
CANADA / JUDGMENT

R. v. Rogers

2022 BCCA 346

COURT

British Columbia Court of Appeal

DECIDED

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2022 BCCA 346 R. v. Rogers

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Rogers,

2022 BCCA 346

Date: 20221013

Docket: CA47492

Between:

Rex

Respondent

And

Brennan Warren Rogers

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Butler

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

August 14, 2020 (conviction) (R. v. Rogers, 2020 BCSC 2144,

Chilliwack Docket 66642).

Counsel for the Appellant:

B.R. Anderson

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Counsel for the Respondent:

L.A. Vizsolyi

Place and Date of Hearing:

Vancouver, British Columbia

September 22, 2022

Place and Date of Judgment:

Vancouver, British Columbia

October 13, 2022

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Butler

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

On appeal from convictions for dangerous driving causing death and dangerous driving causing bodily harm, CA found trial judge had misapprehended evidence and made an error of law such that cumulatively, an appearance of unfairness was created, and the fairness of the trial itself may have been affected. Result would not necessarily have been the same in the absence of such errors. Held: Appeal allowed and new trial ordered.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] On the afternoon of August 13, 2016, the appellant Mr. Rogers, then age 19, was driving three friends in his Jeep Cherokee from a small centre called Deroche, to a campsite where the four had been "celebrating" the life of another friend who had recently died while hiking in the area. The appellant lost control of his vehicle and it plunged down a steep embankment on the right side of the road. Tragically, one passenger, Mr. Carpenter, age 26, died at the scene; two others, Mr. Simpkin and Mr. Grochowicz, were injured.

- [2] After a five-day trial in July 2020, the appellant was found guilty, by judge alone, of dangerous driving causing death and two counts of dangerous driving causing bodily harm contrary to ss. 249(4) and 249(3) of the Criminal Code. In general terms, the trial judge found that the appellant had intentionally tried to "drift" or fishtail his vehicle at a turn in the road and that this attempt amounted to a marked departure from the standard of care expected of a reasonable driver in the circumstances.
- [3] The appellant contends that the convictions are the product of a miscarriage of justice by reason of numerous misapprehensions of fact by the trial judge, and that the judge also erred in law in certain respects. The Crown acknowledges two errors of fact in the trial judge's reasons, but submits that they are of a technical nature and were harmless given the weight of the evidence against the appellant. It asks that the appeal be dismissed. The Crown does not, however, seek to invoke the curative proviso in s. 686(1)(b)(iii) of the Code should that become necessary.
- [4] For the reasons that follow, I would allow the appeal. I do not say that it was not open to the trial judge to have convicted the appellant on the evidence before the Court, but I am of the view the result would not necessarily have been the same had the errors and irregularities described below not occurred.

Factual Background

- [5] In August 2016, the appellant had a "L" or "learner's" driving permit, having failed two attempts to obtain an "N" or "new" driver's licence. His mother had given him the Jeep Cherokee, which was still insured in her name, in the fall of 2015. He had made various repairs to it and had installed a "lift kit" with the help of some friends, and had it inspected by an automobile shop afterwards. There was expert testimony, as well as testimony from the appellant himself, that the "lift" made the vehicle more "tippy" in that the centre of gravity was raised a few inches higher than it would otherwise have been.
- [6] On August 12 -- the fourth occasion on which the appellant had driven the Jeep since installing the lift kit -- he drove with Mr. Carpenter from his home in Port Moody along Highway 7 (the Lougheed Highway) to the Chehalis Forest Service Road ("FSR"), where there was an unmarked campsite. This was the location of the celebration of life. The FSR had no posted speed signs, but under the Forest Service Road Regulation, B.C. Reg. 302/2012, the maximum specified speed was the lesser of 80 kmh and any posted speed. There was no evidence of any posted limit.
- [7] The appellant's vehicle was the third in a "convoy" along the rough surface of the road to the campsite. He had not driven the road before and had no idea where the campsite was, so had to keep close behind the two cars ahead of him. Visibility was very poor because of dust they threw up, and it was dark by the time they got to the FSR. The appellant testified that the convoy was driving at 60 or perhaps 70 kmh and that he felt uncomfortable because of the poor visibility. His headlights and fog lights were turned on. When the convoy stopped at

one point, he asked one of the other drivers, Mr. Grochowicz, if he would swap places with him because he was having trouble seeing, but Mr. Grochowicz did not agree to do so.

- [8] The convoy finally made it to the campsite safely. There, the attendees socialized in the evening and camped overnight. The appellant testified that he consumed some liquor and one marijuana cigarette, and slept in the Jeep.
- [9] Late the next morning, the appellant drove Mr. Carpenter, Mr. Simpkin, and Mr. Grochowicz back down the road towards Deroche to buy supplies, stopping on the way to have a swim at Elbow Lake. According to the testimony of Mr. Grochowicz, who was sitting in the back seat, the appellant's driving was "a little fast. I think the whole time we were going a little too fast, I mean trying to slide the corners and that." (My emphasis.) He estimated the Jeep's speed as about 60 kmh. He said that "at one point" he told the appellant, in a somewhat joking manner, that he was "a little nervous" with the appellant's driving. The appellant changed his driving only very briefly. This was, Mr. Grochowicz said, "on the way back ... from the store." In cross-examination he agreed this might have occurred earlier on the way to Deroche.

