuki's right of way (Trial Transcript, A.R. Vol. 3, p.136, lines, 5-21). As stated above, the trial judge considered and rejected each of these factors.

28. The trial judge found that, absent the appellant's momentary and seemingly rapid acceleration one block before the Intersection, the appellant's driving was otherwise unremarkable. This conclusion was entirely reasonable and supported by the evidence of independent witnesses.

29. The trial judge considered a number of authorities, some of which support the proposition that excessive speeding alone is sufficient to establish liability for dangerous driving (Trial Reasons, at paras.103-107). From his review of these authorities and paraphrasing what was said in *R. v. St. Pierre,* 2005 BCSC 1899, the trial judge concluded that: "**generally**, where speeding is involved, there are other factors that combine with it to amount to dangerous driving" (Trial Reasons, at para.107 (emphasis added), A.R. Vol.1, p. 25). This observation is an entirely correct statement of the law.

Trial Judge's Decision

30. The trial judge relied on the leading authorities from this Court, *R. v. Beatty,* 2008 SCC 5 and *R. v. Roy,* 2012 SCC 26, in his analysis of whether the Crown had established the required elements of the offence of dangerous driving beyond a reasonable doubt (Trial Reasons, at para.58-

66, A.R. Vo1. 1, pp.15-17). There was no suggestion in the Court of Appeal that the trial judge's analysis of this courts jurisprudence was wrong in any way.

31. As required by *Beatty,* the trial judge first considered whether the *actus reus* had been proven beyond a reasonable doubt; was the appellant's driving dangerous when considered objectively having regard to all the circumstances? The trial judge found that the appellant's momentary and sudden excessive speeding one block before reaching the Intersection was objectively dangerous in all the circumstances. A conclusion conceded by the appellant at his trial (Trial Reasons, at paras. 108-110, A.R. Vo1. 1, pp.25-26).

32. The trial judge then considered the *mens rea* for dangerous driving: was the accused's manner of driving a "marked departure from the standard of care that a reasonable person would observe in the accused's circumstances"? (*Beatty,* at para. 43). He found that the appellant's manner of driving until the point of acceleration after 42nd Avenue was unremarkable. He found that the appellant was travelling at the speed limit between 49th and 42nd Avenue. However, it was at some point after 42nd Avenue when the appellant began accelerating momentarily reaching a speed of 140 km/h. The trial judge found that appellant braked, and then collided with the Suzuki at 119 km/h. The trial judge found that the appellant did not run any red or yellow lights, did not run any stop signs, and did not swerve into oncoming lanes. In addition, the trial judge noted that the conditions and the visibility on the road were good and the traffic was light (Trial Reasons, at para.113, A.R. Vo1. 1, p.26).

33. The trial judge concluded that the appellant's excessive speeding was momentary. This, the trial judge held, was indicative of a momentary lapse of judgment rather than a "marked departure" from the standard of a reasonable person (Trial Reasons, at paras. 114-118, A.R. Vo1. 1, pp.27-28).

34. The trial judge held that the Crown had not established the *mens rea* for dangerous driving beyond a reasonable doubt and he acquitted the appellant. Despite the tragic consequences, in the absence of being sure that the Crown had proven the *mens rea* for dangerous driving, the trial judge's duty was to acquit the appellant.

Crown appeal against the appellant's acquittal to the Court of Appeal

35. The Crown appealed the appellant's acquittal to the Court of Appeal for British Columbia. As set out in s.676(1)(a) of the *Code,* the Crown's right to appeal an acquittal is limited to grounds that involve a "question of law alone".

36. The Crown argued that the trial judge erred in his application of the facts to the law and that the application of a legal standard to the facts was a "question of law alone". The Crown submitted that the legal effect of the appellant's excessive speed was "indisputably dangerous" and therefore compelled the conclusion that he was guilty of dangerous driving (Appellant (Crown) Factum, A.R. Vol.1, p.66). Alternatively, the Crown argued that the trial judge erred in his application of the "modified objective test" for dangerous driving. In particular, the Crown argued that the facts of this case not only established that the appellant's conduct was a marked departure from the norm (a modified objective *mens rea*), but also, because his conduct was deliberate, they had established the "subjective *mens rea*" for dangerous driving.

37. The appellant submitted that the Crown appeal did not raise a "question of law alone" but rather was a challenge to the trial judge's verdict of not-guilty, a conclusion reached after considering all the evidence, accurately setting out the law, and properly considering the arguments advanced by the parties during the trial. The appellant argued that the Crown appeal was simply a disguised challenge to what they believed was a "unreasonable acquittal", something that the *Code* and the common law do not permit. Further, the appellant argued that it was unfair for the Crown to raise the issue of the appellant's subjective *mens rea* on appeal for that first time (i.e. the question of whether his conduct was deliberate) as that basis of liability was never advanced by the Crown at trial. The appellant argued that his acquittal should be upheld.

Court of Appeal's Decision

38. The Court of Appeal (Groberman, Fenlon, Hunter JJ.A.) allowed the Crown's appeal and substituted a conviction for dangerous driving in oral reasons delivered soon after oral submissions had finished.

