

CANADA / JUDGMENT

R. v. Moshfeghi Zadeh

2025 BCCA 293

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 293 Moshfeghi Zadeh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Moshfeghi Zadeh,

2025 BCCA 293

Date: 20250822

Docket: CA49841

Between:

Rex

Appellant

And

Seyed Ramin Moshfeghi Zadeh

Respondent

Restriction on publication: No person shall publish or transmit or broadcast in any way any images or videos of the victims as depicted in the CCTV clips contained in Exhibit 3.

Before:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Willcock

The Honourable Justice Riley

On appeal from: An order of the Provincial Court of British Columbia, dated April 9, 2024 (R. v. Moshfeghi Zadeh, Vancouver Docket 265982-1).

Counsel for the Appellant:

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Counsel for the Respondent:

R.L. Dick

Place and Date of Hearing:

Vancouver, British Columbia

June 5, 2025

Place and Date of Judgment:

Vancouver, British Columbia

August 22, 2025

Written Reasons by:

The Honourable Justice Riley

Concurred in by:

The Honourable Chief Justice Marchand

Dissenting Reasons by:

The Honourable Mr. Justice Willcock (Page 22, para. 63)

Summary:

The Crown appeals from a decision acquitting the respondent, Mr. Moshfeghi Zadeh, on charges of dangerous driving causing death and dangerous driving causing bodily harm. The charges arose from an incident in which the respondent drove into an intersection on a red light and was struck by another vehicle, causing the respondent's vehicle to flip onto the sidewalk, seriously injuring one pedestrian (a father) and killing another (his infant child). The trial judge took into account that the respondent's manner of driving prior to failing to slow and stop at the red light was unremarkable, and found that his conduct was indicative of a "momentary lapse" in attention lasting somewhere between three and five seconds prior to his entering the intersection on a red light. The judge held that the respondent's manner of driving was dangerous (establishing the *actus reus* for the offences), but was not a marked departure from the standard of care expected of a reasonable person in the circumstances (as required to establish the *mens rea* for the offences). The Crown argues on appeal that the trial judge erred in law in multiple respects.

HELD: Appeal dismissed, Justice Willcock dissenting.

Majority (per Justice Riley; Chief Justice Marchand concurring): Although at one point in the reasons the trial judge misstated the law, the error was isolated and not reflective of a misapprehension of the legal test for proof of the objective fault element for dangerous driving. The trial judge's conclusion that the respondent's conduct was not a marked departure from the standard of care expected of a reasonable person in all the circumstances was a question of mixed fact and law that was not tainted by any extricable legal error.

Dissent (per Justice Willcock): The trial judge erred in holding that a momentary lapse of judgment without more cannot establish the mens rea of the offence of dangerous driving. Her assessment of the evidence was founded upon that error in principle and the judgment was tainted by the error. The judge's engagement with the evidence focused on establishing the duration of the lapse in attention and evidence relating to the circumstances of the offence was discounted. The acquittal should be set aside and a new trial ordered pursuant to s. 686(4) of the Criminal Code.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

- [1] The Crown appeals from the acquittal of the respondent, Mr. Moshfeghi Zadeh, on charges of dangerous driving causing death and dangerous driving causing bodily harm contrary to ss. 320.13(3) and (2) of the Criminal Code, R.S.C. 1985, c. C-46. The charges arose from a tragic incident in which the respondent drove his vehicle into a busy intersection on a red light, and was struck by another vehicle entering the intersection in another direction on a green light. The respondent's vehicle flipped and landed on the sidewalk, striking the adult victim, Mr. Hiiva, who was carrying his daughter Ocean, the infant victim. Mr. Hiiva was severely injured and his 18-month old daughter was killed instantly.
- [2] The incident was recorded by closed circuit video equipment showing the intersection in question from three different angles. The respondent's manner of driving was also reflected in computer data recovered from his vehicle. Against this backdrop, the circumstances of the incident were largely beyond dispute at the respondent's trial before a Provincial Court Judge.
- [3] The respondent conceded at trial that he drove through the intersection in a manner that was dangerous to the public, satisfying the actus reus element of the offences. The key issue for the trial judge was whether the Crown had proven the requisite mens rea, namely that the respondent's driving constituted a marked departure from the standard expected of a reasonable person in the circumstances.

- [4] The trial judge found that the respondent's driving was unremarkable up to the point that he failed to come to a stop at the red light. He was travelling within the speed limit and there was no evidence of erratic driving prior to his failure to slow and stop. Nor was there any evidence of impairment. Simply put, the respondent drove into the intersection on a red light, without any apparent effort to stop, causing a violent collision with tragic consequences.
- [5] The trial judge characterized the conduct in issue as a momentary lapse in attention. She distinguished this case from others where the accused was found guilty of dangerous driving based on conduct involving more than a momentary lapse. The trial judge ultimately determined that while the respondent's conduct was objectively dangerous, it was not a marked departure from the standard of care that a reasonable person would have observed in the circumstances.
- [6] The Crown argues that the trial judge committed three distinct legal errors. First, the Crown says the trial judge erroneously reasoned that a momentary lapse of attention cannot satisfy the mens rea requirement for dangerous driving. Second, the Crown submits that in considering the mens rea element of the offences, the trial judge failed to assess the extent to which the respondent's driving departed from the reasonable person standard. Third, the Crown says the trial judge improperly "discounted" some of the circumstances relevant to the respondent's manner of driving.
- [7] For the reasons given below, I would dismiss the appeal. Read in isolation, the trial judge's statement that a momentary lapse in attention cannot satisfy the essential elements of the offence of dangerous driving was legally incorrect. However, in other parts of the reasons the judge was less categorical. In any event, the judge went on to apply the correct legal test for the mens rea element of dangerous driving, by asking herself whether the respondent's conduct constituted a marked departure from the standard of driving expected of a reasonable person in the circumstances. Further, the trial judge's reasons reflect that she did not discount any of the circumstances relevant to the manner of the respondent's driving. The trial judge's ultimate conclusion was a finding of mixed fact and law, which has not been shown to be tainted by any reviewable legal error.

