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Being in the Moment: An Analysis of the Supreme Court of Canada's Decision in *R v Chung*

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Case Commented On: *R v Chung*, 2020 SCC 8 (Can LII)

Mindfulness, according to Jon Kabat-Zinn, the founder of MBSR (mindfulness-based stress reduction), is "the psychological process of bringing one's attention to the internal and external experiences occurring in the present moment, which can be developed through the practice of meditation and other training." Leaving aside how one can develop mindfulness, this concept of being "in the moment" has received much attention of late. Mindfulness is everywhere. It focuses on how we can bring more awareness to those reflexive and automatic activities we do throughout the day. This emotional and physical awareness allows us to better control the reactions we have to the stressors of life. Mindfulness also has a place in the legal world as seen in the recent Supreme Court of Canada decision in *R v Chung*, 2020 SCC 8 (Can LII). In that case, the Court, in essence, applies the process of mindfulness to the two issues under consideration; whether the Crown appeal against an acquittal raises a question of law and if so, whether the trial judge erred in applying the incorrect legal test required in assessing the objective *mens rea* of dangerous driving.

Factually, the incident mirrors the everyday; the accused drove at excessive speeds over a short distance resulting in a fatal collision. Mr. Chung was charged with dangerous driving causing death but was ultimately acquitted at trial. On appeal, the British Columbia Court of Appeal found the trial judge erred in law, overturned the acquittal and entered a conviction. The majority of the Supreme Court of Canada agreed with the appellate court and upheld the conviction.

Justice Sheilah Martin, writing on behalf of the majority, found there was, as required for a Crown appeal against an acquittal under s 676(1)(a), an error in law. The error was two-fold but interrelated, being "two sides of the same coin" (at para 18). First, the trial judge applied the wrong legal test and secondly, the trial judge failed to apply the correct legal test. Both of these errors resulted in the failure of the trial judge to "properly consider the conduct of the reasonable person in all of the circumstances" when assessing whether the conduct amounted to a marked departure from that standard (at para 18). The sole dissenter, Justice Andromache Karakatsanis, took the opposite view. In her opinion, the trial judge did not err by relying on a wrong principle (at paras 32 & 35) nor did the trial judge fail to apply the correct test (at para 39).

The decision, albeit rendered by a mere panel of five, offers an important practical clarification of the *mens rea* assessment in driving offences. It also sheds some light on the continuing issue of what kind of error amounts to a question of law. When read closely, both the majority and dissent used mindfulness in coming to their positions on these issues.

First, is the preliminary issue of what amounts to an error in law in the context of a Crown appeal against acquittal. This is not any easy issue to unravel. Indeed, the ephemeral nature and character of "any ground of appeal that involves a question of law alone" per s 676(1)(a) of the *Criminal Code*, RSC 1985, c C-46, has been the subject of many Supreme Court decisions. In the *JMH* (2011 SCC 45 (Can LII)) decision, for instance, Justice Cromwell called the issue a "vexed" one (at para 24). A question of law cannot be founded on the weighing of the evidence or on the assessment of the evidence on the ultimate question of guilt or innocence (*JMH* at para 10). There is, however, a difference to be found in a failure of a trial judge to consider relevant evidence on the ultimate issue or in finding facts for which there is no evidence. Such a failure would amount to an error in law. In those instances, the trial judge is simply not being 'mindful' or aware of the presence or absence of significant evidence.

An error in law can be found, according to Justice Martin (*Chung* at para 11), in the application of the correct legal principle to the evidence that nevertheless shows an erroneous understanding of that principle (at para 11). It can also be found in the application of the wrong legal principle (at para 11). Both such errors, according to Martin J, were committed in *Chung*. In reviewing these errors, Justice Martin was careful to reiterate a long-standing appellate principle that the trial judge's reasons must be read as a whole in determining whether an error exists (at para 13). Parsing the reasons by cherry picking sentences to illustrate errors is not appropriate. It is the totality of the reasons which must be considered. In Martin J's view, this full reading of the reasons for acquittal established the error in law, despite the trial judge's correct articulation of the law on *mens rea* from the *Roy* (2012 SCC 26 (Can LII)) decision (at para 14).