39. As noted above, the Crown argued at trial that the appellant was guilty of dangerous driving for a number of reasons, with the excessive speed at which the appellant was driving being only one factor. Because the trial judge rejected all the reasons put forward by the Crown other than the appellant's excessive speed, Groberman J.A. found that "the sole issue for the trial judge was whether the rapid acceleration and excessive speed that Mr. Chung exhibited in the seconds before the accident constituted a marked departure from the reasonable driver standard" (Court of Appeal Decision, at para.27, A.R. Vo1. 1, p.37).

40. Groberman J.A. found that the trial judge's conclusion that the appellant's momentary and excessive speeding did not amount to dangerous driving was "flawed". While Groberman J.A. found that "driving *moderately* in excess of the speed limit" may not necessarily amount to dangerous driving, driving at a "*grossly* excessive speed" would result in a conviction for dangerous driving. Because the appellant was driving at a grossly excessive speed, "so wildly beyond any safe standard", Groberman J.A. found that the appellant's conduct easily met the "marked departure" standard to establish the *mens rea* for dangerous driving (Court of Appeal's Decision, at para.33, A.R. Vo1. 1, p.40). In essence, Groberman J.A. substituted his assessment of the *mens rea* for that of the trial judge.

41. In rejecting the appellant's argument that the appeal did not raise a "question of law alone" to give the Crown a right of appeal, Groberman J.A. found that the trial judge erred in principle and this amounted to an error of law. According to Groberman J.A, the trial judge misconceived the test for dangerous driving because the trial judge "conceived that a principle exists that a brief period of speeding (no matter how excessive the speed) cannot satisfy the *mens rea* requirement. No such principle of law exists and applying such a principle was an error of law alone" (Court of Appeal Decision, at para.42, A.R. Vo1. 1, p.43).

42. The appellant respectfully submits that the trial judge did not misconceive the test for dangerous driving and certainly did not articulate or comprehend of any principle that a brief period of speeding could not establish the *mens rea* for dangerous driving. However, in his analysis, Justice Groberman essentially made the same error he found the trial judge had made, except in reverse: discerning that there was principle of law that driving at a grossly excessive speed, no matter how

briefly, would always result in a conviction for dangerous driving. With respect, no such principle of law exists.

43. Groberman J.A. addressed the alternative "subjective *mens* rea" argument advanced by the Crown. Groberman J.A. agreed that this argument amounted to the Crown "changing tack on appeal" and that he would prefer to leave that issue undecided. As he said: "there is a certain inequity in allowing the Crown to change tack on appeal. Given that this case can be decided on the basis of modified objective *mens rea*, I prefer to rest my decision on that argument, leaving undecided the question of whether it would be appropriate for the Crown to rely, instead, or in addition, on subjective *mens rea*" (Court of Appeal Decision, at para.38, A.R. Vo1. 1, p.42).

44. The Court of Appeal allowed the appeal, substituted a conviction for dangerous driving, and remitted the matter to the trial court for sentencing.

Before this Court

45. On August 1, 2019, the appellant filed an appeal of the Court of Appeal's decision to substitute a conviction. The appeal pursuant to s.691(2)(b) of the *Code* grants the appellant the right to appeal if a court "enters a verdict of guilty against the person" on an appeal from their acquittal at trial.

PART II – QUESTIONS IN ISSUE

46. The appellant appeals the Court of Appeal's decision to substitute an acquittal on the following issues:

(1) The Court of Appeal misinterpreted the reasons for judgment and incorrectly determined that the trial judge had committed an error of law by misconceiving the test for the *mens rea* of dangerous driving;

(2) The Court of Appeal erred in law by substituting a guilty verdict based on a theory of liability not advanced by the Crown at trial, to wit that momentary excessive speed alone was sufficient to prove the *mens rea* for dangerous driving;

(3) The Court of Appeal did not have the jurisdiction to overturn the acquittal in the circumstances of this appeal; and

(4) The Crown has no right to appeal an acquittal arising from the application of the legal standard to the facts.

PART III – STATEMENT OF ARGUMENT

ISSUE #1 – The Court of Appeal misinterpreted the reasons for judgment and incorrectly determined that the trial judge had committed an error of law by misconceiving the test for the *mens rea* of dangerous driving

47. The Court of Appeal misconstrued and mischaracterized the trial judge's reasons for judgment, erroneously concluding that he had committed an error of law by misconceiving the test for the *mens rea* for dangerous driving. Groberman J.A. described the trial judge's error in the following way:

> The judge misconceived the test that he was to apply in order to determine whether the Crown had proven the *mens rea* element of the offence. In particular, he conceived that a principle exists that a brief period of speeding (no matter how excessive the speed) cannot satisfy the *mens rea* requirement. No such principle of law exists and applying such a principle was an error of law alone. (Court of Appeal Decision, at para.42, A.R. Vo1. 1, p.43).

48. The trial judge did not articulate or apply any such principle. To the contrary, the trial judge accepted as a matter of law that excessive speed alone could amount to dangerous driving. However, he was not sure that the appellant's momentary excessive speeding in the **circumstances of this case** was sufficient to establish the *mens rea* for dangerous driving.

The elements of dangerous driving

49. The *actus reus* for dangerous driving is established when the accused's manner of driving is "dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place" (*Beatty,* at para.43). This is a purely objective assessment. There was no issue that the *actus reus* was established in this case.

