



**SUPREME COURT OF CANADA**

**CITATION:** R. v. Chung, 2020 SCC 8

**APPEAL HEARD:** January 17, 2020

**JUDGMENT RENDERED:** March 27, 2020

**DOCKET:** 38739

**BETWEEN:**

**Ken Chung**  
Appellant

and

**Her Majesty The Queen**  
Respondent

**CORAM:** Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

**REASONS FOR JUDGMENT:** Martin J. (Brown, Rowe and Kasirer JJ. concurring)  
(paras. 1 to 30)

**DISSENTING REASONS:** Karakatsanis J.  
(paras. 31 to 42):

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

---

R. v. CHUNG

**Ken Chung**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

**Indexed as: R. v. Chung**

**2020 SCC 8**

File No.: 38739.

2020: January 17; 2020: March 27.

Present: Karakatsanis, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Criminal law — Appeals — Appeal by Crown against acquittal — Question of law — Dangerous operation of motor vehicle causing death — Accused acquitted of dangerous driving causing death at trial — Court of Appeal finding trial judge committed error of law in finding accused lacked requisite mens rea — Court of Appeal setting aside acquittal and entering conviction — Whether trial judge*

*committed error of law which would allow Crown to appeal acquittal — Criminal Code, R.S.C. 1985, c. C-46, ss. 249(4), 676(1)(a).*

C was acquitted at trial of dangerous driving causing death under s. 249(4) of the *Criminal Code*. There was no question that C drove in an objectively dangerous manner and committed the *actus reus* of the charged offence. However, the trial judge had a reasonable doubt about whether C had the requisite guilty mind or *mens rea*. The Court of Appeal found the trial judge committed an error of law in finding that C lacked the requisite *mens rea*, set aside the acquittal and entered a conviction. The sole issue in this appeal is whether the trial judge made an error of law, which would allow the Crown to appeal C's acquittal under s. 676(1)(a) of the *Criminal Code*.

*Held* (Karakatsanis J. dissenting): The appeal should be dismissed.

*Per* Brown, Rowe, **Martin** and Kasirer JJ.: Under s. 676(1)(a) of the *Criminal Code*, the Crown can only appeal an acquittal on a question of law alone. An appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof. Therefore, the Crown cannot appeal merely because an acquittal is unreasonable. In this case, the trial judge made two inter-related errors of law: he erred by applying a wrong legal principle and most importantly, by failing to apply the correct legal test by not assessing what a reasonable person would have foreseen and done in C's circumstances.

Firstly, the trial judge's fixation on the momentariness of the speeding demonstrates an error of law. Momentary excessive speeding on its own can establish the *mens rea* for dangerous driving where, having regard to all the circumstances, it supports an inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited. The trial judge erred in focusing on the momentary nature of C's conduct, rather than analyzing whether the reasonable person would foresee the dangers to the public from the momentary conduct. A brief period of rapidly changing lanes and accelerating towards an intersection is not comparable to momentary mistakes that may be made by any reasonable driver. The fact that foreseeable consequences occur within a short period of time after someone engages in highly dangerous behaviour cannot preclude a finding of *mens rea* for dangerous driving.

Secondly, the trial judge did not apply the correct legal test. This is not merely a matter of the trial judge failing to write out his thought process, but rather a matter of the trial judge not turning to the core question at issue: whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances. Instead of focussing on what a reasonable person would have foreseen and done in the circumstances, the trial judge engaged in reasoning focussed on the type (speeding) and duration (momentariness) of C's conduct, to the exclusion of the full picture. Concerning the required mental element, it is not necessary to find that C was subjectively aware of the risk of his conduct and intentionally created this risk. The

test for *mens rea* is based on the reasonable person. A reasonable person would have foreseen the immediate risk of reaching a speed of almost three times the speed limit while accelerating towards a major city intersection. C's conduct in these circumstances is a marked departure from the norm.

*Per Karakatsanis J.* (dissenting): The appeal should be allowed and the acquittal restored. The trial judge's decision to acquit C is not tainted by an identifiable legal error. The Court has emphasized that there is no ground of "unreasonable acquittal" open to the Crown on appeal.