Justice Karakatsanis agreed with the majority's description of the law on errors of law (at para 31) but disagreed in the majority's application of that law to the grounds of appeal in *Chung*. She too reiterated the foundational principle of appellate review that a trial judge's articulation of the law must be read in the context of the entire judgment (at para 33). However, Karakatsanis J arrived at an opposite view from the majority. For her, it was in the reading of the whole that she found no error.

How can the utilization of the same principle arrive at such differing outcomes? Here, we lean on another favoured tool used by the Supreme Court in analyzing legal issues – context. Contextually, Justice Karakatsanis viewed the reasons through the perspective of the "busy trial judges who cannot be expected to write perfect reasons" (at para 33). This view mirrors the similar appellate caution for jury cases that the jury must be properly instructed, not perfectly so (*R* v *Jacquard*, [1997] 1 SCR 314, Lamer CJC at para 2). It also reflects the meta-principle that "what the law demands is not perfect justice, but fundamentally fair justice" (*R v O'Connor,* [1995] 4 SCR 411, McLachlin CJC at para 193). In the end, for Karakatsanis J, the decision may not have been perfect but it was fundamentally fair and rendered, contextually, in accordance with the correct legal principle. For the majority, the trial judge simply failed to apply the correct principle by failing to connect the law to the analysis.

This leads to another reason why the majority and dissent disagreed on the question of whether there was a legal issue to ground the appeal, and that is deference. Deference to the trial judge as an overarching principle permeates the dissenting position. Trial judges may not be perfect but

they are in the unique position, as front-line judicial officers, to render decisions based on the unique circumstances before them. In the words of Chief Justice Wagner and Justice Rowe in the context of appellate intervention in sentencing, "the sentencing judge sees and hears all the evidence and submissions in person" and understands the "needs of the community" (*R v Friesen*, 2020 SCC 9 (Can LII) at para 25). It is the trial judge, therefore, who has the pulse of the community's sense of justice. This does not excuse a trial judge who errs in law but it does allow for a generous reading of the reasons in which the appellate court gives the trial judge, particularly where there is an acquittal rendered, the benefit of the doubt. This leads to Karakatsanis J's position that reading the decision as a whole in light of the correct articulation of the law warranted an interpretation that the trial judge's analysis was done correctly. Thus it is this deference perspective, which contributes to such stark differences in appellate intervention in this case.

This decision reinforces another appellate review principle, which requires trial judges to not just repeat legal principles by rote but to demonstrate, in their reasons, through their legal analysis of the facts that they understand and appreciate the effect of the law (see e.g. *R v George*, 2017 SCC 38 (Can LII) at para 16). Judges are presumed to know the law, yet they must show in their reasons "that the law is correctly applied in the particular case" (See *R v REM*, 2008 SCC 51 (Can LII), McLachlin CJC at para 47). Moreover, articulating the legal test accurately "cannot insulate a trial judge from legal errors" (*George* at para 16). Apt to this point, albeit in the context of the balancing required in the s 24(2) *Charter* analysis even where conscriptive evidence is at issue, are the comments made by Justice Lebel in *R v Orbanski*, 2005 SCC 37 (Can LII), that "the concept of fairness should not be reduced to a ritual incantation that spares judges from further thought once the word is said" (at para 96). In other words, trial judges must be mindful (there's that word again!) of what a legally appropriate analysis looks like in their reasons. Lip service to the rule of law will not do. We, therefore, have in *Chung* layers of legal principle resulting in differing conclusions – which is what justice does look like in each courtroom on a daily basis.