[10] Early in his testimony in chief, Mr. Grochowicz described the accident as follows:

As we were speeding towards the left-hand turn, the Jeep had slid to the left so the front pointed to the left side, and then [the appellant] tried to correct it by steering to the right, and as it steered to the right it caught traction, and we -- and the Jeep fishtailed and pointed to the right, and then went straight off of the edge.

Q How quickly did that whole thing take place?

A Oh, about two seconds.

[11] He described what he meant by "fishtailing" or "drifting":

Q Okay. And can you describe what you mean by fishtail?

A So when -- if you lose control in a vehicle, and you start to slide one way, your reaction would be to steer the other way, so when you steer it the other way and then it catches traction, that's a fishtail.

...

Q Okay. So initially as the rear end begins to come around to the right, in order to counteract that, you would actually steer the front wheels to the right, wouldn't you?

A Yes.

Q In order to regain control of the vehicle?

A Yes. Absolutely.

Q When the rear end is coming around, you've lost control?

A Yes.

Q And you're trying to regain it?

A Yes.

Q And if you steer too much that can cause the rear end to come back around to the left really quickly, can't it?

A Yes.

Q And then you have to steer the other way?

A Yeah.

Q Sometimes you can't stop it, can you?

A That's right.

Q And it goes all the way around?

A That's right.

Q So the rear wheels end up going in front of the front wheels?

A Exactly so. [Emphasis added.]

[12] He did not "feel" the brakes being applied before the Jeep went off the road. He recalled that there had been a dog in the back seat. When asked if Mr. Rogers had "said anything about the dog before the crash", he said:

At one point he [the appellant] told me to hold onto his dog, because his dog was sitting between me and Alex and the dog was getting tossed around a bit. [Emphasis added.]

In response to the Crown's question of whether the appellant had been "trying to slide around the corner before the crash" (my emphasis), Mr. Grochowicz answered, "Yeah".

[13] The appellant took the stand at trial. He agreed the convoy to the campsite had travelled at 60-70 kmh, slowing to not less than 30 kmh at the corners. He acknowledged that on the way from the campsite to Deroche, he had tried to "drift" the Jeep on three occasions. The first two attempts, he said, were "horrible", the third was successful. He recalled being asked to modify his driving before the stop at the lake. With respect to the surface of the road, he noted as he drove that "if you were to accelerate a little hard, the tires would spin."

[14] The appellant testified that during the last leg of the journey back to the campsite, he had slowed down to "a crawl" to cross the bridge and then slightly accelerated after leaving the bridge. The road curved first to the right and then to the left, where in his words "The back end [of the Jeep] started kicking out and I was not expecting it. I remember being freaked out, and then I tried correcting". The right rear of his car was fishtailing "further outside". He was terrified. He continued:

I remember steering out of that corner so I was steering left and then I tried steering right to correct it and I don't remember if I had hit any of the gas or brake pedals.

and further:

Q Okay. And -- and your initial response to that with the steering wheel was what? What did you do?

A Steer the other way. I tried to counteract the fishtailing by steering -- I remember seeing the -- the base of the cliff face on the left side, like the wall and being scared, and trying to turn out of it.

Q Right. And you've indicated turning but you need to tell us what -- what direction you were turning.

A I was turning to the right.

Q What happened next as you recall it?

A I recall doing that turn, realizing that I had over-corrected and then we were off the road.

Q The term "over-corrected" is one that you'll need to explain. What do you mean by "over-corrected?"

A I over-steered. I turned --

Q In what direction?

A -- the steering wheel too much. I -- I remember turning it more than once, if you would. Like I didn't just go turn, turn. I circled around the steering wheel --

Q Yes.

A -- and I had made what I would call an over-correction.

Q You said you steered too far. You mean you turned the wheel too far?

A Yeah, I turned the wheel too much

Q Okay. And then what happened?

A The vehicle then -- I was completely out of control of the vehicle and we went off the road.
[Emphasis added.]

[15] In cross-examination, he estimated that after slowing to about 30 kmh on the bridge, he had accelerated to about 40 or 50 kmh. He had "no idea" why his car had fishtailed. He testified that he would not have tried to "drift" the vehicle on this stretch of road, given its narrowness and the unforgiving nature of the terrain on each side.

[16] The vehicle went over the right side of the embankment, rolling over several times down towards a ravine. Mr. Rogers did not lose consciousness and was able to walk away from the car, as was the dog. The appellant's passengers were not so fortunate.

[17] Emergency and police vehicles attended the scene. One police officer, Cst. Bennett, checked Mr. Rogers' identification. She testified:

I don't recall what I asked, because I did not write that in my notebook, but he did -- Mr. Rogers did say he was the driver, and that he was travelling approximately 60 kilometres an hour, that he had gone around a curve and started to fishtail, and then went down an embankment.

Cst. Bennett made a very summary note of her conversation, which indicated the driver said he had been going 60 kmh. The statement was ruled voluntary after a voir dire. However, it was never admitted into evidence in the trial proper. It was held by the Crown for cross examination but the appellant was never cross examined on it. According to the appellant's testimony, he told her he was "pretty sure" he was going "50, maybe 60", just before the crash.