Read fairly and as a whole, the trial judge's reasons disclose that the trial judge was aware that both excessive speed and momentary conduct could meet the marked departure standard, depending on the circumstances. Questions about whether the trial judge should have placed less weight on the short duration of speeding, and more weight on the degree to which speeding exceeded the limit, where the speeding occurred, or on other factors relating to C's control of the car and awareness, are not questions of law alone. The trial judge understood that what represents a marked departure in the circumstances is a matter of degree, and that the *mens rea* test is fundamentally comparative. Inferring that the trial judge failed to compare C's conduct to that of a reasonable person because he did not explicitly describe what a reasonable person would have done in the circumstances is tantamount to presuming that he misunderstood the applicable legal principles. The trial judge was ultimately left with a reasonable doubt as to whether the manner of driving met the *mens rea*

standard. Whether his decision to acquit on that basis was reasonable under the circumstances is not an issue in a Crown appeal such as this one.

### **Cases Cited**

By Martin J.

**Referred to:** *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *R. v. Willock (C.)* (2006), 212 O.A.C. 82; *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49; *R. v. Cassidy*, [1989] 2 S.C.R. 345; *R. v. Lutoslawski*, 2010 SCC 49, [2010] 3 S.C.R. 60.

By Karakatsanis J. (dissenting)

*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021; *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60; *R. v. Willock (C.)* (2006), 212 O.A.C. 82; *R. v. Adams (C.J.)*, 2012 PECA 15, 325 Nfld. & P.E.I.R. 93.

### **Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C-46, ss. 249(4) [rep. & sub. 2018, c. 21, ss. 14-15], 676(1)(a), 686(4)(b)(ii).

APPEAL from a judgment of the British Columbia Court of Appeal (Groberman, Fenlon and Hunter JJ.A.), 2019 BCCA 206, 55 C.R. (7th) 459, 41 M.V.R. (7th) 10, [2019] B.C.J. No. 1025 (QL), 2019 CarswellBC 1573 (WL Can.), setting aside the acquittal entered by Rideout J., 2018 BCPC 133, 29 M.V.R. (7th) 122, [2018] B.C.J. No. 1081 (QL), 2018 CarswellBC 1429 (WL Can.) and entering a conviction. Appeal dismissed, Karakatsanis J. dissenting.

*Richard S. Fowler, Q.C.*, and *Eric Purtzki*, for the appellant.

*David Layton, Q.C.*, for the respondent.

The judgment of Brown, Rowe, Martin and Kasirer JJ. was delivered by

MARTIN J. —

## I. Introduction

[1] Mr. Chung was acquitted of dangerous driving causing death under s. 249(4)<sup>1</sup> of the *Criminal Code*, R.S.C. 1985, c. C-46 (“Code”). At trial and on appeal, there was no question that Mr. Chung drove in an objectively dangerous

---

<sup>1</sup> This is the offence under which Mr. Chung was charged in 2015. Subsection 4 of s. 249 was repealed and replaced by s. 320.13(3) of the Code as of December 18, 2018.

manner and committed the *actus reus* of the charged offence. However, the trial judge had a reasonable doubt about whether Mr. Chung had the requisite guilty mind or *mens rea* (2018 BCPC 133, 29 M.V.R. (7th) 122). On appeal, the sole issue was whether the trial judge committed an error of law in finding that Mr. Chung lacked the requisite *mens rea* (2019 BCCA 206, 55 C.R. (7th) 459). The British Columbia Court of Appeal found such an error of law. Reading the trial judgment fully and fairly, I conclude that there was an error of law and that this appeal must be dismissed.

## II. Factual Background and Judicial History

[2] On the morning of Saturday, November 14, 2015, Mr. Chung drove his vehicle at almost three times the speed limit towards a major intersection in Vancouver and crashed into a left-turning vehicle. The driver of the left-turning vehicle died at the scene.

[3] The collision occurred at the intersection of two arterial roads in Vancouver: Oak Street and West 41st Avenue. This was a mixed residential-commercial area with two gas stations, a community centre, a nursing home, small retail businesses, and multiple bus stops around and near the intersection. Four pedestrians were in the vicinity of the intersection at the time of the collision. It was not raining, but the road was damp or wet. Traffic was light around the intersection, but other cars were present and five civilian witnesses were called at trial who were all driving cars near the intersection at the time of the collision. The speed limit for



both streets is 50 km/h, but drivers generally go above that speed limit. Both roads are wide and straight and have dedicated left turning lanes.