Facts

- [8] At trial, the Crown's case included a comprehensive agreed statement of facts drawing upon: (i) computer data recovered from the respondent's vehicle; (ii) closed circuit video camera footage of the intersection from three different angles; (iii) analysis of data from the respondent's cellular phone; and (iv) toxicology analysis of bodily samples taken from the respondent. The Crown also called viva voce testimony from several individuals who were on the street at the time of the collision, and police officers who attended in the aftermath.
- [9] On this largely, if not entirely uncontested body of evidence, the trial judge made the following key findings of fact:

- (a) The respondent had been driving his sport utility vehicle ("SUV") for some 15 to 16 minutes prior to the collision. There was "no evidence that there was any issue" with the respondent's driving prior to his failure to slow down and stop for the red light: reasons at para. 26. He was the sole occupant in the vehicle: reasons at para. 27. He was wearing his seatbelt. Hospital testing conducted after the fact showed that he had no drugs or alcohol in his system: reasons at para. 27.
- (b) As the respondent approached the intersection of Smithe Street and Hornby Street, he was driving west on Smithe Street "in a straight line", "at or below the speed limit": reasons at paras. 26-27. More specifically, in the block before the intersection, the respondent was traveling between 41 and 50 km per hour. His speed was 47 km per hour "just prior to the collision": reasons at para. 26.
- (c) There was "no evidence that [the respondent] was eating or doing any other activities while driving which may have distracted him", nor was there any evidence that he "diverted his attention from the road to another location": reasons at para. 27. An analysis of the respondent's phone data showed that he was "not distracted by any texts or telephone calls": reasons at para. 27.
- (d) As the respondent's vehicle proceeded westbound on Smithe Street toward the intersection of Smithe and Hornby, the overhead traffic lights and the lights above the cross-walk on each side of the street were all red: reasons at para. 29.
- (e) The lights at Smithe Street and Hornby Street had been red for 20 seconds before the respondent's SUV entered the intersection: reasons at para. 29. Thus, as the respondent drove along Smithe Street toward the intersection, the lights would have been visible to him from three blocks away: reasons at para. 30.
- (f) The respondent entered the intersection of Smithe Street and Howe Street at 6:02:14 p.m., and crossed over the stop line into the intersection at Smithe and Hornby at 6:02:20 p.m. It therefore took the respondent six seconds to travel the single block of Smithe Street from Howe to Hornby, over which time his speed varied from 41 to 50 km per hour: reasons at para. 31.
- (g) There were pedestrians proceeding through the north-south crosswalks on Hornby Street as the respondent approached, "up to three seconds before" the respondent entered the intersection on the red light: reasons at para. 34.
- (h) Another vehicle, a silver hatchback, was travelling west along Smithe Street "in tandem" with the respondent's SUV as it approached Hornby Street: reasons at para. 32. The silver hatchback began to slow down at 6:02:17 p.m., coming to a complete stop at the red light: reasons at para. 32.

- (i) Meanwhile, the respondent made no apparent attempt to stop, driving straight into the intersection on the red light. He "did not brake" prior to entering the intersection on the red light: reasons at para. 28. According to the computer data from his vehicle, the respondent did not apply his brakes until after his SUV was hit by a sportscar in the intersection as described in the following subparagraph: reasons at para. 28.
 - (j) As the respondent's SUV drove through the intersection on the red light, it was hit by a sportscar travelling north on Hornby Street into the intersection on a green light. When the vehicles made contact, the respondent's SUV flipped onto the sidewalk, striking the two victims: reasons at para. 1.
- [10] Although the trial judge's reasons do not include any explicit description of the setting, the Crown points out on appeal that the incident took place in downtown Vancouver at just past 6:00 p.m. on a weekday. The Crown points to the uncontroverted evidence of witnesses at the scene who testified that the intersection was "busy", with "a lot of people outside", and "a lot of pedestrians".

Reasons for Judgment

- [11] The trial judge delivered oral reasons immediately after closing submissions and it is obvious from the content of the reasons that she had a full grasp of the facts and had familiarized herself with the relevant legal authorities.
- [12] It was admitted that the respondent was the cause of a collision which took the life of one victim and seriously injured the other. The question the judge had to address was whether the respondent could be held criminally liable for the offences of dangerous driving causing bodily harm and dangerous driving causing death: reasons at para. 2.
- [13] After identifying that overarching issue, the trial judge proceeded to set out a number of general propositions of law regarding the nature of the offence of dangerous driving, and its essential elements: reasons at paras. 2-8. The significance of the legal propositions as stated by the trial judge is addressed later in these reasons.
- [14] At this point, it is enough to say that the trial judge's review of the legal principles included a summary of (i) the actus reus of the offence, namely operating a vehicle in a manner that is dangerous to the public, and (ii) the mens rea, namely driving conduct that involves a marked departure from the standard expected of a reasonable person in all the circumstances: reasons at para. 4, citing *R. v. Roy*, 2012 SCC 26 at para. 28. The trial judge instructed herself that proof of the mens rea element requires a "two-step inquiry" into: (i) whether, in light of all the relevant evidence, a reasonable person would have foreseen a driving-related risk and taken steps to avoid it; and (ii) if so, whether the accused's failure to foresee the risk and take steps to avoid it involved a marked departure from the "standard of care expected of a reasonable person in the accused's circumstances": reasons at para. 5, citing *Roy* at para. 36.