[18] Expert evidence was given at trial. For our purposes, two of the experts are important. First, Mr. Jeffrey Hall was called as an expert on the topic of vehicle inspection. He found no sign of any mechanical malfunction in the Jeep; confirmed that the lift kit made the vehicle "tippy"; that the tread on the tires was worn and close to the legal limit; and that because of the age of the Jeep, the ABS system was likely not working at all when the vehicle was sliding sideways. The defence does not challenge any of these conclusions on appeal.

[19] Sgt. Dyson testified as an expert in the area of accident reconstruction, although did not provide a written opinion. He attended the scene in November of 2016, some months after the accident. He had driven the FSR several times before and said he would consider a speed of 50-60 kmh to be "average", with slower speeds at corners. His opinion evidence was based on photographs of the roadway and markings or striations thereon, as well as a three-second video clip recovered from the phone of Mr. Carpenter. It was taken as, or after, the Jeep left the road.

[20] Since no measurements were taken of markings on the road, Sgt. Dyson was unable to link the marks shown on the road in the photographs with any particular vehicle. He agreed that the gravel and hardpan surface would make it harder to gain traction than an asphalt surface, for example. He opined that the marks shown in the photos indicated that "the vehicle" -- i.e., the vehicle that had made the marks shown in the photos -- had rotated to at least 90 degrees and perhaps more as it reached the edge of the road. He could not estimate its speed when it left the road. One tire had been "spinning" around and around and pushing sideways, indicating "no appreciable braking". He continued:

... All four marks meet right -- go right to the edge, which means that the leading tires, which would be the left side tires or the front tires, depending on the actual attitude, went over the side and carried the vehicle over.

[21] He was asked what a driver should do when a vehicle "begins to rotate around its centre of mass". He answered:

A If the vehicle begins to rotate around its centre of mass, the -- what we teach is to steer into the skid, so the direction the vehicle is trying to travel. So if the vehicle is rotating clockwise, we would teach to steer to the left so that in the -- so what traction those front wheels do have can pull that front back into the original or intended path of travel.

Q Okay, when you said that if a vehicle is -- is rotating clockwise, which part of the vehicle is rotating clockwise?

A The whole vehicle is rotating around what would be known as its centre of mass.

Q Okay. And so if the back end is rotating to the right, how does one steer into the skid?

A To the right.

Q If that was happening, and the back end was steering to the right, and you steered to the left, what would happen?

A Assuming the ve -- the front tires had some contact with the road surface still, and some -- some amount of traction, it would actually increase the rate of spin. So the vehicle would actually rotate quicker.

Q In the same direction that it was already spinning?

A Yes. [Emphasis added.]

[22] Sgt. Dyson described "fishtailing" as follows:

A A fishtail is a layman's term for what we're exhibiting -- seeing here in these marks, is where the rear of the vehicle slides out beyond the normal track, and the -- as a fish's tail comes out beyond, and the vehicle begins to rotate.

Q Can you tell a difference between a drift mark or a fishtail mark?

A Effectively they are the same thing. A drift suggests that it was intentional, whereas a fishtail may or may not have been intentional, typically.

Q Okay. What type of driving, if any, could cause a vehicle to fishtail, besides deliberately trying to drift?

A Typically a fishtail would be from an aggressive steering input, which is more harsh or too harsh for the speed the vehicle is travelling. It can take less the faster the vehicle is travelling.

Q And would a gravel road affect the speed required to cause a fishtail?

A A gravel road under most circumstances with a lower coefficient of friction would make that -- make it easier to do at lower speeds. [Emphasis added.]

[23] Sgt. Dyson acknowledged that he himself had "drifted" unintentionally twice (in controlled conditions). He was asked if he would try "drifting" in the location shown in the photos and replied, "Absolutely not". He explained:

It would be difficult to find a more impractical place to attempt to drift a vehicle. First of all, it's not closed quarters, so there's no way to know what vehicles are coming the other way. As we saw on the video, this is an active logging road so there's large vehicles that are travelling up and down that road. In the video and in -- in the pic -- in the picture, particularly image a, there's a rock wall on the left-hand side, in other places there's just a steep embankment, and to the right there is an embankment downwards. So it's not a great place, there's no forgiveness in the event of an error.

[24] The trial judge described Sgt. Dyson's testimony about drifting as follows:

He also testified as to the qualities of a lifted vehicle such as the Jeep Cherokee. He noted that the lifted vehicle would tilt more than a regular vehicle, and the more the tilt or the lift, the higher the centre of gravity causing the vehicle to roll more noticeably, such that the occupants would feel more lateral movement as the vehicle cornered than were they in a normal vehicle.

He testified regardless of whether the road was asphalt or gravel, that a lifted vehicle would tilt more than a regular vehicle. He testified as to what constitutes the term "drifting". Drifting, according to his evidence, is generally thought of as a motorsport, where the rear tires are made to spin, losing traction on the roadway, so that the vehicle is travelling at an angle. Done professionally, it is usually done with a vehicle with increased horsepower and a lowered centre of mass, so as to be less likely to roll. It is usually accomplished by a combination of either over steering or acceleration.

Once the vehicle is drifting, a combination of brake and throttle are used by professional drivers to ensure the steering angle is correct. He opined that drifting, if done by a layperson, is not easy to control.

When asked as to a reasonable speed of the Chehalis Forest Service Road in the area where the incident occurred, he testified that depended on the makeup of the roadway. He opined straight sections would be safe at 50 to perhaps 60 kilometres per hour, but that curves or corners called for a reduction of speed. He offered no specific speed for the particular curve or corner where the accident began to unfold, but said that one would need to reduce speed.