[4] A dashboard camera video from another vehicle at the intersection captured 4.9 seconds of the event. Over the span of a block, Mr. Chung had moved in to the curbside lane, passed at least one car on the right, and accelerated from 50 km/h to 140 km/h before entering the intersection. The trial judge found that Mr. Chung was not inattentive nor was he engaged in any dangerous conduct prior to this one block span. Mr. Chung was driving a powerful vehicle that could accelerate quickly; the trial judge heard expert evidence that the vehicle could accelerate from 0 to 100 km/h in 4.5 seconds in dry conditions, although the trial judge made no findings regarding exactly how quickly Mr. Chung reached his top speed in damp or wet conditions. As Mr. Chung approached the intersection going north along Oak Street, there was a Toyota in front of him making a right turn. As the Toyota was turning right, the victim started to make his left turn from going southbound on Oak Street to eastbound on West 41st Avenue. At this point, Mr. Chung started braking, narrowly missed hitting the Toyota, and collided with the victim's car at a speed of 119 km/h.

[5] Taking into account all of the above circumstances, the trial judge found that Mr. Chung's excessive speeding over a short distance towards this major intersection was objectively dangerous to the public and that the *actus reus* of dangerous driving was established.

[6]           However, the trial judge acquitted Mr. Chung because he had reasonable doubt that Mr. Chung's conduct met the *mens rea* requirement for dangerous driving. The trial judge distinguished the facts of this case from circumstances where excessive speed met the *mens rea* requirement and emphasized that the momentariness of Mr. Chung's speeding was critical in finding that his conduct did not show criminal fault.

[7]           The British Columbia Court of Appeal found that the trial judge had erred in law by "conceiv[ing] that a principle exists that a brief period of speeding (no matter how excessive the speed) cannot satisfy the *mens rea* requirement" (para. 42). The Court of Appeal therefore overturned the acquittal and entered a conviction, ruling that Mr. Chung would have been found guilty but for the trial judge's error.

[8]           The sole issue in this appeal is whether the trial judge made an error of law, which would allow the Crown to appeal Mr. Chung's acquittal under s. 676(1)(a) of the Code.

[9]           In these reasons I first describe the types of errors that are reviewable by appellate courts for Crown appeals of acquittals. Second, I interpret the trial judge's reasons and explain how they demonstrate two inter-related errors of law concerning the interpretation and application of the test for *mens rea* for dangerous driving. Lastly, I address why I would dismiss the appeal and uphold the conviction entered by the Court of Appeal.

### III. Reviewable Errors in Crown Appeals

[10] Under s. 676(1)(a), the Crown can only appeal an acquittal on a “question of law alone”. An appealable error must be traced to a question of law, rather than a question about how to weigh evidence and assess whether it meets the standard of proof (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 25-27; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at paras. 15-17). Therefore, the Crown cannot appeal merely because an acquittal is unreasonable (*R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33).

[11] Errors of law arise, for example, where “the legal effect of findings of fact or of undisputed facts raises a question of law” and where there is “an assessment of the evidence based on a wrong legal principle” (*J.M.H.*, at paras. 28-30). These two types of errors are somewhat similar; they both address errors where the trial judge’s application of the legal principles to the evidence demonstrates an erroneous understanding of the law, either because the trial judge finds all the facts necessary to meet the test but errs in law in its application, or assesses the evidence in a way that otherwise indicates a misapprehension of the law.

### IV. The Errors of Law in the Trial Judge’s Reasons

[12] Mr. Chung argues that there is no such error of law in the trial judge’s reasons. I disagree.

[13] When interpreting a trial judge's reasons, appellate courts should not parse the reasons of the trial judge in a line by line search for errors. Instead, the reasons are to be "read as a whole, in the context of the evidence, the issues and the arguments at trial, together with 'an appreciation of the purposes or functions for which they are delivered'" (*R. v. Laboucan*, 2010 SCC 12, [2010] 1 S.C.R. 397, at para. 16, quoting *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 16). Appellate courts must attempt to understand the reasoning of the trial judge. However, even if the trial judge articulates the right test, appellate courts may find an error of law if the judge's reasoning and application demonstrate a failure to properly apprehend the law (*George*, at para. 16).