50. The *mens rea* for dangerous driving is, however, different. It requires the Crown to prove beyond a reasonable doubt that the dangerous conduct constituted a "marked departure" from the standard expected of a reasonably prudent driver. As Charron J. stated in *Beatty,* "what constitutes a "marked departure" from the standard expected of a reasonably prudent driver is a matter of degree" (at para.48). The *mens rea* was in issue in this case. The trial judge concluded that the appellant's momentary and excessive speeding did not constitute a marked departure and acquitted the appellant of dangerous driving. The Court of Appeal disagreed with the trial judge's conclusion.

51. Given that the test for the *mens rea* of dangerous driving does not permit of a 'bright-line' demarcation between a culpable and non-culpable mental state, reasonable judicial minds may well disagree about whether the *mens rea* is established on a particular set of facts. But disagreement about the application of the 'marked departure' test cannot give rise to an error of law, for if it did every acquittal could be appealed by the crown on the question of law arising from the application of the facts to the legal standard.

The role of excessive speeding dangerous driving cases

52. In some cases, based on the particular facts, courts have held that excessive speeding can be enough, in and of itself, to establish a conviction for dangerous driving. The leading and most frequently cited authority for this proposition is the Ontario Court of Appeal's decision in *R. v. Richards,* 2003 CanLII 48437. There, the Ontario Court of Appeal stated that "under certain circumstances, evidence of excessive speed, in itself, can constitute the offence of dangerous driving" (at para.9. emphasis added). In doing so, the Court relied on similar statements expressed by that Court in, for example, *R. v. M. (M.K.)* 1998 CanLII 1324 (Ont CA) where it was held that "excessive speed can amount to a marked departure from the standard of care of a prudent driver".

53. In *Richards,* the Court of Appeal set aside an acquittal for dangerous driving finding that the trial judge erred in law when he stated that "evidence of speed alone is insufficient to ground a conviction" for dangerous driving" (at para.8).

54. On the other hand, some courts have held that something more than excessive speed is required to establish that the conduct in question amounted to dangerous driving (see*, R. v. Quesnel*, 1996 CanLII 2360 (BC CA)). Recently, the Saskatchewan Court of Appeal concluded that "although the authorities differ on whether excessive speed on its own can constitute dangerous driving, it is clear that evidence of excessive speed *is* a relevant consideration" (*R. v. Nahnybida,* 2018 SKCA 72, at para.54 – emphasis in original).

The trial judge articulated the principles correctly

55. In this case, the trial judge referred to the Ontario Court of Appeal's decision in *Richards.* After a review of several authorities, he expressed the applicable legal test in this way: "generally, where speeding is involved, there are other factors that combine with it to amount to dangerous driving" (Trial Reasons, at para.107 – emphasis added). The trial judge's conclusion replicates what was said in *R. v. St. Pierre,* 2005 BCSC 1899 (a decision which was binding on him), where the court said: "[g]enerally where speeding is involved, there are other factors that combine with it to amount to dangerous driving…", (at para.21 – emphasis added).

56. In short, by using the phrase "generally" at para. 107 of his reasons, it is apparent that the trial judge accepted that in *some* cases excessive speeding alone would be sufficient to ground a conviction for dangerous driving. This was a correct statement of the law. Unlike in *Richards*, where the trial judge had concluded that evidence of speed alone is insufficient to ground a conviction, a clear error or law requiring intervention by the Court of Appeal, the trial judge unambiguously accepted that there could be cases where speed alone was sufficient to prove the offence of dangerous driving.

57. The Court of Appeal was clearly wrong in concluding that the trial judge "conceived that a principle exists that a brief period of speeding (no matter how excessive the speed) cannot satisfy the *mens rea* requirement". The trial judge articulated no such principle of law. He made no legal error in his analysis.

58. To the extent that the Saskatchewan Court of Appeal in *Nahnybida* has suggested that there is a division in the jurisprudence as to whether speed on its own can constitute dangerous driving, that apparent difference of opinion need not be addressed in this case. That is because the trial judge accepted that in some cases excessive speeding would be sufficient to establish the *mens rea* for dangerous driving. The appellant is not suggesting otherwise.

59. There is another problem with the Court of Appeal's decision: the particular error they concluded was committed by the trial judge was never raised by the Crown during the appeal. As this Court recently held in *R. v. Barton,* 2019 SCC 33*,* "[w]hen an appellate court decides to raise a

new issue, it must give notice to the parties and provide them with an opportunity to respond" (at para.51). The transcript of the hearing before the Court of Appeal clearly shows that this purported error was never raised by the Court of Appeal and was therefore not addressed by either counsel for the Crown or the respondent. In fact during the oral hearing the Court stated:

> And isn't that really the **only** question in the case? Whether or not driving at a hundred and forty kilometres an hour in the city, approaching a busy intersection, represents a marked departure from the norm that can be expected of a reasonably prudent driver. A.R. Vol. II page 46 lines 6-11

This question, and the submissions that followed, show that the Court of Appeal was focussed on the reasonableness of the verdict and not on any extricable error of law – certainly not the error of law that they ultimately relied upon to overturn the acquittal.

60. No notice was ever provided. Instead, the Court of Appeal substituted a conviction from the bench at the hearing of the appeal, based on an argument never made by the Crown, and for which the appellant never had an opportunity to address. This is itself an error in law.