In preparation for his opinion, he drove the location of the accident and said that one needs to reduce speed around the corner because in the area of the accident the road narrowed with a cliff on the left hand side, a steep embankment on the right hand side, and the view in the direction of travel was obscured because of the road conditions, that is curves. At the location of the accident, he opined that a reduction of speed would be appropriate from what otherwise would be normal. He said that 40 to 45 kilometres per hour as one approached the accident site would be appropriate, but added because of the shortness of the curve, and then a curve in the opposite direction, an even greater reduction might be warranted. He did not offer a specific opinion as to

the speed at which a lifted Jeep might safely make the turn. [At paras. 113-17; emphasis added.]

[25] Sgt. Dyson was also asked about the video from Mr. Carpenter's phone. The judge recounted his evidence thus:

When he reviewed the video retrieved from Mr. Carpenter's cellphone, Sergeant Dyson offered the opinion that the rollover had actually begun by the commencement of the video. He observed the right hand of the accused coming off the steering wheel as the vehicle continued to rotate, and there was no positive contact between the accused's right hand and the steering wheel throughout.

In cross-examination, he confirmed that because of [the dog] Jackson's ears going in, I will say, various directions throughout the three second video, it is clear the video was starting its roll, and the same with the orientation and the angle of the trees that eventually appear near the end of the short video. He opined that by the point of the crossover of the tires, the Jeep had lost control. He further opined that control might have been regained with proper steps.

...

Finally, he stated that initiating a drift can result from aggressive steering input. He saw no visual evidence on the roadway that the Jeep had turned aggressively. He commented upon the effect of the lift kit, which he said creates a higher centre of mass, that is centre of gravity, making the rollover propensity much higher or higher, and that would be enhanced by the fact there were four adults and a dog in the car, again increasing the propensity for rollover, and makes cornering more problematic if travelling near or at the critical curve speed. [At paras. 125-26, 128.; emphasis added.]

[26] Another police officer, Corp. Clark, was called, but not as an expert. The day after the accident, he had taken the photos that were in evidence. He testified about the nature of the Chehalis FSR. In his words:

It runs south to north from the Morris Valley Road just off of Highway 7, from the Harrison Mills area, and it's windy, bumpy, gravel road. It's got potholes. It's got mainly uphill grade, but some downhill. Loose gravel, compact areas. There's larger rocks that are just breaking the surface in some areas. It widens in some places, it's narrow in some places. And during the summer particularly it's busy, particularly weekends and sunny days because there's a lake up there, and a lot of various different places to camp.

When asked what speed was appropriate on the road (presumably the FSR), Corp. Clark said that in the summertime, when the road is usually very dry and dusty, and there are many potholes and loose gravel, he would drive at about 40 kmh.

Trial Judge's Reasons

[27] I do not intend to review the trial judge's reasons in their entirety. They are indexed as 2020 BCSC 2144 and I refer the reader to them. It will be necessary, however, to reproduce below additional passages from the Court's conclusions in the course of my analysis.

[28] In his "Analysis and Conclusion", the trial judge correctly noted the requisite elements of the offences of dangerous driving causing death and dangerous driving causing bodily harm, citing *R. v. Roy* 2012 SCC 26. The Crown submitted that the evidence before the trial judge demonstrated that the appellant had been attempting to slide or "drift" his vehicle as he "emerged from the corner preceding the area where the vehicle left the road" and that he had been aware of the risks associated with such conduct, given his acknowledgement of having "drifted" three times when driving earlier. The appellant himself had described these attempts at drifting as "very skittish and unsafe". Alternatively, the Crown argued that the only other explanation for his loss of control of the vehicle was that he had been traveling at an excessive speed having regard to all the circumstances, including the "tippiness" of his vehicle, the slippery gravel and hardpan surface of the road, and his status as an "L" driver. (At para. 135.)

[29] The trial judge acknowledged that because the appellant had testified, *R. v. W.(D.)* [1991] 1 S.C.R. 742 was applicable. He correctly described the required W.(D.) analysis. He noted that Mr. Rogers had been unable to offer an explanation for losing control of the car but had testified he had not been trying to "drift" and that he had "slowed appropriately" for the corners as he proceeded off the bridge. The judge continued:

... To be clear, the accused need prove nothing. Absent evidence from the accused as to the cause of the rollover, I am left to consider whether his evidence as to his manner of driving immediately prior to the rollover can stand in harmony with the evidence of Tomasz Grochowicz and the opinion evidence of Sergeant Dyson as to the causation of the rollover. [At para. 140; emphasis added.]