Finally to the substantive ground of appeal in *Chung* which provides further fine-tuning of the *mens rea* requirements for driving offences as discussed in *Roy* and *Beatty* (2008 SCC 5 (Can LII)). Returning to the first of the two errors identified by Justice Martin, the trial judge used the correct *mens rea* principles in the wrong way by failing to compare the accused's conduct in the circumstances of the case with the actions of the reasonably prudent driver in similar circumstances in determining whether the conduct showed a marked departure from that standard. In other words, just articulating the standard correctly, as the trial judge did at some point in the reasons, is not enough. Rather, the trial judge must show they applied that standard in assessing the conduct. This requirement is the equivalent to showing your work in giving the answer to a mathematical equation – it's not just the answer that matters but how someone arrived at the conclusion.

The second error is found in the trial judge having used the incorrect legal principle. This error also connects to the substantive error as discussed above; by failing to compare the accused's conduct with that of the reasonable person, the trial judge focused too readily on the "momentary nature" of the conduct (at para 21). On this point, Justice Martin made it perfectly clear that momentary marked departures, such as excessive speed over a short period of time in *Chung*, can

result in a conviction (at para 19). According to Martin J, the trial judge therefore erred by accepting, as a principle of law, that momentary excessive speed, on its own, cannot amount to dangerous driving (at paras 19 & 20). Justice Martin distinguished the *Chung* situation from the momentary inattention or momentary mistake of *Roy* and *Beatty*, which is connected to the nature of driving as an automatic and reflexive activity (at para 22). Momentary speed, as a momentary risky action done by the accused, creates a risk of danger "of serious consequences" (at para 22) amounting to a marked departure from what we expect of the reasonable driver (at para 28). What lies between these risky actions and the momentary inattention or missteps in the *Roy* and *Beatty* cases is the difference between an act and an omission to act. In *Chung*, the intentional behaviour of weaving through traffic and accelerating excessively was a marked departure from the standard of a reasonably prudent driver. It was not inattentive behaviour, such as in *Roy* and *Beatty*, but lacked awareness of the impact the behaviour may have on others. This difference was also highlighted when Justice Charron, in the *Beatty* decision, came to the common sense conclusion that intentional conduct, being the actual state of mind of the accused, should be considered in assessing the *mens rea* for dangerous driving (*Beatty* at para 47). Mr. Chung's driving could be seen as intentional conduct in which he was intentionally creating a risk to the public.

The dissent made short work of this *mens rea* error. First, relying on her preliminary position that there was no question of law because there was no error, Justice Karakatsanis found the trial judge was well aware of the requirement to assess the conduct in light of the reasonable person standard (at para 39). In any event, according to Karakatsanis J, the assessment is "fundamentally" or inherently comparative (at para 39) such that the trial judge by entering into a determination of the issue discharged his legal duty. As for the second error, finding that the momentary conduct was not a marked departure, there was no such 'legal' principle to begin with, ergo no error at all. In Karakatsanis J's view, the findings of the trial judge on the issue were wholly within the purview of the trial judge. It's all a matter of perspective.

In the end, for the majority, Mr. Chung was not channeling mindfulness behaviour. Rather, he was acting purposely whilst totally oblivious to the risk he was creating to others through his actions. He was not acting in the moment but acting for himself alone. Notably, he was not acting as a reasonably prudent driver would in similar circumstances (at para 28). As Justice Martin reiterated at paragraph 28, the reasonable person "understands that driving is an inherently risky activity. It is made all the more risky the faster we drive, the harder we accelerate, and the more aggressively we navigate traffic." It is this marked departure that defines the offence committed. It was this finding, based on an incorrect understanding of the legal principles, that was an error in law.

Mirrored in the failure to articulate the law is the failure of the accused to attend to his conduct – not just inattentiveness but a complete lack of mindfulness. So too, although trial judges are busy, they must be mindful of the law, of how they articulate it, and how they then apply it to a given set of facts. Within this mindfulness, the trial judge must also connect the dots between the legal principles, the application of those principles and the factual determinations required. But

just what mindfulness looks like is a moving target within which a judge has the latitude to write decisions in their own unique way. And we, in the legal sphere, must be mindful of that too.

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