61. On appeal, the Crown argued that the trial judge erred in applying the law to the facts and that he erred in failing to consider the question of the appellant's subjective *mens rea* for the offence. The Crown never argued that the trial judge misconceived the test for dangerous driving by divining a principle of law that does not exist. The Court of Appeal decided the case based on a "new issue" and the parties should have been given an opportunity to respond. Obviously, however, the Crown never raised it as an issue because it was not an issue. The Court of Appeal made something out something, that was not in fact or law something.

62. The appellant is not seeking to remit the matter back to the Court of Appeal as it would serve no practical purpose at this stage. However, the manner in which the Court raised the new issue of the trial judge's purported error of law – which was erroneous and contradicted by what the trial judge said in his reasons – shows the risks when an appellate court raises a new issue at the hearing of the appeal without the benefit of any submissions from the parties. Had the Court of Appeal provided the parties with an opportunity to respond to this new issue, the Court could have avoided falling into error.

63. Simply put, under the guise of finding an error of law the Court of Appeal substituted its own view of the evidence without showing any real error by the trial judge. (see, *R. v. R.E.M.,* 2008 SCC 51). Without question the trial judge did not commit the error of law as suggested by the Court of Appeal. The trial judge committed no errors of law and the verdict of acquittal should be restored.

ISSUE #2 – The Court of Appeal erred in law by substituting a guilty verdict based on a theory of liability not advanced by the Crown at trial, to wit that momentary excessive speed alone was sufficient to prove the *mens rea* for dangerous driving

64. The basis on which the Court of Appeal substituted a guilty verdict in this case – that the appellant's excessive speeding was enough to constitute dangerous driving – was not a theory of liability advanced by the Crown at trial. The Court of Appeal singled out the appellant's excessive speed in establishing the appellant's guilt. The common law rightly prohibits the Crown advancing a new theory of liability on appeal that was not advanced at trial (*Barton,* at para.47).

65. The appellant's excessive speed was relied on by the Crown at trial as one fact, in addition to other factors, which the Crown argued established that the appellant was guilty of dangerous driving. The Crown never based its case on the appellant's excessive speeding alone; the Crown explicitly argued at trial that it was "not just speeding". They submitted that the appellant's reckless conduct and inattentiveness while driving, **in addition** to excessive speed, was dangerous driving. As set out above, the trial judge held that the acts of inattentiveness or recklessness, other than speeding, were not proven by the evidence.

66. In contrast, the Court of Appeal relied on the appellant's excessive speeding through the Intersection **alone** to establish his guilt, a theory of liability not advanced by the Crown at trial. The Court of Appeal held that the "focus of the Crown's case at trial was on Mr. Chung's decision to travel at a grossly excessive speed" (Court of Appeal's Decision, at para.37, A.R. Vo1. 1, p.42). As noted above, the Crown argued that several factors, including the appellant's excessive speed, constituted dangerous driving.

67. Even if the appellant's excessive speed was the "focus" or the central part of the Crown's case, it certainly could not be said that speeding alone was the Crown's theory of liability advanced at trial. For the Court of Appeal the appellant's excessive speed through the Intersection was

dispositive of the appeal: "the conduct of Mr. Chung in this case was very clearly a marked departure from the standard of the reasonable driver. While he was not inattentive to his driving, *his speeding* was so wildly beyond any safe standard that it is appropriately branded as criminal" (Court of Appeal's Decision, at para.39 (emphasis added), see also, paras.40, A.R. Vo1. 1, p.42).

68. By singling out of the appellant's excessive speed, the Court of Appeal effectively raised a new theory of liability, which is prohibited under principles of double jeopardy enshrined in s. 11(*h*) of the *Charter:* a "Crown appeal cannot be the means whereby the Crown puts forward a different case than the one it chose to advance at trial" (*Barton,* at para.47, citing Doherty J.A. in *R. v. Varga* (1994), 180 O.R. (3d) 784, at p. 792 (C.A), at 793).

69. The appellant submits that this is another reason why the acquittal should be restored.

ISSUE #3 – The Court of Appeal did not have the jurisdiction to overturn the acquittal in the circumstances of this appeal

70. This Court has cautioned that an allegation of legal error cannot be used as a means to question the trial judge's reasoning process and thereby attack the reasonableness of the verdict (*R. v. J.M.H.,* 2011 SCC 45, per Cromwell J. at paras 25-27). The real disagreement between the Court of Appeal and the trial judge rests on the *degree* of the appellant's excessive speeding and whether it was enough in all the circumstances to establish his guilt for dangerous driving. This was a matter for the trial judge and whether the standard of persuasion beyond a reasonable doubt had been met. An acquittal cannot be set aside on the basis that it is not supported by the evidence. It was not an error of law for the trial judge to have determined that he was not sure the momentary excessive speed in this case was a sufficient marked departure to establish the *mens rea* for dangerous driving.

71. Whether or not the manner of driving in any given case constitutes a "marked departure" is "a matter of degree". The matter of sufficiency of proof is a question for the trial judge and is not a question of law (*R. v. Sunbeam Corp. (Canada) Ltd*., [1969] S.C.R. 221; *R. v. Poirier*, [1998] 1 S.C.R. 24).