- [15] In this particular case, the respondent's conduct in driving into the intersection on a red light was dangerous and satisfied the actus reus element. The issue the trial judge had to decide was whether the Crown had proven the mens rea element, applying the "modified objective standard" as described in *R. v. Beatty*, 2008 SCC 5 at paras. 43, 48: reasons at paras. 5-6, 17.
- [16] The trial judge went on to review the basic facts and outcomes of some of the leading cases on dangerous driving, including *Beatty* and *Roy*, as well as *R. v. Hundal*, [1993] 1 S.C.R. 867, *R. v. Robertson*, 2013 BCCA 268, *R. v. Bagri*, 2016 BCCA 272, and *R. v. Chung*, 2020 SCC 8: reasons at paras. 10-25. The judge distinguished some of the cases relied upon by the Crown, most notably *Bagri*, *Hundal*, and *Chung*, in which findings of dangerous driving arose from conduct that involved "more than a momentary lapse of attention": reasons at paras. 15-25.
- [17] Turning to the circumstances of the case before her, the trial judge observed that there was no evidence of "any issue with [the respondent's] driving prior to entering the intersection at Hornby Street on a red light": reasons at para. 26. The respondent's SUV was traveling "at or below the speed limit", there was no evidence of any irregular driving, no evidence that the respondent was doing anything which "may have distracted him", and no evidence that he had any drugs or alcohol in his system: reasons at paras. 26-27.
- [18] Referring to the evidence that the respondent did not apply the brakes until after his SUV collided with the sportscar, the trial judge inferred that the respondent "obviously did not see the red light", which had been red for 20 seconds before he entered the intersection and was displayed on two overhead traffic signals and crosswalk signs on both sides of Smithe Street: reasons at paras. 28-29.
- [19] The trial judge reasoned that "[p]rudent drivers are focused on the traffic lights immediately in front of them to which they must respond": reasons at para. 30. On this basis, the trial judge rejected the Crown's argument that because the lights had been red for some 20 seconds prior to the respondent's entry into the intersection of Smithe and Hornby, the respondent suffered "more than a momentary lapse of attention": reasons at para. 30.
- [20] Starting from the fact that it took the respondent six seconds to drive the single block of Smithe Street from Howe Street to Hornby Street, and allowing that a prudent driver would take one second to "transfer [his or her] view" from one set of streetlights to the next, the trial judge concluded that the respondent had "five seconds to begin focusing on and reacting to the red lights ahead at Hornby Street": reasons at para. 31.
- [21] The trial judge then referred to the evidence of the silver hatchback that was travelling along Smithe Street "in tandem" with the respondent's SUV. The judge noted that the hatchback started to slow down some three seconds before reaching the intersection of Smithe and Hornby, from which the judge inferred that a "three-second period" was clearly enough response time for the driver of the hatchback to come to a complete stop at the red light: reasons at para. 32.

- [22] The trial judge considered the Crown's submission that there were "all sorts of indicia that should have alerted [the respondent] to the red lights at Hornby Street", including the four distinctly visible red lights, the pedestrians crossing Smithe Street in the seconds before the respondent entered the intersection, and the silver hatchback that was initially traveling in tandem with the respondent's SUV and then slowed and stopped at the lights. In the judge's view, none of these indicia were "indicators of impending danger", which distinguished this case from other dangerous driving cases involving inattentiveness: reasons at para. 35. The trial judge also said she "cannot conclude" that the respondent did not see the pedestrians crossing in front of him: reasons at para. 35.
- [23] On this reasoning, the trial judge concluded that the respondent suffered a "lapse in attention" of somewhere between three and five seconds before entering the intersection on the red light: reasons at para. 33. More specifically, he "suffered a momentary lapse in attention", "at the point when he should have been slowing for the red light three seconds from the intersection": reasons at para. 35.
- [24] Accepting for the purposes of her analysis that the respondent had a five second "lapse of attention", the trial judge characterized this as "a very brief period of time", with "no evidence of a prior pattern of inattentiveness": reasons at para. 36. The trial judge then applied the modified objective test for mens rea as identified in the case law to determine whether this conduct "amounted to a marked departure from the standard of care that a reasonable person would observe in [the respondent's] circumstances": reasons at para. 36, citing Beatty at para. 43.
- [25] The trial judge characterized the relevant aspect of the respondent's driving as "[a] period of between three and five seconds of inattention where the driving was otherwise unexceptional": reasons at para. 37. In the judge's view, this amounted to "momentary conduct which, when assessed in totality against the reasonable person standard, represents only a departure, not a marked departure" from the standard of driving expected of a reasonable person in these circumstances: reasons at para. 37. Driving conduct of this sort, over such a "brief timeframe", was "more suggestive" of negligence at the civil end rather than at the criminal end of the "negligence continuum": reasons at para. 37, citing Beatty at para. 48.
- [26] On her assessment of "the totality of the evidence", the trial judge determined that the respondent's "single and momentary lapse of attention" following a "pattern" of driving that was otherwise "prudent" did not satisfy the mens rea element of dangerous driving, notwithstanding the "very tragic consequences": reasons at para. 38. On this basis, the trial judge acquitted the respondent on both counts.

