

CANADA / JUDGMENT

# R. v. Chan

2021 BCSC 1383

## COURT

Supreme Court of British Columbia

## DECIDED

14 July 2021

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2021 BCSC 1383 R. v. Chan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Chan, 2021 BCSC 1383 Date: 20210714 Dockets: 31552; 31553 Registry: Vancouver Regina v. Chi Wai Chan Before: The Honourable Mr. Justice Williams On appeal from: A decision of the Provincial Court of British Columbia, dated March 2, 2021 (R. v. Chan, Vancouver Action Nos. AJ15178636 and AJ15178644) Reasons for Judgment Re: Appeal Counsel for the Crown: K.H. Gagnon Counsel for the Accused: J.V. Myers Place and Date of Trial/Hearing: Vancouver, B.C. July 7, 2021 Place and Date of Judgment: Vancouver, B.C. July 14, 2021

- [1] This matter was before this Court on July 7, 2021. Mr. Chan appealed two convictions which had been entered in the Provincial Court on March 2, 2021. The offences charged were contrary to ss. 68(2) and 84(2) of the Motor Vehicle Act. The appellant was found guilty following trial before a Judicial Justice,
- [2] The Crown conceded both appeals. In its factum, the Crown said this: While the appellant in his argument states numerous ground of appeal, the respondent is content to concede the appeal on the basis of serious legal errors by way of the JJ (Judicial Justice) having allowed in a significant amount of inadmissible evidence, which if not admitted would have inexorably led to insufficient evidence for a conviction on either count.
- [3] To my mind, that concession was prudent and well-founded.
- [4] The only issue of consequence that arose at the hearing concerned the appropriate remedy. Mr. Chan takes the position that there should be an acquittal entered in respect of each of the convictions. The Crown, although this was not set out in its factum, accepts that there should be an acquittal on the first conviction but, in respect of the s. 84(2) conviction, contends that the basis of the appeal being successful was a legal error and that there is some evidence to support the conviction. In the circumstances, the Crown says that there should be a new trial ordered.
- [5] In my view, the appropriate remedy is an acquittal in respect of each conviction. I advised counsel that would be the disposition and that reasons would follow. These are those reasons.

- [6] I do not intend to provide any detailed analysis of the proceedings at trial and the legal issues as counsel have framed them for the purpose of the appeal. Nor will I undertake to address all of the issues raised by Mr. Chan in his lengthy factum. As the brief excerpt from the filed argument indicates, it is apparent that Crown Counsel quite clearly appreciates the significant errors that arose in the trial.
- [7] The essence of my analysis, stated in a brief and cursory way, is this: · The trial court allowed inadmissible hearsay evidence which resulted in a statement of the appellant being adduced as an important part of the prosecution's case. · The trial court improperly allowed expert evidence with respect to cell phone location and then compounded that error by misconstruing the evidence to conclude that the applicant's phone was "at the scene of the hit-and-run at the material time". · The court then assessed the effect of the circumstantial nature of the Crown case by applying the Villaroman test (R. v. Villaroman, 2016 SCC 33) to that misconstrued and improperly admitted evidence, concluding that there was no reasonable alternative inference other than guilt.
- [8] Frankly, the proceeding at trial is most troubling. What occurred appears to have been an instance of a lay prosecutor, the investigating police officer, I assume not legally-trained, proceeding with considerable zeal, but either unaware of the applicable rules of evidence or quite content to flout those rules to secure a conviction. At any rate, it can fairly be said that the officer ran roughshod over fundamental rules of evidence.
- [9] That unfortunate state of affairs was exacerbated by a presiding justice who apparently saw no problem with the admission of the evidence and then, as indicated, substantially overstated its effect to found a conviction.
- [10] I would note that the irregularities that enabled the admission of the evidence were not minor or technical in nature; these were not close calls. They were quite egregious violations of basic rules of evidence.
- [11] It is as well not without significance that the appellant was not represented by counsel at the hearing. He had requested an adjournment at the outset so that he could secure counsel, but that application was summarily denied.
- [12] As I observed, the proceeding was troubling because of the irregularities and errors described.
- [13] I should not be taken as suggesting that police officers or persons other than lawyers should not be permitted to prosecute offences, or that their involvement is somehow inferior or not worthy of respect. Those types of prosecutions take place in the courts of this province regularly. However, such persons must comply with the applicable rules and standards, in the same way that would be expected of a lawyer. Furthermore, it is the obligation of the presiding judicial officer to ensure that proceedings are conducted properly and fairly. Those are basic requirements that must be met.

[14] In my view, both of these convictions are tainted by the impropriety of the trial proceeding, and to permit the Crown to have another opportunity to attempt to secure a conviction by retrying the case would be inconsistent with any reasonable notion of fairness.

[15] To conclude, the convictions are vacated and acquittals are substituted for each. "Williams J."

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