72. The appellant's position in this respect is supported by *R. v. Blostein,* 2014 MBCA 39, where the Manitoba Court of Appeal dismissed a Crown appeal from acquittal in a dangerous driving case.

In that case, the Crown argued, among other things, that the appellant's excessive speed in a construction zone amounted to dangerous driving and the trial judge was not alive to the special care and attention required for driving in construction zones. The Court of Appeal dismissed the appeal finding that it did not raise an error of law. In so doing, the Court of Appeal held that the trial judge applied the correct legal test for dangerous driving and made findings of fact that were open to him. As the Court held: "[a] judge's assessment of the sufficiency of the evidence as to whether the driving was, in the particular context, a marked departure from the standard of care expected from a reasonable person is not a question of law for the purposes of s.676(1)(a) of the *Code*" (at para.22).

73. The appeal was no different. The trial judge applied the correct legal principles. He considered the evidence and made findings of fact that were open to him. The question of whether the evidence was sufficient to establish guilt was for the trial judge to determine and did not raise an error of law.

74. The trial judge's decision in this case must also be understood in the context of the Crown's position at trial (see, *R. v. Alves,* 2014 SKCA 82, at para. 30, holding that in assessing whether a trial judge erred it is was important to determine "how the Crown structured its case"). As noted above, the Crown's position at trial was that it was "not just" the excessive speed, but other factors which established dangerous driving. He found these other factors were not established on the evidence. The trial judge's decision to acquit the appellant was not only based on a correct application of legal principles, it was responsive to the evidence adduced and the positions advanced by the parties at trial.

75. The appellant submits that the Crown appeal never properly alleged an error of law alone. The Crown appeal always was an attempt to challenge the reasonableness of the acquittal – a challenge not available to them because it does not raise a question of law alone. As noted above, the test for what constitutes a 'marked departure' in the analysis of the *mens rea* for dangerous driving is a "matter of degree". This never can be a dichotomous standard such that the analysis is either correct or wrong in law. Before convicting the trial judge must be sure, close to certain, that the degree of departure from the standard expected of a reasonably prudent driver is sufficient to

justify a conviction. That application of the legal standard of proof to the facts and the law never gives rise to a question of law alone.

ISSUE #4 – The Crown has no right to appeal an acquittal arising from the application of the legal standard to the facts

76. Aside from the issues addressed above in relation to the Court of Appeal's decision, the appellant expects the Crown will attempt to support the order it obtained before the Court of Appeal by reasserting the grounds it argued below. The Crown will assert, as it did before the Court of Appeal, that the application of the facts to the law, particularly the application of the facts to the elements of the offence and standard of proof, are questions of law upon which it has a right of appeal. The Crown will similarly argue that the legal effect of the facts is a question of law (see, Appellant (Crown) Factum, A.R. Vol.1, p.62, at para.34, p.66, at para.48).

77. The Crown's true complaint is with the trial judge's global assessment of the evidence and his decision that the Crown had failed to meet its onus on the element of a "marked departure". These are not matters upon which the Crown could have appealed. Without there being a proper question of law alone before this Court or before the Court of Appeal, the Crown has no right of appeal and the acquittal must be restored.

The Crown's limited right to appeal acquittals

78. Because appeals are creatures of statute, the wording of the statutory provisions in question and ordinary principles of statutory interpretation determine appellate jurisdiction (*R.C. v Quebec (Attorney General) R v Beauchamps*,2002 SCC 52, at para. 11).

79. In indictable matters, s. 675(1) of the *Code* provides a convicted person with very broad grounds of appeal:

> A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
>
> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
>
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for

> appeal, or
>
> (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; …

80. In obvious contrast, s.676(1)(a) provides the Crown a much more limited right to appeal a verdict of acquittal on grounds that involve questions of "law alone":

> The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal
>
> (a) against a judgment or verdict of acquittal or a verdict of not criminally responsible on account of mental disorder of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

81. This legislative scheme demonstrates that Parliament expressly chose to distinguish between: (1) questions of fact; (2) questions of mixed fact and law; and (3) questions of law alone. Obviously, Parliament intended to allow an accused to appeal on questions of fact, and mixed fact and law, but not the Crown. These distinctions are further maintained by the broad powers the Court of Appeal has in respect of an accused's appeal of conviction (s.686(1)(a)) as contrasted with the more limited powers involving a Crown appeal against acquittal (s.686(4)).

82. This Court has also affirmed that the Crown may not appeal on questions of fact or mixed fact and law, but only on questions of law alone (*R. v. Biniaris*, 2000 SCC 15, at para. 30; *R. v. Mian*, 2014 SCC 54, at para. 77).

Inconsistent approaches to determining "questions of law" vs. "questions of mixed fact and law"

83. Questions of fact include the determination of direct facts, inferred facts and the interpretation of the evidence as a whole (*Housen v Nikolaisen*, 2002 SCC 33, at paras 10-25). This Court affirmed the broad definition of findings of fact in *H.L. v Canada (Attorney General)*, 2005 SCC 25, saying (at para.53):

> The standard of review for error has been variously described. In recent years, the phrase "palpable and overriding error" resonates throughout the cases. Its application to *all* findings of fact — findings as to "what happened" — has been universally recognized; its applicability has not been made to depend on whether the trial judge's

> disputed determination relates to credibility, to "primary" facts, to "inferred" facts or to global assessments of the evidence.
>
> [italics in original, underlining added]

84. In *Housen,* this Court found the application of a legal standard to a set of facts to be a question of mixed fact and law (at para.26):

> At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual.
>
> [emphasis added]

85. This Court has also held that unless there is an extricable error in law, like the misstatement of the legal test or the failure to apply it, the standard of review for questions of mixed fact and law is palpable and overriding error and not correctness. This Court has cautioned lower courts about finding errors of law because it is often difficult to extricate the legal questions from the factual questions. For this reason many matters are more properly characterized as questions of mixed fact and law. (*Housen,* paras. 3-31, 36-37. See also: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co*., 2016 SCC 37 at para. 35).