[14] In this case, the trial judge thoroughly reviewed the evidence before him and made clear factual findings. He cited, at para. 63, the correct test for the *mens rea* of dangerous driving causing death, articulated in *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60, at para. 36:

The focus of the *mens rea* analysis is on whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances (*Beatty*, at para. 48). It is helpful to approach the issue by asking two questions. The first is whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible. If so, the second question is whether the accused's failure to foresee the risk and take steps to avoid it, if possible, was a *marked departure* from the standard of care expected of a reasonable person in the accused's circumstances. [Emphasis in original.]

[15] The trial judge found that Mr. Chung's dangerous conduct was only limited to the one block span where he accelerated to almost three times the speed limit, passing at least one car on the right, nearly hit the Toyota turning right in front of him, and then collided with the victim's vehicle. The trial judge concluded that Mr. Chung had not been inattentive while driving. The trial judge then canvassed a line of cases which he believed supported the principle that speeding alone is rarely sufficient to establish the *mens rea* for dangerous driving. He distinguished these cases, finding that in these cases speeding was more than momentary or there was some other additional dangerous conduct that was not present in the case at bar. The trial judge emphasized that Mr. Chung's speed was momentary, noting that although momentary conduct can be a marked departure, it will more usually be only a mere departure where driving is otherwise proper (para. 117, citing *R. v. Willock (C.)* (2006), 212 O.A.C. 82, per Doherty J.A.). Therefore, he had reasonable doubt that Mr. Chung's conduct represented a marked departure because the "momentariness of the accused's conduct in excessively speeding [was] insufficient to meet the criminal fault component" (paras. 119-120).

[16] It would not be an error of law if the trial judge simply applied the test in *Roy*, considered all the circumstances, and came to an unreasonable conclusion regarding whether the accused's conduct displayed a marked departure from the norm. However, it would be an error of law if the trial judge failed to compare the accused's actions to what a reasonable person would have foreseen and done in all of

the circumstances. This type of error is not a factual matter of weighing evidence, but rather it goes to the legal definition of the *mens rea* analysis for dangerous driving.

[17] Although the trial judge correctly cited passages from cases which express the applicable legal standards, I find two inter-related errors of law. First, I agree with the Court of Appeal that the trial judge erred by applying a wrong legal principle. Second, and most importantly, I find that the trial judge failed to apply the correct legal test in *Roy* by not assessing what a reasonable person would have foreseen and done in Mr. Chung's circumstances.

[18] Applying a wrong legal principle and failing to apply the correct legal test are two sides of the same coin. Both characterizations go to the same essential error of law in this case, which was a failure of the trial judge to properly consider the conduct of the reasonable person in all of the circumstances in determining whether there was a marked departure.

[19] First, I agree with the Court of Appeal that the trial judge's fixation on the momentariness of the speeding demonstrates an error of law. Clearly, momentary excessive speeding on its own can establish the *mens rea* for dangerous driving where, having regard to all the circumstances, it supports an inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited (*Roy*, at para. 41).

[20] Although the trial judge recognized that momentary conduct could be a marked departure, the trial judge stated that his analysis turned “critically” on the fact that Mr. Chung’s speed was categorically momentary (para. 117). That the trial judge was relying on a legal principle, rather than making a determination of fact, is supported by his citation to *Willock* and the fact that he distinguished other cases where excessive speeding and acceleration occurred over a longer period of time or in conjunction with additional dangerous conduct (paras. 103-7 and 118). Read as a whole, his reasons indicate that he believed that, when excessive speed was momentary, it was unable on its own to establish the *mens rea* for dangerous driving.

[21] The trial judge erred in focussing on the momentary nature of Mr. Chung’s conduct, rather than analyzing whether the reasonable person would foresee the dangers to the public from the momentary conduct. A brief period of rapidly changing lanes and accelerating towards an intersection is not comparable to momentary mistakes that may be made by any reasonable driver, like the mistimed turn on to a highway in *Roy*, the momentary loss of awareness in *R. v. Beatty*, 2008 SCC 5, [2008] 1 S.C.R. 49, or the sudden loss of control in *Willock*.