On Appeal

Jurisdiction and Standard of Review

- [27] Appeals from acquittal in indictable matters are limited to questions of law alone: Criminal Code, s. 676(1)(a). The Crown has no right to appeal from an unreasonable verdict, and no ability to challenge a trial judge's weighing of the evidence leading to a finding that the case has not been proven beyond a reasonable doubt, unless that finding is shown to be tainted by legal error in the manner described below: Chung at para. 10; R. v. J.M.H., 2011 SCC 45 at paras. 25-27; R. v. George, 2017 SCC 38 at paras. 24-25.
- [28] A question of law may arise in a number of ways, two of which are said to be engaged in this case. The first is where the trial judge reaches an erroneous legal conclusion based on proven facts. The second is where the trial judge's assessment of the evidence rests on an extricable error of law. Both of these have been recognized as errors of law that may form the basis of a successful Crown appeal from acquittal: Chung at para. 11; R. v. Eddison, 2021 BCCA 168 at paras. 35-36.
- [29] Acquittals are not lightly overturned. The Crown bears a heavy onus of not only identifying an error of law, but also of showing with a "reasonable degree of certainty" the verdict "would not necessarily have been the same" had the error not occurred: R. v. Graveline, 2006 SCC 16 at para. 16, citing R. v. Sutton, 2000 SCC 50 at para. 2. The Crown must show the trial judge's legal error (or errors), "might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal": Graveline at para. 14.
- [30] It is also important to bear in mind the trial judge's reasons must be read as a whole and cannot be "parsed" in a "line by line" search for error: Chung at para. 13. However, mere recitation of the proper legal principles will not insulate a trial judge's decision from appellate scrutiny. Even where the judge states the correct legal test or governing legal principles, the reasons read as a whole may reveal a misapprehension of the law: Chung at para. 13, citing George at para. 16.
- (1) Trial Judge's Decision Not Tainted by a Misstatement of the Law
- [31] The Crown submits the trial judge misstated the law in asserting at para. 10 of her reasons that, according to the Court in Beatty, "a momentary lapse of judgment without more cannot establish the actus reus and mens rea of the offence of dangerous driving". In fact, this was the view expressed by Chief Justice McLachlin in her concurring minority reasons in Beatty at para. 72. The majority reasons of Justice Charron did not endorse this approach, and subsequent binding authority makes it clear there is no such categorical rule: Beatty at paras. 36, 51-52; Roy at paras. 26-27, 37; Chung at para. 22.
- [32] The Crown asserts, correctly in my view, that in practice a momentary lapse of attention or judgment will not usually involve the degree of culpability or objective fault necessary to satisfy the mens rea element of dangerous driving. To paraphrase from the reasons of Justice Cromwell for a unanimous Court in Roy at para. 37, a momentary lapse of attention may, depending on the circumstances, give rise to civil liability, or may support a finding of

careless driving under a provincial regulatory statute, but "generally will not rise to the level of a marked departure" required to support a conviction for dangerous driving under the Criminal Code.

- [33] However, the observation that in practical terms a momentary lapse in attention, without more, will generally be insufficient to establish the mens rea for dangerous driving must not be used as a shortcut around the proper application of the modified objective test for mens rea first articulated in Hundal, and subsequently affirmed in Beatty, Roy, and Chung. It would be an error of law for a judge to rely on such a categorical rule thereby failing to give full consideration to the totality of the circumstances bearing upon whether the conduct in issue rises to the level of a marked departure from the standard of care that a reasonable person would observe in the circumstances. To put it another way, a trial judge may fall into legal error by fixating on the categorization of the driving conduct as "momentary", in a manner that short-circuits a case-specific assessment of the totality of the circumstances.
- [34] This is precisely the kind of error committed by the trial judge in Chung. The driving conduct in issue in that case -- accelerating to almost three times the posted speed limit while entering a busy intersection -- occurred in the span of a single city block, over a matter of seconds. The trial judge acquitted, observing that although momentary conduct can be a marked departure, it will usually be characterized as a mere departure where the driving is otherwise proper, and later stating that his analysis turned "[c]ritically" on the fact that the accused's speeding was "momentary": Chung at para. 20.
- [35] After acknowledging the trial judge correctly stated the law, Justice Martin for the majority found that the judge fell into error by "relying on a legal principle, rather than making a determination of fact": Chung at para. 20. Read as a whole, the trial judge's reasons in Chung indicated he characterized the excessive speeding as "momentary" and then concluded this conduct was incapable on its own of establishing the requisite mens rea for dangerous driving: Chung at para. 20. Thus, "[t]he trial judge erred in focusing on the momentary nature of [the accused's] conduct, rather than analyzing whether the reasonable person would foresee the dangers to the public from that momentary conduct": Chung at para. 21.
- [36] The Crown submits the trial judge fell into the same error in this case. Indeed, the Crown asserts the trial judge's error was more explicit, as she incorrectly relied upon McLachlin C.J.'s minority reasons in Beatty. The Crown says the trial judge's misstatement of the law was neither isolated nor purely abstract, in that the judge repeated the same error throughout the analysis, distinguished some of the cases cited to her on the basis they involved more than a momentary lapse, and ultimately concluded the respondent's "single and momentary lapse" in a pattern of driving that was "otherwise" prudent was "not a criminal act": reasons at para. 38. In the Crown's submission, the error had a material bearing on the outcome, because on the trial judge's flawed approach, acquittal was a "foregone conclusion" flowing inevitably from the characterization of the respondent's conduct as a momentary lapse.

- [37] I accept the trial judge erroneously attributed McLachlin C.J.'s statement about the legal import of a momentary lapse to the majority in Beatty. However, I do not agree with the Crown that this was an error repeated throughout the trial judge's reasons, or that it had a material bearing on the outcome.
- [38] Near the beginning of her reasons, the trial judge quoted from the operative part of the majority judgment in Beatty, stating "[e]ven the most able and prudent driver will from time to time suffer from momentary lapses of attention": reasons at para. 3, quoting from Beatty at para. 34. The judge went on to observe that sometimes such a lapse will fall below the standard expected of a reasonably prudent driver, although not every departure will do so: reasons at para. 4. In the very next sentence of her reasons, the judge added that "what is a marked departure from reasonably prudent driving is a factual matter of degree and the totality of the evidence must be considered". This statement reflected the trial judge's appreciation that the conduct in issue -- even where it involves a momentary lapse -- must be scrutinized against the reasonable person standard to ascertain whether it rose to the level of a marked departure. This same passage of the reasons reflects the trial judge's understanding that this is a fact-intensive exercise requiring an assessment of the totality of the evidence.
- [39] Later in her reasons, the trial judge referred to Chung, observing "the Court again commented that momentary lapses in attention and judgment do not usually result in criminal liability if they result from the 'automatic and reflexive nature of driving', or 'simple carelessness, to which even the most prudent drivers may occasionally succumb'" [emphasis added]: reasons at para. 25, citing Chung at para. 22. Elsewhere in her reasons, the trial judge referred to cases in which it was held that conduct involving a momentary lapse in attention or judgment was insufficient to make out the mens rea element of dangerous driving. However, in those passages, the trial judge was describing outcomes in particular cases, not stating a general rule that a momentary lapse cannot in law amount to a marked departure from the reasonable person standard: reasons at para. 11, citing Roy; reasons at para. 14, citing Robertson.
- [40] Similarly, the trial judge's review of cases in which dangerous driving convictions were founded upon conduct that was "more than a momentary lapse of attention" was, in my view, nothing more than a canvassing of the authorities cited by the parties: reasons at paras. 15-22, reviewing Bagri, Hundal, and R. v. Heth-Klems, 2021 BCSC 2536. The trial judge did not find the outcomes in these cases of much assistance, because the conduct in issue involved more than a mere lapse in attention or judgment, making it somewhat easier to place at the criminal end of the negligence spectrum. I would add that in many circumstances prior cases are useful for their treatment of the relevant legal principles rather than their fact-dependant, case-specific outcomes.
- [41] The Crown further contends the trial judge erred by fixating on what she found to be the respondent's momentary lapse, when the nature of driving as an activity that is sometimes "reflexive" or "automatic" has been recognized as part of the rationale for adopting an