86. In *R. v. Shepherd*, 2009 SCC 35, this Court arrived at a different conclusion: that the application of a legal standard to a set of facts is a question of law, not a question of mixed fact and law (at para. 20):

> However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992 (S.C.C.), at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 (S.C.C.), at para. 23.
>
> [emphasis added]
>
> See also: *R. v. Chehil*, 2013 SCC 49, at para. 60

87. A review of appellate authorities suggest that the Crown is routinely able to appeal a trial judge's decision to acquit an accused under s. 676(1)(a) by framing the application of a legal standard to the facts as a question of law alone (*R. v. Moquin,* 2010 MBCA 22, "whether the facts, as found by the trial judge, constituted bodily harm" was a question of law for which the Crown could appeal; *R. v. S.H.,* 2014 ONCA 303, trial judge's conclusion that the accused was suffering from a "disease of the mind" appealed by the Crown on the basis of an application of law to the facts was a question of law; *R. v. Day,* 2014 NLCA 14, Crown appeal challenging the trial judge's finding that an arrest was lawful and whether there were "reasonable grounds" for the arrest; see also, *R. v. Schofield,* 2015 NSCA 5; *R. v. Herritt,* 2015 NBCA 33; *R. v. D.J.S.,* 2015 BCCA 111; *R. v. Todd,* 2019 SKCA 36).

88. However, in *R. v. Buhay*, 2003 SCC 30, this Court was deferential to a trial judge's decision under s.24(2) *Charter* decision on the basis that "it involves the application of a legal standard to a set of facts", citing *Housen* [emphasis added] (at para. 45)

89. In other criminal cases appellate courts have found the application of a legal standard to a set of facts to be a question of mixed fact and law, to which a deferential standard of review applies (see, *R. v. Cadman,* 2018 BCCA 100, at para.49, holding that whether the accused was in a "position of trust or authority" was a question of mixed fact and law; *R. v. Seagull,* 2015 BCCA 164, whether a confession was "voluntary" was a question of mixed fact and law; *R. v. S.E.V.,* 2009 ABCA 108, whether a *Charter* violation occurred is a matter of mixed fact and law).

90. It is difficult if not impossible to reconcile these decisions. In particular, to reconcile the principle in *Shepherd* with Parliament's express intent to distinguish between questions of fact, mixed fact and law, and law, along with the decision to limit Crown appeals to questions of law alone. The principle in *Shepherd*, that the application of a legal standard to the facts of the case is a question of law, renders Parliament's express distinction between questions of law and questions of mixed fact and law in reality quite meaningless. Furthermore, the ability of the Crown to contrive an error of law from the application of fact to a legal standard, a process which occurs in every criminal trial, means that the prohibition against appealing an unreasonable acquittal is meaningless.

The conflicting approaches ought to be clarified in the context of Crown appeals against acquittals

91. The appellant submits that this Court may have to reconsider the principle in *Shepherd* to decide whether it is in fact consistent with Parliament's intent to limit the Crown's right to appeal an acquittal under s.676(1)(a).

92. Even in *R. v. Biniaris*, 2000 SCC 15, cited in *Shepherd* in support of the principle that the application of a legal standard to a set of facts is a question of law, this Court said (at paras.32-33):

> In their written submissions, both the Attorney General for Ontario and the Attorney General of Manitoba (who participated in the companion cases) recognized that the law, as it stood at the time of the appeal, is clear that the Crown has no right of appeal from an acquittal on the ground that it was unreasonable, because the reasonableness of a verdict is a question of fact (or one of mixed fact and law). See, e.g., *Sunbeam Corp. (Can.)* , *supra* , at p. 233; *Lampard* , *supra* , at pp. 380-81; *R. v. Ciglen*, [1970] S.C.R. 804 (S.C.C.) at pp. 814-15, *per* Cartwright C.J., dissenting; *R. v. B. (G.)*, [1990] 2 S.C.R. 57 (S.C.C.) at pp. 70-71; *R. v. H. (D.S.)*, [1994] 2 S.C.R. 392 (S.C.C.) , rev'g (1993), 28 B.C.A.C. 129 (B.C. C.A.) ; *R. v. B. (C.B.)* (1993), 84 C.C.C. (3d) 249 (Nfld. C.A.) at pp. 279-80. There can be no suggestion that the Crown's right of appeal at first instance is being enlarged or expanded to include "unreasonable acquittals" as a result of the determination that the reasonableness of a verdict is a "question of law" as well as a "question of law alone". As before, the Crown is barred from appealing an acquittal on the sole basis that it is unreasonable, without asserting any other error of law leading to it.
>
> There is no anomaly in this result. The powers of the court of appeal in the case of Crown appeals on a question of law are contained in s. 686(4) of the *Code* . There is no reference in that section to an unreasonable verdict. This is consistent with the limited rights of appeal conferred on the Crown by s. 676(1). The absence of language granting a remedial power corresponding to s. 686(1)(*a*)(i), suggests that Parliament did not intend "unreasonable acquittals" to be appealable by the Crown at first instance. Further, and more importantly, as a matter of law, the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt. See *Lampard* , *supra* , at pp. 380-81; *R. v. Schuldt*, [1985] 2 S.C.R. 592 (S.C.C.) at p. 610; *B. (G.)* , *supra* , at pp. 70-71. Since, different policy considerations apply in providing the Crown with a right of appeal against acquittals, it seems to me that there is no principle of parity of appellate access in the criminal process that must inform our interpretation of this issue.