[22] Although this Court in *Roy* and *Beatty* determined that momentary lapses in attention and judgment would usually not raise criminal liability, this was because momentary lapses often result from the “automatic and reflexive nature of driving” (*Beatty*, at para. 34) or “[s]imple carelessness, to which even the most prudent drivers may occasionally succumb” (*Roy*, at para. 37). These are examples of conduct that,

when assessed in totality against the reasonable person standard, only represent a mere departure from the norm. Momentary conduct is not assessed differently from other dangerous conduct. Conduct that occurs over a brief period of time that creates foreseeable and immediate risks of serious consequences can still be a marked departure from the norm (*Beatty*, at para. 48). A reasonable person would have foreseen that rapidly accelerating towards a major intersection at a high speed creates a very real risk of a collision occurring within seconds. This is what actually occurred in Mr. Chung's case. Risky conduct at excessive speeds foreseeably can result in immediate consequences. Therefore, the fact that foreseeable consequences occur within a short period of time after someone engages in highly dangerous behaviour cannot preclude a finding of *mens rea* for dangerous driving.

[23] Second, I find that the trial judge did not apply the correct legal test in *Roy*. In his reasons, he failed to determine whether a reasonable person in Mr. Chung's circumstances would have foreseen the risk from accelerating rapidly and speeding into that major intersection and taken actions to avoid it. This is not merely a matter of the trial judge failing to write out his thought process, but rather a matter of the trial judge not turning to the core question at issue: “whether the dangerous manner of driving was the result of a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances” (*Roy*, at para. 36 (emphasis added)). The trial judge's reasons, interpreted as a whole, reveal that he failed to undertake this analysis.



[24] Although trial judges are not required to set out their analysis in any particular way, the two questions in *Roy*, at para. 36, are helpful and emphasize the need to compare the accused's conduct to the conduct of a reasonable person in their circumstances, and by reference to all relevant evidence. This is essential for determining objective *mens rea*. At some point in the *mens rea* analysis, the trial judge must work with the facts as found and consider whether, in the totality of the circumstances, a reasonable person would have foreseen the risk and taken the same actions as the accused. Only when there has been an active engagement with the full picture of what occurred can the trial judge determine whether the accused's conduct was a marked departure from the conduct of a reasonable and prudent driver.

[25] Instead of focussing on what a reasonable person would have foreseen and done in the circumstances, the trial judge engaged in reasoning focussed on the type (speeding) and duration (momentariness) of Mr. Chung's conduct, to the exclusion of the full picture. His analysis focussed on distinguishing cases where excessive speeding had been found to be a marked departure from the circumstances of this case, rather than examining the risks created by Mr. Chung's speeding. In other words, he focussed on what Mr. Chung did not do in comparison to these other cases, rather than asking the correct legal question and assessing what risks a reasonable person would foresee arising from Mr. Chung's momentary speeding in the circumstances.

[26] Had the trial judge turned to consider the circumstances of this case fully and specifically, he would have addressed the fact that Mr. Chung's conduct did not only include momentary excessive speeding, but also narrowly missing another vehicle turning right in front of him, passing in the curb lane, and accelerating towards a major intersection while aware of at least two vehicles in the intersection. The trial judge found that Mr. Chung was not inattentive while driving, but did not consider how Mr. Chung's awareness of his surroundings contributed to his conduct being a marked departure from the conduct of a reasonable person. A full analysis in this case would have considered the duration of the speeding, as well as the accused's control of the car (he switched lanes and then accelerated), the magnitude of speeding (almost three times the speed limit), the location of speeding (approaching a major intersection), and the accused's awareness of at least two vehicles at the intersection as he approached it. The trial judge then had to consider whether, on these facts as found, a reasonable person would have foreseen the risk of endangering the public by engaging in this conduct and taken steps to avoid it, presumably by not driving so fast.

[27] The duration and nature of the accused's conduct are only some of the factors to be considered with all of the circumstances in the *mens rea* analysis. They are not factors that can be taken out of context. It is conceivable that in some contexts, even grossly excessive speed may not establish a marked departure from the standard of care, while in other circumstances speed may not need to be grossly excessive in order to still be a marked departure. Courts must be careful to avoid

fettering the analysis in *Roy* by adopting hard and fast rules regarding when isolated factors will or will not be marked departures. Although case law may be helpful in providing examples of what has previously been determined to be a marked departure, courts must still analyze the accused's actions relative to the reasonable person in the specific circumstances at issue.