objective fault element for the offence of dangerous driving. However, the reality that drivers sometimes operate their vehicles without a great deal of conscious thought is a factor that cuts both ways. On the one hand, "it would be a denial of common sense for a driver, whose conduct was objectively dangerous, to be acquitted on the ground that he was not thinking of his manner of driving": Beatty at para. 37, citing Hundal at 885. On the other hand, the case law recognizes that even the most prudent driver will, from time to time, experience momentary lapses in attention or judgment, and for this reason criminal liability will only be appropriate where the driving conduct in issue rises to the level of a marked departure from the standard of care that a reasonable person would observe in the circumstances: Beatty at paras. 34-36.

- [42] It is now settled law that momentary lapses in attention or judgment are not "assessed differently" from other driving that poses a danger to the public, because "[c]onduct that occurs over a brief period of time" and which "creates foreseeable and immediate risks of serious consequences can still be a marked departure from the norm": Chung at para. 22, citing Beatty at para. 48. The trial judge's reasons, read as a whole, do not reveal a failure to appreciate this point.
- [43] In the end, the most that can be said is that a trial judge's finding that an accused's manner of driving involved a momentary lapse in attention or judgment is relevant, but by no means dispositive on the question of whether the mens rea of dangerous driving has been proven. Such a finding certainly cannot form an independent basis for an acquittal, standing in the place of a proper consideration of the totality of the circumstances under the modified objective test. The trial judge did not fall into this error. Rather than fixating on what she found to be the momentary nature of the respondent's dangerous driving, the judge considered that finding together with all the other circumstances to determine whether the respondent's conduct involved a marked departure from the standard of care a reasonable person would observe.
- [44] In my respectful view, although the trial judge made an isolated misstatement of the law, the reasons read as a whole reflect her understanding that a momentary lapse in attention or judgment can, depending on the circumstances, rise to the level of a marked departure from the standard expected of a reasonable person in all the circumstances.
- [45] And although the trial judge observed that a momentary lapse in attention or judgment that is attributable to "automatic or reflexive" driving, or mere "carelessness" will "not usually" be sufficient to satisfy the mens rea element of dangerous driving, she did not rely on that observation as a substitute for a proper analysis of the totality of the circumstances. As explained under the next heading, the trial judge considered and applied the correct legal test for determining whether the Crown had proven the mens rea element of the offences. In the result, the misstatement of the law based on McLachlin C.J.'s minority concurring reasons in Beatty did not have a material bearing on the trial judge's conclusion.

(2) Trial Judge Did Not Fail to Apply the Correct Legal Test

- [46] The Crown argues the trial judge failed to apply the correct legal test in determining whether the Crown had proven the mens rea element of the offences. More specifically, the Crown submits that, rather than assessing the risk arising from the respondent's manner of driving on an objective basis, the judge "confined her analysis to the respondent's subjective state of mind". The Crown cites various passages in the reasons in which the trial judge referred to the respondent's behaviour, or drew inferences about what the respondent was and was not able to perceive (reasons at paras. 27-29), leading up to her conclusion the respondent "suffered a momentary lapse of attention" (reasons at para. 35).
- [47] I do not agree with the Crown's submission the trial judge erred in considering the respondent's subjective state of mind. Under the modified objective test, "the trier of fact should be satisfied on the basis of all the evidence, including evidence about the accused's actual state of mind, if any, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances": Beatty at para. 43(b); Roy at para. 39.
- [48] In dangerous driving cases, evidence of the accused's actual intention or state of mind is relevant to proof of mens rea in at least two ways. First, proof of subjective mens rea -- for example, intentionally driving in a manner that one subjectively recognizes as posing a danger -- can be a basis for a finding of guilt: Beatty at paras. 47-48; Roy at para. 38. Subjective intention to drive in a knowingly dangerous manner is therefore sufficient but not necessary to satisfy the fault element of the offence.
- [49] Second, "evidence about the actual intention of an accused is relevant to a court's objective assessment of whether or not conduct constitutes a marked departure from the norm": Beatty at para. 47. To be clear, subjective intent is not an essential element of "negligence-based offences" like dangerous driving, but subjective fault may be grounded in a marked departure from an objective standard. In other words, objective fault sufficient to ground a conviction for dangerous driving can arise from the accused's failure to advert to and avoid the attendant risk, where there is a marked departure from the reasonable person standard: Beatty at para. 48; Roy at para. 36.
- [50] It therefore cannot be said the trial judge erred in considering the evidence shedding light on the respondent's actual state of mind, and in drawing inferences about his state of mind at the time of the incident. If the judge was satisfied beyond a reasonable doubt the respondent was aware of the risks associated with his manner of driving and proceeded into the intersection on a red light despite the risk, this could have been a basis for concluding the mens rea element of the offence had been established. Furthermore, and in any event, evidence shedding light on the respondent's actual state of mind was relevant to the judge's assessment of the extent to which his conduct departed from the reasonable person standard.