93. In every case of an acquittal, the trier of fact has applied legal standards - the elements of the offence and the standard of proof - to the facts. That exercise cannot provide the Crown with a right to appeal on the basis that the application of a legal standard to a set of facts is a question of

law, because to do so would circumvent the prohibition against appealing ‘unreasonable acquittals’, as well as the common law principle, as discussed above, that the sufficiency or insufficiency of proof is not a question of law (*Poirier*).

94. No matter how unreasonable a trial judge’s decision to acquit an accused, Parliament has determined that the Crown has no right of appeal in those circumstances. The Crown’s inability to appeal an unreasonable acquittal is not only dictated by the *Criminal Code* itself*,* but most importantly, the concept of an unreasonable acquittal is incompatible with the presumption of innocence as enshrined s.7 of the *Charter* (*Biniaris,* per Arbour J. at para.33).[3]

95. This Court has continued to warn against improperly allowing the Crown to appeal an acquittal. In *J.M.H.*, this Court identified that some errors in assessing the evidence are properly characterized as errors in law on which the Crown can appeal. However, on the ground the trial judge failed to consider all the evidence, this Court warned as follows (at para.32):

> *Walker* also clearly holds that the adequacy of a trial judge's reasons is informed by the limited grounds for Crown rights of appeal from acquittals (paras. 2 and 22). As Binnie J. succinctly put it, "[c]aution must be taken to avoid seizing on perceived deficiencies in a trial judge's reasons for acquittal to create a ground of 'unreasonable acquittal' which is not open to the court under the provisions of the *Criminal Code*" (para. 2).
> See also: *R. v. Walker*, 2008 SCC 34, at para 2

96. On the ground of making a finding of fact for which there is no evidence, this Court strongly cautioned as follows (at paras. 25-27):

> *(1) It Is an Error of Law to Make a Finding of Fact for Which There Is No Evidence — However, a Conclusion That the Trier of Fact Has a Reasonable Doubt Is Not a Finding of Fact for the Purposes of This Rule*
>
> It has long been recognized that it is an error of law to make a finding of fact for which there is no supporting evidence: *R. v. Schuldt*, [1985] 2 S.C.R. 592 (S.C.C.),

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[3] Furthermore, the well-recognized doctrine of jury nullification has been accepted as part of the legal tradition in Canada (see, *R. v. Krieger,* 2006 SCC 47) could not exist, and in fact, is completely incompatible with the Crown having the right to appeal an unreasonable acquittal. If the crown had the right to appeal an unreasonable acquittal any jury nullification would be reversed by the court of appeal.

at p. 604. It does not follow from this principle, however, that an acquittal can be set aside on the basis that it is not supported by the evidence. An acquittal (absent some fact or element on which the accused bears the burden of proof) is not a finding of fact but instead a conclusion that the standard of persuasion beyond a reasonable doubt has not been met. Moreover, as pointed out in *R. v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.), at para. 39, a reasonable doubt is logically derived from the evidence or absence of evidence. Juries are properly so instructed and told that they may accept some, all or none of a witness's evidence: *Lifchus*, at paras. 30 and 36; Canadian Judicial Council, Model Jury Instructions, Part III Final Instructions, 9.4 Assessment of Evidence (online).

The principle that it is an error of law to make a finding of fact for which there is no supporting evidence does not, in general, apply to a decision to acquit based on a reasonable doubt. As Binnie J. put it in *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245 (S.C.C.), at para. 22:

> A major difference between the position of the Crown and the accused in a criminal trial, of course, is that the accused benefits from the presumption of innocence. ... [W]hereas a conviction requires the prosecution to establish each of the factual elements of the offence beyond a reasonable doubt, no such requirement applies to an acquittal which, unlike a conviction, can rest simply on the absence of proof. [Emphasis deleted.]

The point was expressed very clearly in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 (S.C.C.), at para. 33: "... as a matter of law, the concept of "unreasonable acquittal" is incompatible with the presumption of innocence and the burden which rests on the prosecution to prove its case beyond a reasonable doubt."