## V. Conclusion

[28] A reasonable person understands that driving is an inherently risky activity. It is made all the more risky the faster we drive, the harder we accelerate, and the more aggressively we navigate traffic. Although even careful driving can result in tragic consequences, some conduct is so dangerous that it deserves criminal sanctions.

[29] On the facts as found by the trial judge, over a one block span, Mr. Chung moved into the curb lane, passed at least one car on the right, and accelerated to 140 km/h in a 50 km/h zone while approaching a major urban intersection and being aware of at least two other cars in the intersection. There is no evidence that the accused lost control of his vehicle. Concerning the required mental element, it is not necessary to find that Mr. Chung was subjectively aware of the risk of his conduct and intentionally created this risk. The test for *mens rea* is based on the reasonable person. A reasonable person would have foreseen the immediate risk of reaching a speed of almost three times the speed limit while accelerating towards a major city

intersection. Mr. Chung's conduct in these circumstances is a marked departure from the norm.

[30] The trial judge made all the findings of fact necessary to determine that there was a marked departure from the standard of care of a reasonable and prudent driver, and therefore to support a verdict of guilty under s. 686(4)(b)(ii) of the Code (*R. v. Cassidy*, [1989] 2 S.C.R. 345, at p. 355). In other words, but for the error of law, the accused would have been convicted (*R. v. Lutoslawski*, 2010 SCC 49, [2010] 3 S.C.R. 60). I would therefore dismiss the appeal.

The following are the reasons delivered by

KARAKATSANIS J. —

[31] Crown rights of appeal from acquittals are limited to questions of law alone: *Criminal Code*, R.S.C. 1985, c. C-46, s. 676(1)(a). In particular, this Court has emphasized that there is no ground of “unreasonable acquittal” open to the Crown on appeal: see *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197, at paras. 32-33. Not only is no such Crown right of appeal provided for in the Code, but “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”: *J.M.H.*, at para. 27, citing *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 33. The fact that an acquittal may be on its face unreasonable, or

even “manifestly” unreasonable, does not lead inexorably to the conclusion that a legal error was committed in coming to the decision to acquit. Appellate intervention in an acquittal is only available when the Crown establishes that the trial judge’s reasonable doubt is tainted by an identifiable legal error: *J.M.H.*, at para. 39. Appellate jurisdiction does not extend to questions of fact and questions of mixed fact and law. Parliament’s clear policy choice to tightly circumscribe the scope of Crown appeals from acquittal must be respected.

[32] In this case, I conclude that the trial judge’s decision to acquit the appellant is not tainted by an identifiable legal error. The appellant’s acquittal should therefore be restored.

[33] Busy trial judges cannot be expected to write perfect reasons. Appellate courts approach a trial judge’s reasons by reading them as a whole rather than finely parsing them, presuming that the trial judge knows the basic principles of criminal law: see for example *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 16, 35, 45 and 54. On a Crown appeal from an acquittal, this Court has further emphasized that the adequacy of a trial judge’s reasons is informed by the limited nature of the Crown’s appeal rights: *J.M.H.*, at para. 32, citing *R. v. Walker*, 2008 SCC 34, [2008] 2 S.C.R. 245, at paras. 2 and 22. This context calls for restraint: *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 17.

[34] The Court of Appeal found that the trial judge applied a wrong legal standard to the facts, in that he “conceived that a principle exists that a brief period of

speeding (no matter how excessive the speed) cannot satisfy the *mens rea* requirement”: 2019 BCCA 206, 55 C.R. (7th) 459, at para. 42.

[35] Reading the reasons as a whole, I am not satisfied that the trial judge relied on the erroneous principle that, as a matter of law, a brief period of excessive speed alone is insufficient to establish the *mens rea* for dangerous driving. Of course, there is no such legal principle. Momentary excessive speed can establish the *mens rea* for dangerous driving where, having regard to all the circumstances, the manner of driving supports an inference that the driving was the result of a marked departure from the standard of care that a reasonable person in the same circumstances would have exhibited: *R. v. Roy*, 2012 SCC 26, [2012] 2 S.C.R. 60, at para. 41.

