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 REPLY FACTUM

(Pursuant to Rules 29(3) and 35(3) of the *Rules of the Supreme Court of Canada*)

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REPLY FACTUM

A. Overview

1. In addition to supporting the reasons of the Court of Appeal, the Crown respondent now argues two additional alleged errors by the trial judge that were never argued before the Court of Appeal. The appellant submits this reply factum to address these two new alleged errors of law pursuant to rules 29(3) and 35(3) of the *Rules of the Supreme Court of Canada* as these two issues were never considered by the Court Appeal.

2. The Crown's belated introduction of these alleged errors demonstrates the difficulty that the Crown has always had identifying true errors of law as opposed to the Crown's real complaint in this case, which they cannot appeal, that this was an unreasonable acquittal. For example, in the Court of Appeal, the Crown alleged two errors: that the trial judge erred in his application of the law to the facts and he erred in not finding that subjective *mens rea* had been established. The Court of Appeal did not find that either of these two errors had been established, but rather, allowed the appeal from acquittal and entered a conviction based an error not raised by the Crown and therefore not addressed by Mr. Chung. Now, in this Court, for the first time, the Crown alleges two different errors. With respect, if the trial judge had truly committed an error of law in acquitting Mr. Chung it should not be this difficult for the Crown to identify the error in the Court of Appeal.

3. The difficultly identifying errors of law is a function of the fact that fundamentally this has always been about the Crown appealing an unreasonable acquittal. These new 'late in the day' errors of law are further proof of this. In any event, as with all of the other alleged errors of law, they are without merit.

B. First issue: the appellant's awareness of the Toyota

4. The Crown argues that the trial judge ought to have considered the appellant's awareness of the presence of the Toyota that was in front of him just before he entered the intersection and collided with the Suzuki. Further, the Crown submits that the trial judge erred in law by finding that the appellant was not inattentive to the presence of the Toyota.

5. None of these points could ever be considered errors of law. The trial judge fully considered the trial Crown's submissions about what they alleged to be the appellant's reckless

driving just before the collision. However, from all the evidence, the trial judge was not satisfied that the appellant was inattentive. He found that: (1) there was no evidence that the appellant was overtaking vehicles just prior to the collision; and (2) the appellant's driving as it related to the Toyota was "not indicative of an inattention on the part of the accused" (Trial Reasons, at para. 97).

6. What, if anything, could be drawn from the appellant's manner of driving as it related to the presence of the Toyota were factual matters for the trial judge to consider and analyze. The extent to which the appellant was inattentive or not just before the collision is also a question of fact. It is clear from the reasons for judgment that the trial judge considered all of the Crown's submissions at trial. This was a short trial. Most of the evidence was not contentious, the trial judge reserved for a number of weeks and issued comprehensive written reasons for judgment. As is often said when an accused appeals against conviction, trial judges are not required to refer to and analyze every piece of evidence in their reasons for judgment (*R. v. R.E.M.,* 2008 SCC 51 at para. 64).

7. Nothing the trial judge said in respect of the evidence about the appellant's manner of driving as it relates to the Toyota could possibly give rise to an error of law.

C. Second issue: whether the Suzuki was making its turn at the time of the collision

8. The Crown also submits that the trial judge erred in law by not considering the evidence of Trevor Dinn as to the location of the Suzuki at the time of its collision with the Audi. Mr. Dinn's evidence established that the Suzuki was three seconds into making a left-hand turn at the time of the collision. As such, the Crown argues that the presence of the Suzuki in the intersection would have been known to the appellant as he entered the intersection at a high rate of speed, which in turn, was relevant to the assessment of the *mens rea* for dangerous driving.

9. This submission is completely without merit and should be rejected.

10. When the reasons for judgment are read as a whole, as they must be, it is absolutely clear that the trial judge was fully aware of the fact that the Suzuki was in the course of making a left hand turn at the time of its collision with the Audi. For example, the trial judge found that the Suzuki "commenced a left-hand turn" when it was struck by the Audi (Trial Reasons, at para.3), and that the Suzuki "proceeded to make" a turn, and that the Suzuki was "in the process" of

making its left-hand turn when the Toyota completed its right-hand turn and before the Audi entered the intersection (Trial Reasons, at paras. 50, 51).

11. It therefore clear that that the trial judge accepted that the Suzuki was in the process of making a left-hand turn even before the Audi entered the intersection. The trial judge's failure to specifically mention the 3 to 3 ½ second time interval adds nothing to the analysis. Ironically, the trial judge made the very finding of fact that the Crown is now saying ought to have been made. The trial judge's failure mention the 3 to 3 ½ interval was also not particularly surprising given that the trial Crown's focus was on their theory that the appellant had completely failed to see the left-turning Suzuki, a submission which the trial judge rejected for several reasons. The trial judge concluded that the appellant could in fact see the Suzuki:

> I cannot agree with the submission of the Crown that the evidence would establish that the accused "did not or could not have seen Dr. Hui's Suzuki in the intersection." From a review of the photographs and the dashboard camera video, it is clear that the dedicated left turn lane southbound on Oak Street at 41st Ave. is located on the right half of the roadway. This would be at an angle to traffic travelling northbound on Oak in the curb lane.
>
> No expert evidence was called to establish hypothetical sightlines that could assist the Court in determining whether or not the accused could not have seen Dr. Hui's Suzuki.
>
> There is some evidence that would establish that the accused did see Dr. Hui's Suzuki and he did not expect Dr. Hui would turn in front of him as he entered the intersection. Mr. Katamara testified that he went over to check the driver of the Audi who spontaneously told him, "That was a green light." It would be reasonable to infer from that statement that the accused saw Dr. Hui's Suzuki, but did not expect that he would turn in front of him as the accused had the green light.
>
> Additionally, the accused did engage the brakes of his Audi as he entered the intersection which I infer is more consistent with attention, rather than, inattention to the hazard posed as Dr. Hui made his left hand turn.
>
> (Trial Reasons, at paras. 98-101)

12. More importantly, having accepted that the Suzuki was well into making its left-hand turn at the point of collision, the trial judge still concluded that the appellant's manner of driving did not constitute a marked departure. As the trial judge concluded in this reasons: "[t]here is at least a reasonable doubt that such conduct amounted to a marked departure from the standard of a reasonably prudent driver" (Trial Reasons, at para.119).

13. The trial judge's conclusion in this respect could only be challenged as an unreasonable verdict. And Crown has no ability to appeal an unreasonable acquittal.

ALL OF WHICH IS RESPECFULLY SUBMITTED.

Dated at Ottawa, Ontario, this 16th day of December, 2019.

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Richard Fowler, QC
Eric Purtzki

LIST OF AUTHORITIES

Cases **Paragraph(s)**

R v R.E.M., 2008 SCC 51 6