[30] The judge said he did not accept the accused's evidence and was not left in doubt as to his manner of driving. The judge set out the following reasons in his para. 141:

- 1) His description of his driving in the same area on the previous night at 60 to 70 kilometres per hour in dark and dusty conditions is at significant odds with the prudence he maintains he took in the moments before the accident, in better light conditions, less dust, and not following other vehicles;
- 2) The variance in his description throughout the evidence as to his speed at the relevant time. At the beginning of the corner where he began to fishtail, he says he told Constable Bennett he was going some 50 to 60 kilometres per hour, which is not consistent with the evidence that he said he slowed for the curve. He does not acknowledge that he told her the 60 kilometres an hour that she recorded when she inquired about the circumstances of the accident. Here I acknowledge that Constable Bennett's evidence was admitted solely for the

purpose of cross-examination and for impeachment purposes. She did not perform a proper "Q and A", writing down each question and answer. However, in my view, the accused modified his evidence as to the speed of the actual corner by saying he slowed to an unknown speed, qualifications seemingly not offered to Constable Bennett;

- 3) His denial of telling Tomasz Grochowicz to hold onto the dog. The significance of that would be benign if not for Mr. Grochowicz's evidence that such occurred just before the accident, in the moments before what Mr. Grochowicz described as the accused's attempt to drift the vehicle;
- 4) The accused said he could not recall braking and that seems consistent with the opinion of Sergeant Dyson and Mr. Grochowicz, and while there are no precise measurements at the scene which inform the precise distance the vehicle travelled from the onset of it beginning to fishtail, which he says occurred earlier in the right hand curve, the photos depicting the first sign of skidding on the roadway make clear that there is a significant distance covered by the Jeep before it left the roadway, and if the accused was travelling at the speed suggested by him in his evidence, braking would have been, in my view, an instinctive response and likely would have stopped the vehicle before it left the roadway;
- 5) The accused acknowledged his attempts on the way to Deroche to drift the vehicle and says he stopped in part because of vocal complaints about the manner of his driving, but in a fashion which made the complaints based on the solemnity of the celebration of life and not so much the unsafe manoeuvring, which he admitted he was performing; and
- 6) Finally, I note the conflict in the evidence with Mr. Franzke, who is adamant the accused told him at the scene, as well as several days later, that something had fallen off. The accused made no mention of unexplained fishtailing to Mr. Franzke.

Quite apart from what I consider those internal inconsistencies, his evidence cannot stand in harmony with the evidence of the expert testimony as to the mechanisms for the events causing the vehicle to go over the embankment, that is the fishtailing, (1) the intentional drifting of the vehicle, or (2) excessive speed, having regard to the road conditions and particularly the curvature of the road. The accused denied both of these, but there is no other explanation for the rollover, other than those opined by Sergeant Dyson, which is in conformity with the evidence of Tomasz-Michal Grochowicz who says that the accused was attempting to drift the vehicle. [At para. 141-42; emphasis added.]

- [31] In summary, the trial judge rejected Mr. Rogers' evidence as "self-serving and in polar opposition" to the available photographic evidence, the expert evidence, and the testimony of Mr. Grochowicz. The judge concluded on the totality of the evidence -- "that is speed coupled with the makeup of the roadway, its surface, and the curvature, along with the accused's knowledge of the characteristics of the vehicle" -- that the Jeep had been driven in a manner that was objectively dangerous. (Citing *R. v. Beatty* 2008 SCC 5 at para. 20.) He continued:

The actus reus, in my view, is established by the unexplained loss of control of the Jeep, coupled with the evidence of the accused's manoeuvring, as opined by Mr. Grochowicz, the absence of braking over what I conclude was a lengthy albeit unquantified stretch of roadway. The evidence of Sergeant Dyson and, to a lesser extent, that of Constable Clark lead me to conclude that even without a precise estimate of speed, through accident reconstruction, I can conclude the accused was traveling at a speed that was unsafe when entering into the series of curves leading to the area where the Jeep left the road. [At para. 147; emphasis added.]

[32] After noting *R. v. McLennan* 2016 ONCA 732, he turned to the question of mens rea, quoting paras. 29-32 of Beatty. The judge accepted Mr. Grochowicz's evidence to the effect that the appellant had been trying to "drift" the vehicle as he entered the corner or curve near where he lost control. The judge noted that Mr. Grochowicz was familiar with drifting and with Mr. Rogers' earlier unsuccessful attempts to drift the Jeep and had complained about them to the appellant. Mr. Rogers had admitted those attempts were unsafe. In the judge's analysis:

Mr. Grochowicz had a legitimate reason to be concerned about the manner of the accused's driving earlier in the day and, whether in a joking tone or not, requested the accused alter his driving pattern. Mr. Grochowicz testified and I find that the accused altered his driving pattern only momentarily in response to that complaint, and then reverted to the earlier pattern of driving too quickly for the road conditions and the vehicle as modified by the lift that he had installed. [At para. 154.]

The Court also accepted Mr. Grochowicz's evidence concerning the appellant's request that he hold onto the dog (in the middle of the back seat). The judge stated that this had occurred "just before entering the curve and the commencement of the drifting motion." (At para. 155.)

[33] The judge then turned to Sgt. Dyson's evidence, which he summarized as having provided two possible explanations for the loss of control -- either an intentional drift or "inadvertent speed in the corner or possibly both", coupled with aggressive steering. Sgt. Dyson had conceded there was no visual evidence on the roadway of oversteering but, the judge noted, the absence of evidence is not evidence "such that I conclude there was no oversteering, or whether it was simply as a function of speed that the vehicle began to fishtail. It matters not, in my view." (At para. 156.)

[34] Finally, the trial judge observed that in arriving at the conclusion that the appellant had been "intentionally trying to drift or fishtail his vehicle at the corner preceding the loss of control", he was relying on the evidence of Mr. Rogers' earlier attempts at drifting the vehicle. He noted *McLennan*, where the Court of Appeal had examined the admissibility of three separate events occurring in the half hour or so before the accident in that case. The Court of Appeal rejected the argument that the previous events should be excluded as 'propensity' evidence, and concluded:

... it is unrealistic and contrary to the clear language of s. 249 of the Criminal Code to compartmentalize a driver's conduct into discrete time periods of mere seconds. The language of the section requires consideration of "all the circumstances". Those circumstances would include the appellant's driving behaviour in the half hour before the accident. [At para. 53; emphasis added.]