[36] The trial judge correctly stated the relevant legal principles applicable to dangerous driving, at paras. 60-66, and restated the *mens rea* test in the course of his *mens rea* analysis and conclusion, at paras. 112 and 119. The trial judge’s treatment of case law does not provide a basis to infer that he failed to apply the proper principles or constrained his assessment of all of the circumstances by relying on an erroneous legal principle. The trial judge undertook a context-based assessment of the case law that was presented to him involving excessive speed and made observations about tendencies in that case law. He noted facts that in his view distinguished those cases from the present case. In other words, the trial judge engaged in a completely ordinary method of reasoning.

[37] Read fairly and as a whole, the reasons disclose that the trial judge was aware that both excessive speed and momentary conduct could meet the marked departure standard, depending on the circumstances. For instance, he explicitly referred to the statement of Doherty J.A. in *R. v. Willock (C.)* (2006), 212 O.A.C. 82, at para. 31, that “[t]here can be no doubt that conduct occurring in a two to three second interval can amount to a marked departure from the standard of a reasonable person”: para. 117.

[38] That the trial judge considered it “critical” that the appellant’s excessive speed was momentary does not mean that he understood that the appellant’s conduct could not, as a matter of law, satisfy the *mens rea* requirement. It suggests that he considered the momentariness of the appellant’s excessive speed to be an important factor in the circumstances. The trial judge was not required to touch on every circumstantial factor in the course of his analysis, but on those he considered important, so as to explain why he reached his conclusion: *R.E.M.*, at para. 17. Questions about whether the trial judge should have placed less weight on the short duration of speeding, and more weight on the degree to which speeding exceeded the limit, where the speeding occurred, or on other factors relating to the appellant’s control of the car and awareness, are not questions of law alone: *J.M.H.*, at para. 28.

[39] There is also no basis for inferring that the trial judge did not compare the appellant’s conduct to what a reasonable person would have done in the circumstances in coming to the conclusion that there was “at least a reasonable doubt

that [the appellant's] conduct amounted to a marked departure from the standard of a reasonably prudent driver": para. 119 (emphasis added). He understood that what represents a marked departure in the circumstances is a matter of degree, and that the *mens rea* test is fundamentally comparative: paras. 60, 65 and 116. Inferring that the trial judge failed to compare the appellant's conduct to that of a reasonable person because he did not explicitly describe what a reasonable person would have done in the circumstances is tantamount to presuming that he misunderstood the applicable legal principles.

[40] The two questions this Court identified in *Roy*, at para. 36, were set out to assist trial judges in determining whether the *mens rea* test is met in the circumstances. They do not change the nature of the *mens rea* test.

[41] The core issue in this case was the second question in *Roy*, whether the accused's failure to foresee the risk and take steps to avoid it was a *marked* departure from the standard of care expected of a reasonable person in the accused's circumstances. The first question in *Roy*, whether a reasonable person in the accused's circumstances would have foreseen the risk and taken steps to avoid it, was not the "substance of what was in issue": *J.M.H.*, at para. 32, citing *Walker*, at para. 20. At trial, the appellant appeared to concede that it could be answered affirmatively: see para. 57. The trial judge was not required to spend his time resolving issues that were effectively uncontested. In any event, the trial judge implicitly answered the first question by finding that the appellant's failure to foresee the risk was aptly described



as “a departure or a mere departure from the normal manner of driving”: para. 116, citing *R. v. Adams (C.J.)*, 2012 PECA 15, 325 Nfld. & P.E.I.R. 93, at para. 65.

[42] The trial judge was ultimately left with a reasonable doubt as to whether the manner of driving met the *mens rea* standard, that is, whether it supported an inference that the driving was the result of a marked departure from the standard of care. As stated above, whether his decision to acquit on that basis was “reasonable” under the circumstances is not at issue in a Crown appeal such as this one: *J.M.H.*, at para. 25; *Biniaris*, at para. 33. Because I do not find that the trial judge’s decision to acquit is tainted by legal error, I would allow the appeal and restore the acquittal.

*Appeal dismissed, KARAKATSANIS J. dissenting.*

*Solicitors for the appellant: Fowler and Blok, Vancouver.*

*Solicitor for the respondent: Attorney General of British Columbia, Vancouver.*