- [51] Nor do I find merit in the Crown's submission that the judge failed to apply the correct test for mens rea by considering the respondent's actions and what he was and was not able to perceive. The modified objective test must be applied flexibly in light of all the circumstances: Hundal at 886. Although the test does not allow for a consideration of "personal attributes" such as age, experience, and education, it is nonetheless necessary to place the reasonable person "in the circumstances the accused found himself in when the events occurred" in order to assess the reasonableness of the conduct: Beatty at para. 40; Roy at paras. 36, 38.
- [52] The overall thrust of the Crown's argument on the appeal is that the trial judge erred by fixating on her characterization of the respondent's conduct as a momentary lapse in attention, thereby failing to conduct a case-specific, evidence-based analysis of the mens rea element of the offence under the modified objective test. In my view, the reasons for judgment read as a whole reveal otherwise. The reasons demonstrate the trial judge not only set out the test correctly, but also applied it to the facts of the case.
- [53] The trial judge set out the test correctly. At para. 4 of her reasons, after observing "what is a marked departure from reasonably prudent driving is a factual matter of degree" based upon a consideration of the "totality of the evidence", the judge quoted directly from Roy for its discussion of both the actus reus and mens rea elements of the offence. In the next paragraph, the trial judge referred to what she described as the "two-step inquiry" set out in Roy at para. 36, in which the court must consider (i) whether, in light of all the relevant evidence, a reasonable person would have foreseen the risk and taken steps to avoid it, if possible, and (ii) 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. This was a correct summary of the two aspects of the modified objective test.
- [54] The trial judge applied the test to the facts of the case. Near the end of her reasons, after reviewing all of the circumstances and reaching conclusions about the nature of the respondent's driving, including but not limited to her characterization of his conduct as a momentary lapse in attention, the trial judge once again adverted to the modified objective test: reasons at paras. 36-39. She then reasoned "[a] period of between three and five seconds of inattention where the driving was otherwise unexceptional" was, in all of the circumstances, a "departure" from the reasonable person standard: reasons at para. 37. This finding addressed the first of the two steps set out in Roy. In the same sentence, the judge held the respondent's departure from the reasonable person standard did not rise to the level of a marked departure, and thus concluded the Crown failed to prove its case at the second step of the analysis.
- (3) Trial Judge Did Not Fail to Consider All the Relevant Circumstances

- [55] The Crown argues the trial judge took a "flawed approach to the evidence" and "wrongly discounted relevant factors" which inform the modified objective test for assessing the mens rea element of dangerous driving.
- [56] More specifically, the Crown says the trial judge improperly "discounted" certain "visual cues" that ought to have alerted the respondent to the upcoming red light. The Crown cites three such cues: (i) the fact there were four separate traffic lights all showing red for some 20 seconds before the respondent's SUV entered the intersection; (ii) the fact there were pedestrians in the crosswalk as the respondent approached the intersection; and (iii) the fact the silver hatchback, originally travelling in tandem with the respondent's vehicle, slowed and stopped while the respondent's SUV continued toward the intersection without slowing.
- [57] I do not find this submission persuasive. The trial judge's reasons reflect that she was fully cognizant of these "visual cues". She referred to each of them in her reasons, and took them into account in various ways in assessing the extent to which the respondent's manner of driving departed from the reasonable person standard. The Crown's complaint is not that the trial judge failed to consider these factors, but rather with her weighing of them. With respect, this is not a viable argument in the context of a Crown appeal that is statutorily limited to questions of law alone. Absent some extricable legal error, the trial judge's assessment and weighing of the evidence is a question of mixed fact and law not reviewable in an acquittal appeal. It is not the role of the appeal court to reweigh the evidence or substitute its view of the facts in the place of the trial judge's findings: *R. v. Javanmardi*, 2019 SCC 54 at para. 42; *George* at para. 17.
- [58] The Crown also submits the trial judge erred in failing to consider the setting in which the events unfolded, namely a busy downtown intersection, on a weekday evening, in the summer. With respect, I do not find this argument convincing. The trial judge described the setting of the incident in some detail. Although the reasons made no express reference to the season or the relative busyness of the area, it is clear from the judge's recounting of the evidence that she had an appreciation of the context in which the events unfolded. The judge was "not required to refer to every item of evidence considered or to detail the way each item of evidence was assessed": *J.M.H.* at para. 32.

Conclusion

- [59] The incident that gave rise to the proceedings against the respondent was a tragedy, and the respondent's driving was unquestionably the cause of that tragedy. His manner of driving -- proceeding into an intersection in a busy urban area, on a red light, with no apparent effort to slow or stop his vehicle, in the face of multiple "visual cues" -- was a manifest departure from driving norms. The consequences of the respondent's conduct were catastrophic and heart-breaking.

[60] The central issue the trial judge had to decide was not whether the respondent's conduct constituted civil negligence, or careless driving under a provincial regulatory statute, but rather whether it amounted to dangerous driving within the meaning of s. 320.13 of the Criminal Code.

[61] The case law tells us criminal liability for dangerous driving cannot be visited upon a driver unless the manner of driving is found to be both dangerous, and a marked departure from the standard of care expected of a reasonable person in all of the surrounding circumstances. After a three-day trial, the trial judge carefully considered that question and concluded the requisite mens rea had not been established. The judge made no error of law in reaching that conclusion.

[62] I would dismiss the appeal.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Chief Justice Marchand"

Reasons for Judgment of the Honourable Mr. Justice Willcock:

[63] I would allow the appeal. I agree with Justice Riley that the trial judge erred in expressing the view that a momentary lapse of judgment without more cannot establish the mens rea of the offence of dangerous driving. There is no doubt that conduct occurring in a few seconds can constitute a marked departure from the standard of a reasonable person: Beatty at para. 48; Chung at para. 22.

[64] However, I disagree with my colleague's conclusion that the judgment was not tainted by that error. In my opinion, the error was repeated and had a material bearing on the outcome. The trial judge appears to have been guided by the minority judgment in Beatty and her assessment of the evidence was therefore founded upon an error in principle. Because she was of the view that a momentary lapse, without more, could not constitute criminal liability, her engagement with the evidence focused on establishing the duration of the lapse in attention and evidence relating to the circumstances of the offence was discounted.