[35] Relying on this authority, the trial judge in the case at bar found that the appellant's acknowledged attempts at drifting the vehicle when driving from the campsite to Deroche, properly "form part of the path to conviction." This, together with the Court's rejection of his evidence as to the circumstances immediately before the rollover, led to the conclusion that the appellant's driving exhibited a marked departure from the standard of care expected of a reasonable driver in the circumstances. The Court found him guilty on all three counts.

On Appeal

Miscarriage of Justice

[36] The law is clear that where an appellant can demonstrate that his conviction depends on a misapprehension of the evidence and that misapprehension goes to "the substance rather than to the detail" of the trial court's reasons, a miscarriage of justice within the meaning of s. 686(1)(a)(iii) of the Code will be found: see *R. v. Morrissey* (1995) 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer* 2004 SCC 80 at para. 6. The Supreme Court of Canada in the latter case emphasized that this is a "stringent standard", but that once it has been met, it is not necessary for the appellant to show in addition that the verdict "cannot be supported by the evidence" within the meaning of s. 686(1)(a)(i). (See also *R. v. Swales* 2014 BCCA 350 at paras. 48-49; *R. v. Charlie* 2020 BCCA 24 at para. 48, citing *R. v. J.F.D.* 2017 BCCA 162 at paras. 39-40.)

[37] The Crown also points out that where a material misapprehension of evidence is found, the appeal must be allowed if it cannot be said the trial judge would necessarily have reached the same conclusion absent the demonstrated errors: see *R. v. Pham* 2008 BCCA 272 at para. 29; *R. v. Sekhon* 2014 SCC 15 at para. 53.

[38] In *R. v. Davey* 2012 SCC 75, the Court described "miscarriage of justice" for purposes of s. 686(1)(a)(iii) by quoting from *R. v. Khan* 2001 SCC 86 and *R. v. Wolkins* 2005 NSCA 2. In *Khan*, LeBel J. had noted at para. 69 that the essential question in cases where miscarriage of justice is raised, is whether the irregularity in question was "severe enough to render the trial unfair or to create the appearance of unfairness." Also in *Khan*, LeBel J. wrote that while there is no strict formula for determining whether a miscarriage of justice has occurred, there are several factors that are of assistance:

First, one should ask whether the irregularity pertained to a question which was, in law or in fact, central to the case against the accused. Thus, an irregularity which is related to a central point of the case is more likely to be fatal than one concerning a mere peripheral point (see e.g. *Olbey v. The Queen*, [1980] 1 S.C.R. 1008, at p. 1029). Of course, this issue will not always be absolutely determinative, and it is possible that a serious irregularity on a peripheral point can have

rendered the trial unfair in reality or in appearance. Moreover, it is important to realize that some irregularities will not relate to a particular element in the case, but will rather create a general apprehension of unfairness on the whole of the case .

Second, the court of appeal should consider the relative gravity of the irregularity. How much influence could it have had on the verdict? What are the chances that the apprehended detrimental effect of the irregularity did in fact occur? How severe could these detrimental effects have been for the accused's case? This is important not only in relation to an actual finding of unfairness, but also in relation to the appearance of unfairness. A single irregularity which is unlikely to have had any significant impact would seem to indicate to the reasonable observer that the trial appeared fair.

When the court considers the gravity of the error, it should also consider the possible cumulative effect of several irregularities during the trial. Sometimes, a trial in which more than one error has occurred can be seen as unfair, even if these irregularities standing alone might not have been fatal on their own. .Conversely, when, apart from one alleged irregularity, the trial was otherwise error-free, the court may sometimes be justified in forgiving the error more easily.

Third, one should be mindful of the type of trial during which the error has occurred. Was it a trial by jury or by a judge sitting alone? Sometimes, irregularities can have a more severe impact on the fairness of the trial when they occur during a trial before a judge and a jury. This is especially true considering that some irregularities can have a psychological effect, which we presume judges are more apt to overcome than juries. However, this question is not absolutely determinative, and some irregularities will render the trial unfair even if they occurred before a judge sitting alone, while other mistakes may not be fatal even if they took place before a jury. Thus, a well-instructed jury may have the capacity to overcome irregularities.

Fourth, and related, is the possibility that the irregularity may have been remedied, in full or in part, at the trial. ...

...

Fifth, one must keep in mind that what matters most is the effect of the irregularity on the fairness of the trial and the appearance of fairness. Therefore, it will not be a mitigating factor that the irregularity did not result from a deliberate act by the Crown, the judge, or one of the court officials .

Sixth, the attitude of defence counsel if and when he was confronted with the irregularity may have an impact. Therefore, if defence counsel had an opportunity to object to the irregularity and failed to do so, this militates for a finding that the trial was not unfair .[At paras. 75-9, 84-5; citations omitted.]

- [39] In a recent decision of this court, *R. v. Ball* 2019 BCCA 32, the foregoing remarks were quoted at para. 120. Dickson J. for the Court went on to find that various "irregularities" and errors had occurred and that although none of them resulted from deliberately improper acts, all had impacted the fairness of the trial. In the result, the "cumulative effect" of those errors and irregularities was found to have rendered the trial unfair and thus resulted in a miscarriage of justice.