See also: *R. v. Villaroman*, 2016 SCC 33 at para.28

97. More recently in *R. v. George*, 2017 SCC 38, this Court again issued a warning (at para.15-17):

> A careful review of the trial judge's reasons reveals no legal errors. As a result, the Court of Appeal lacked jurisdiction to interfere with the trial judgment.
>
> I note, at the outset, that the trial judge correctly articulated the governing legal principles and cited multiple leading authorities. Of course, simply stating the correct legal test does not exhaust our inquiry and cannot insulate a trial judge from legal errors. But it helpfully orients our remaining analysis to whether the trial judge's application of those principles reveals any legal errors.
>
> Whether an error is "legal" generally turns on its character, not its severity (*J.M.H.*, at paras. 24-39). In this case, the majority confused these two concepts; it translated its strong opposition to the trial judge's factual inferences (severity) into supposed legal errors (character). Here, that was an improper approach, and it disregarded the restraint required by Parliament's choice to limit Crown appeals from acquittals in

> proceedings by indictment to "question[s] of law alone" (*Criminal Code*, s. 676(1)(a)).

98. Thus conceived, a Crown appeal based on an error in the application of the facts to the elements of the offence and the standard of proof, as in this case, is nothing more than an appeal of an 'unreasonable acquittal' dressed up as an error of law appeal. Worse still, such an expansive approach to classifying a "question of law alone" has the potential to erode judicial deference altogether, as the standard of review for questions of law is correctness.

99. The Crown also argued its appeal by relying on the "legal effects of the findings of fact" legal error, described as follows by this Court in *J.M.H.* (at para.28):

> *(2) The Legal Effect of Findings of Fact or of Undisputed Facts Raises a Question of Law*
>
> *R. v. Morin*, [1992] 3 S.C.R. 286 (S.C.C.), lists this as one category of cases in which the trial judge's assessment of the evidence may give rise to an error of law. As Sopinka J. put it, at p. 294:
>
> > If a trial judge finds all the facts necessary to reach a conclusion in law and in order to reach that conclusion the facts can simply be accepted as found, a Court of Appeal can disagree with the conclusion reached without trespassing on the fact-finding function of the trial judge. The disagreement is with respect to the law and not the facts nor inferences to be drawn from the facts. The same reasoning applies if the facts are accepted or not in dispute.
>
> In short, the appellate court can simply apply the trial judge's findings of fact to the proper legal principles; the trial judge's error, if there is one, may safely be traced to a question of law rather than to any question about how to weigh the evidence. [emphasis added]

100. The language used by this Court in *J.M.H.* is important: "the error, if there is one, may safely be traced to a question of law rather than to any question about how to weigh the evidence." The appellant says this case was about the weighing of the Crown's evidence and in particular the weight to give to the evidence as a whole on the element of a marked departure. It was about whether the Crown had met the standard of proof, a fact-driven inquiry, and not a question law. The Crown has failed to "trace back" to any error of law by the trial judge. The Crown was simply dissatisfied with the trial judge's verdict. (*Biniaris*, at paras. 32-33; *J.M.H,* at paras. 25-27, 32; *George*, at paras. 15-17).

101. Nevertheless, the appellant suggests the "legal effects of the fact" legal error requires reconsideration or at least clarification by this Court to ensure it is consistent with: (1) Parliament's express distinction between errors in fact, mixed fact and law and law; (2) Parliament's decision to only allow the Crown to appeal on questions of law and *not* questions of fact *or* mixed fact and law; and (3) the principles established by this Court for Crown appeal's against acquittals in the cases cited above.

102. The appellant's first position is this type of error is a question of mixed fact and law on which the Crown has no right of appeal. In the alternative, if this error should continue to be available to the Crown, it should be limited to circumstances in which there is a *demonstrated extricable error in law* on a question of mixed fact and law as described in *Housen*, and it is plain and obvious the trial judge would have convicted on the facts as found (*Housen,* at paras 3-31, 36-37).

103. For example, if a trial judge found the Crown had proven all the elements of an assault causing bodily harm, including bodily harm, but found the accused did not intend to cause bodily harm, the legal error is easily identified because the Crown does not have to prove the accused intended to cause bodily harm. In such circumstance it is plain and obvious the trial judge would have convicted had he applied the proper legal principles to the findings of fact.

104. An appeal based on a "question of law alone" cannot allow for a challenge to the trial judge's weighing of the evidence as a whole and conclusion on the sufficiency of the Crown's case where there has been no demonstrated error in law. In those circumstances, the presumption of innocence simply continues to apply (*Biniaris*, at paras. 32-33).

105. In the case before this Court, the trial judge applied reasonable findings of fact to an accurate assessment of the law. In his analysis he was simply not satisfied that the facts, particularly the momentary excessive speed, was a sufficient marked departure from the norm. In other words the trial judge was simply left unsure that the degree of departure from the norm was sufficient to establish the *mens rea* for dangerous driving. His conclusion, and the process by which he arrived

at this conclusion, is not a question of law alone. In the absence of identifying any error of law, there was no statutory jurisdiction for the Crown to appeal the acquittal or for the Court of Appeal to enter a conviction. The acquittal should be restored

PART IV – SUBMISSIONS ON COSTS

106. There are no submissions on costs.

PART V – ORDER SOUGHT

107. That the appeal be allowed and the acquittal restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 1st day of October 2019 at Vancouver, British Columbia

Richard Fowler, QC
Eric Purtzki
Counsel for the appellant

PART VI – SUBMISSIONS ON CASE SENSITIVITY

There are no orders or statutory provisions that would impact the reasons of this court.

PART VI – TABLE OF AUTHORITIES

Cases **Paragraph(s)**