[65] The judge expressly distinguished the cases relied upon by the Crown, Bagri; Heth-Klems; Hundal; and Chung, on the basis that in each case there "was more than a momentary lapse of attention" (at para. 15), apparently being of the view that everything turned upon that distinction. She did not refer to the observation of Justice Duncan in Heth-Klems, for which the case was cited by the Crown, that in some circumstances a reasonable driver should not divert their attention for more than a fleeting glance where there are hazards there to be seen and not unexpected.

[66] I agree with the Crown's submission that here, as in *Chung*, the trial judge erred in focusing upon what she considered to be the momentary nature of the accused's conduct, rather than focusing on whether the reasonable person would foresee the dangers to the public from that momentary conduct. In doing so, she failed to consider the setting in which the events unfolded. The judge noted, in para. 6 of her reasons, that the defence had agreed that driving through a red light during rush hour was driving in a manner that was dangerous to the public but had argued that his conduct was not a marked departure from the standard of care required in the circumstances. Yet, as my colleague points out, there is no reference to the surrounding circumstances in the trial judge's analysis. It is true that a trial judge need not refer to every item of evidence considered, but the absence of reference to critical circumstances in this case makes it impossible for me to say the misstatement of the law was not material.

Inadequate Consideration of the Traffic in the Intersection

[67] The evidence was that eleven pedestrians, four bicyclists, and five cars, including a yellow taxi, had passed through the intersection on Hornby Street, travelling north, directly in front of the path of the vehicle driven by the respondent before he entered the intersection. The judge dealt with that evidence in a manner that is somewhat difficult to understand but suggests she considered it to be exculpatory, as follows:

[34] The Crown also says that there were all sorts of indicia that should have alerted Mr. Moshfeghi Zadeh to the red lights at Hornby Street. In addition to the four red lights, there were pedestrians clearly in the crosswalk up to three seconds before he entered the intersection and then, three seconds before he entered the intersection, the silver hatchback beside him began slowing down.

[35] However, in most cases of inattentiveness, there are indicators of impending danger which other people readily see, but which the accused fails to see. In addition, just because the lights were red and there were pedestrians in the crosswalk for one or two seconds after Mr. Moshfeghi Zadeh should have been looking ahead to the intersection of Hornby Street, I cannot conclude that Mr. Moshfeghi Zadeh did not see them. What I can conclude is that, at the point when he should have been slowing for the red light three seconds from the intersection, he suffered a momentary lapse of attention.

[Emphasis added.]

[68] The red hand, no-walk signal facing pedestrians crossing Smithe Street turned to a white "walk" signal at 6:02:01 and pedestrians were in the crosswalk from that time until shortly before the respondent's vehicle entered the intersection against the red light at 6:02:20. Three were in the crosswalk when the accused crossed Howe Street but others, including the accident victims, were in the crosswalk as the respondent drove along Smithe Street approaching the green light at Howe Street.

Inadequate Consideration of the Period During Which the Light was Red

- [69] Surprisingly, the duration of the red traffic signal was only mentioned by the trial judge as a factor exculpatory of the respondent; the judge said:
- [29] The traffic light facing Mr. Moshfeghi Zadeh at Hornby Street had been red for approximately 20 seconds before he entered the intersection. Therefore, he was not trying to beat a red light by speeding up on an amber light such as in the Hundal case.
- [Emphasis added.]
- [70] In my view, the judge's attribution of the fatal accident to a momentary lapse of perhaps three seconds was affected by an erroneous conception of the standard of care. That resulted in a very circumscribed consideration of the surrounding circumstances, including the duration of the red light. Frequent reference has been made to Justice Doherty's description of the "negligence continuum" in *R. v. Willock*, 212 OAC 82 at para. 31: "conduct that occurs in such a brief timeframe in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum". This passage was cited with approval in *Beatty*: at para. 48. In a case that turns on the distinction between a mere departure and a marked departure from the norm, the question is where the case lies on the negligence continuum. Much can turn on the duration of inattention.
- [71] The evidence before the judge was that a driver approaching the intersection at the speed limit would have travelled a distance of approximately 290 metres, three city blocks, while the light was red before entering the intersection. In that period the driver would have travelled from Seymour Street, and through intersections at Granville Street and Howe Street before entering the intersection of Smithe and Hornby Street.
- [72] As in most urban core areas, there are traffic control devices at every intersection of every major street in downtown Vancouver. A driver is able to see not only the light at the nearest intersection but also those the driver will next encounter. One need not pass one intersection before considering what lies ahead. It takes more than momentary inattention to travel 290 meters without seeing the next red light one is approaching, if those through which one is passing are green, as appears to have been the case here.
- [73] In my respectful view, the trial judge erred in describing the standard of care in the following terms:
- [30] [A] prudent driver does not focus on traffic lights three blocks away. Prudent drivers are focused on the traffic lights immediately in front of them to which they must respond. It is only once Mr. Moshfeghi Zadeh had travelled through the intersection of Howe Street that he would be expected to then turn his attention to the next traffic lights at Hornby Street.