Explanation of Speed the Night before the Accident

- [40] The trial judge's conclusions at para. 141 of his reasons, reproduced above at para. 30, were the main focus of the appellant's arguments in this court. Beginning with subparagraph (1), the appellant submits that the trial judge should have considered his evidence as to why he had been driving at between 60 and 70 kmh the night before the accident and that it was unfair to 'fault' his credibility without at least explaining why he, the trial judge, disbelieved his explanation. Instead, the trial judge drew what the appellant calls an "adverse inference", observing that his description of his driving the night before was "at significant odds" with the "prudence" with which he claimed to have been driving at the time of the accident.
- [41] As I understand this submission, it is not so much that the trial judge in effect inferred that he had a propensity to speed, but rather that if the judge was going to draw an adverse inference, he should as a "matter of fairness" have considered the appellant's explanation for his speed the night before and explained why he rejected it. If, as suggested in *McLennan*, a trial judge must consider the "totality" of the evidence, it was incumbent on him to explain why the 'dusty road' evidence seems to have been ignored. I acknowledge, however, that this is a minor point and could not alone justify a finding of miscarriage of justice.

Failure to Cross-Examine on Prior Statement

- [42] Subparagraph 141(2) of the trial judge's reasons concerns the information the appellant provided at the scene to Cst. Bennett concerning his speed. It will be recalled that this statement was not admitted into evidence in the trial proper and the appellant was never cross-examined on it. Nevertheless, the trial judge appears to have drawn an adverse inference regarding his credibility because, the trial judge inferred, the appellant had not told the constable he had "slowed to an unknown speed". Again, this was unfair to the appellant. For one thing, it is unclear what the constable asked about his speed; she kept no note of her questions to him. Did she ask about the time immediately before the accident, or about his speed generally up the road? All her notation said on this topic was "Driver, driving 60 KMH -- drove around corner." The appellant was not given the opportunity to testify what he had been asked and what he had understood he had been asked.

Slowing and Accelerating

[43] At sub-paragraph 141(2), the trial judge incorrectly stated that the appellant had testified he slowed "for the curve" just before the accident. In fact he had testified he slowed "to a crawl" while going over the bridge because he expected potholes at the end of the bridge, but accelerated slightly after coming off the bridge and approaching the two curves. In cross-examination it was suggested he had been proceeding faster than 60 kmh "just prior to the crash". The appellant replied that he did not know the exact speed he was going, but that he had told Cst. Bennett it was "about 50 or 60." The point is that he did not testify that he had slowed just before the curve and the beginning of the fishtailing. Very arguably, then, the judge's inference that his evidence had 'varied' on this point was not justified.

"Hang on to the Dog"

[44] Another error asserted by the appellant appears in subparagraph 141(3). There the trial judge stated that the appellant told Mr. Grochowicz to hang onto the dog "just before the accident, in the moments before what Mr. Grochowicz described as the accused's attempt to drift the vehicle". (My emphasis.) The appellant testified this had occurred "earlier in the day" when he had been "driving recklessly." Mr. Grochowicz himself gave the following answer to the question of whether Mr. Rogers had said anything about the dog "before the crash":

At one point he told me to hold onto his dog, because his dog was sitting between me and Alex and the dog was getting tossed around a bit. [Emphasis added.]

No further clarification was sought concerning the period of time to which he was referring. In the appellant's submission, the trial judge erred in interpreting Mr. Grochowicz's evidence to mean that the appellant told him to hold onto the dog "just before the accident." In the judge's analysis, this seems to have supported the inference that the appellant intended to "drift" the Jeep.

[45] This point was taken up by counsel in closing submissions. In the discussion that appears at page 324 of the transcript, the trial judge began to ask a question of (trial) counsel for the appellant about Mr. Grochowicz's "remarks about the dog and the holding the dog because of the swaying of the car." Counsel said he was "not certain what to say about that" and that he was not sure "whether he [Mr. Grochowicz] had placed that in a particular period of time". The judge said he would look at his notes on the topic. The trial judge said he had his note and he was "going to go with my note, not yours", whereupon counsel responded, "Rely on your note. And I won't get into it any further."

[46] In this court, counsel for the Crown acknowledged that the trial judge had misspoken concerning the time at which the appellant had asked Mr. Grochowicz to hang onto the dog, but that it was not material to the trial judge's conclusions given that there were many other reasons to doubt his, the appellant's, credibility. At the same time, counsel agreed that the trial judge seemed to think it was material, having listed it in para. 141.

- [47] I am inclined to agree that it was a material consideration in the trial judge's analysis and that the evidence was at best unclear as to whether in fact this request to hold on to the dog had been made just before the car fishtailed or at some other "point".