- [74] Drivers do not, and should not, focus their attention on singular objects but should be aware of their surroundings generally, including those that lie ahead. In my opinion, the judge erred in adopting a standard of care that effectively discounted the fact that the light at the Smithe and Hornby intersection had been red for a long time before Mr. Moshfeghi Zadeh drove through it.
- [75] The opinion that only once Mr. Moshfeghi Zadeh had travelled through the intersection of Howe Street would he be expected to then turn his attention to the traffic lights at Hornby Street serves as the basis for the trial judge's calculation of the period of his "momentary lapse of attention". There was, in fact, no evidence of the period of inattention, all was speculation founded upon the trial judge's view that one need not look ahead until one has passed under a traffic light at an intersection.
- [76] The trial judge's description of the conduct expected of a "prudent driver" underlies what is said at para. 36, "even if I were to conclude that Mr. Moshfeghi Zadeh had a lapse of attention for five seconds, it is a very brief period of time where there was no evidence of a prior pattern of inattentiveness" (emphasis added). In my view, the fact that the driver did not recognize that the light facing him at Smithe Street was red and that pedestrians and traffic were crossing in front of him well before crossing Howe Street is some evidence of prior inattentiveness, even if his immediate attention was directed at the light at each intersection he passed.
- [77] Further, in my view, even accepting the trial judge's view that prudent drivers need only focus upon lights immediately in front of them, her assessment of the period of inattention is founded upon a misconception. It implies drivers are looking upward as they pass under traffic lights at an intersection and only after passing the light, and not before, will prudent drivers look ahead. Common sense suggests that drivers will decide at some reasonable distance before entering an intersection that the light will remain green and they can proceed safely. After making the decision to do so, if not sooner, drivers' attention should be focused upon the next traffic light, well in excess of a city block away.
- [78] The trial judge was of the view that the respondent need not have focused on the light at Hornby Street until after he had passed Howe Street but, further, made allowance for additional time that would be required to turn attention to that light after passing through the Hornby Street intersection. She reasoned:
- [31] The video evidence demonstrates that, at a speed varying between 41 kilometres per hour and 50 kilometres per hour, it took six seconds for Mr. Moshfeghi Zadeh to travel the one-block span from the intersection of Smithe and Howe to the intersection of Smithe and Hornby from 6:02 and 14 seconds to 6:02 and 20 seconds. The Crown agrees that it is reasonable to infer that it would take a prudent driver at least one second to transfer their view and to react to the streetlights ahead at Hornby Street after passing through the intersection at Howe Street. So Mr. Moshfeghi Zadeh had five seconds to begin focusing on and reacting to the red lights ahead at Hornby Street.

- [79] The trial judge was correct to say "[w]e do not know when Mr. Moshfeghi Zadeh suffered a lapse of attention" but, with respect, there was no basis for drawing the inference that "it was somewhere between three seconds when he should have begun slowing down for the red light at Hornby and five seconds when he should have first noticed the red lights at Hornby after passing through the intersection of Howe Street": at para. 33.
- [80] The evidence at trial was that, travelling at 50 kilometres per hour, it would take a vehicle 7.2 seconds to travel the 100 metres of Smithe Street between the intersections of Howe and Hornby streets (that is consistent with the video evidence referred to by the trial judge, that does not record fractions of seconds). There is no basis for saying the respondent's inattention was shorter than that period, even accepting (as I do not) the trial judge's view that a driver need not be aware of the status of upcoming traffic control devices at rush hour in downtown Vancouver.

Evidence of the Conduct of the Driver in the Adjacent Lane was Misused

- [81] There was evidence that a vehicle adjacent to that driven by Mr. Moshfeghi Zadeh began to slow down two seconds after crossing Howe Street. The judge did not place any weight upon that visual clue to Mr. Moshfeghi Zadeh of the fact the approaching light was red but, rather, considered it to be some evidence of when the other driver became aware the light at Hornby Street was red. In colloquy during submissions, she described the obligation of drivers in the following terms:

They have to focus on traffic lights in front of them. And so until he had passed the traffic light at Howe Street, he wouldn't start focusing on the traffic light at Hornby Street and that would take a second or two to adjust their focus which we see from the hatchback that's exactly what happened. It took a second or two for the hatchback to then start responding, if you will, to the red light at Hornby Street.

[Emphasis added.]

- [82] When the judge expressed this view, Crown counsel responded, correctly in my view, that one cannot infer that the other driver only observed the red light at the point that they applied the brakes. That driver may have seen the red light long before slowing. However, in her reasons for judgment, the judge appears to have relied upon the evidence of the conduct of the other driver to support her assessment of the period of inattention. She said:
- [32] The video evidence demonstrates that a silver hatchback, which was travelling in tandem with the SUV when the vehicles emerged from the intersection of Smithe and Howe, began to slow down at 6:02 and 17 seconds which was three seconds from the intersection of Smithe and Hornby. Presumably, the hatchback was slowing for the red light at Hornby Street as it continually slowed until it came to a full stop at Hornby Street. The three-second period during which the hatchback responded to the red light at Hornby Street was clearly enough response time as the hatchback was easily able to stop for the red light.

- [33] We do not know when Mr. Moshfeghi Zadeh suffered a lapse of attention, but it was somewhere between three seconds when he should have begun slowing down for the red light at Hornby and five seconds when he should have first noticed the red lights at Hornby after passing through the intersection of Howe Street.
- [83] Paragraph 33 of the judgment is a non-sequitur unless the conduct of the driver of the hatchback was used inappropriately for the purpose of determining when a prudent driver ought to have first been aware of the red signal.

Conclusion

- [84] I am acutely aware of the words used by Justice Abella in Javanmardi to describe the role of appellate courts in cases where the Crown challenges a conclusion that the marked departure test is not met:
- [42] This Court has frequently cautioned against appellate courts transforming their opposition to a trial judge's factual findings and inferences into attributed legal errors (R. v. George, [2017] 1 S.C.R. 1021, at para. 17). There is no basis for overturning Villemure J.'s findings or her conclusion that the marked departure threshold was not met. It was not open to the Court of Appeal, with respect, to reweigh the evidence or substitute its own factual findings on this critical issue.
- [85] However, where, as here, the trial judge has misstated the law, it is necessary for us to look to the evidence that was before the trial judge in order to determine whether the judgment is tainted by that error.
- [86] In his separate concurring reasons in Beatty, Justice Fish observed (at para. 90): "[t]here may well be circumstances in which inattention, even transitory, will suffice to establish the fault element of dangerous driving". Whether this is such a case requires more careful examination of all the surrounding circumstances than that which occurred in the court below. Because I am of the view there was inadequate consideration of the circumstances that ought to have been considered in determining whether the Crown had proven the mens rea of the offence, I would allow the appeal, set aside the acquittal and order a new trial pursuant to s. 686(4) of the Criminal Code.

"The Honourable Mr. Justice Willcock"

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