"Instinctive Response"

- [48] The next error in fact advanced on behalf of the appellant arises in subparagraph 4 of para. 141, at the end of which the trial judge suggested if the appellant had been traveling at the speed suggested by him in his evidence, braking would have been an "instinctive response and likely would have stopped the vehicle before it left the roadway". It will be recalled that Mr. Rogers testified that he tried to steer into the curve. Sgt. Dyson had stated in his testimony that this would be the "usual reaction" and Mr. Grochowicz had said the "normal reaction" would be to "steer the other way". No one suggested that braking would be the normal reaction or that it would help correct the fishtailing. The appellant could not remember whether he had tried to accelerate or tried to brake at all. Mr. Grochowicz did not "feel" any application of the brakes before the car went over the side.
- [49] It was certainly open to the trial judge to find that the appellant had not braked, but the judge went further. The appellant contends in this court that the judge took impermissible judicial notice of what an instinctive response would have been and more importantly, in stating that braking would have stopped the vehicle, given the "significant distance covered by the Jeep" before it left the roadway. Counsel notes that Sgt. Dyson did not hazard an opinion on these issues.
- [50] The Crown agreed in this court that the trial judge may have "gone too far" in this aspect of his reasoning, but emphasized that the judge had convicted the appellant on the basis that he had either tried to 'drift' the vehicle or been going too fast immediately before the accident.
- [51] In my respectful view, the trial judge did err on this point and the error was material to his conclusions. Given the opinions expressed by Sgt. Dyson and Mr. Grochowicz concerning the appropriate response to fishtailing, it is clear this was not a matter of which one could take judicial notice. The same is true of the judge's conclusion that braking would likely have stopped the vehicle before it left the roadway. Again, this was not a matter of "common sense": neither Sgt. Dyson or Mr. Grochowicz suggested this would have been an effective or a natural reaction.

Expert Evidence

- [52] The last three errors asserted on appeal are all closely related. First, a misapprehension is said to arise out of the trial judge's statement at para. 142 to the effect that Mr. Rogers' evidence could not "stand in harmony with the evidence of the expert testimony as to the mechanisms for the events causing the vehicle to go over the embankment, that is the fishtailing, (1) the intentional drifting of the vehicle, or (2) excessive speed, having regard to the road conditions and particularly the curvature of the road." In the appellant's

submission, Sgt. Dyson did not provide any opinion about the particular cause of the fishtailing in this case. Indeed, it was impossible for Sgt. Dyson to give an opinion as to how the vehicle went over the road in this case, because all he had to work with was a series of fairly old photographs and he did not visit the scene until November of 2016. His evidence was aimed mainly at explaining fishtailing -- which he equated with "drifting" -- to the Court, not with opining as to why the appellant drifted in this case or the speed at which he had been travelling.

- [53] Sgt. Dyson did testify as to the effects of the lift kit that had been installed on the Jeep, the condition of the road surface, and that a drift might result from an "aggressive steering input". Based on the marks he saw, he opined that the front wheel left the travelled portion of the roadway first. As for the markings on the road, he could see none that showed any "aggressive steering action". He acknowledged that he himself had accidentally drifted his vehicle a couple of times under track conditions.
- [54] With respect, the trial judge's conclusion at para. 142 that the expert evidence showed there were only two possible causes of the accident seems to me to reflect a misapprehension of evidence that was material to his conclusion.

Intentional Drifting

- [55] Also in para. 142, the trial judge described the expert evidence as establishing that the vehicle must have gone over the embankment either because of the intentional drifting of the vehicle or excessive speed. Although the accused had denied both of these, the judge said, there was no other explanation for the rollover other than that the accused had been "attempting to drift the vehicle". At para. 159, he referred to "the intentional act of attempting to drift the vehicle". These and further references at paras. 24, 36, 45, 134, and 137 indicate the high degree of importance the judge gave to Mr. Grochowicz's opinion that the appellant had been "trying to slide around the corner before the crash". Aside from the fact that only Mr. Rogers could testify as to what he "intended", it is not clear that any consideration was given to the possibility that the fishtailing or drifting may have been accidental - a possibility that Sgt. Dyson's evidence left open. It is unfortunate the question posed to Mr. Grochowicz was not objected to, given that the answer seems, as the appellant argues, to have "gone to the heart" of the Court's determination that the mens rea of dangerous driving was proven.

"Harmonizing" the Evidence

- [56] Finally, the trial judge said at the end of his description of the facts that he was left to consider whether the appellant's manner of driving immediately prior to the rollover could "stand in harmony" with the evidence of Mr. Grochowicz and the opinion evidence of Sgt. Dyson "as to the causation of the rollover." With respect, W.(D.) does not require a trial judge to try to reconcile or decide whether conflicting evidence can be made harmonious. The question is whether at the end of the day the finder of fact is left with a reasonable doubt on

all the evidence as it stands -- even if one is left in no doubt by the evidence of the accused. The appellant denied with some vehemence that he had tried to drift the vehicle after coming off the bridge, pointing out that the narrowness of the corner (two cars could not pass on the road) and the unforgiving nature of the location between a rock face on the left and the precipice on the right would have made such a manoeuvre very dangerous. Obviously, the trial judge disbelieved him; but the judge was then required to go on and consider whether a reasonable doubt remained. His apparent failure to do so did in my view constitute an error of law that added to the cumulative effect of the misapprehensions of evidence discussed above. In my respectful view, the end result was at the least to create the appearance of unfairness, if not to render the trial unfair.

Disposition

[57] Although as mentioned, I readily acknowledge that the evidence at trial could have supported the guilty verdicts, I am unable to say that those verdicts would necessarily have been the same had these errors not been made. Accordingly, I would allow the appeal, set the convictions aside, and order a retrial.

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Butler"

I agree:

"The Honourable Madam Justice DeWitt-Van Oosten"

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