Court File No. 37247

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

RICHARD ALAN SUTER

APPELLANT
(Appellant)

- and –

HER MAJESTY THE QUEEN

RESPONDENT
(Respondent)

RESPONSE FACTUM OF THE APPELLANT, RICHARD ALAN SUTER
(Pursuant to Rules 29(3) and 35(3) of the *Rules of the Supreme Court of Canada*)

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RESPONSE FACTUM OF THE APPELLANT

Statement of Argument

[1] In its factum, the Respondent argues that the Court of Appeal erred in finding that the Appellant's sobriety should mitigate his moral culpability for his offence under **s. 255(3.2)** of the ***Criminal Code***.[1] The Appellant submits that the Respondent's position should be rejected for the reasons outlined below.

(a) Sobriety is a mitigating factor for the same reason that impairment is an aggravating factor – due to the proximity and interdependence of the impaired driving and refusing offences.

[2] The argument that sobriety is not a mitigating factor for a conviction imposed under **s. 255(3.2)** was rejected by both courts below[2] and should again be rejected by this Honourable Court. As Anderson ACJ recognized, the absence of impairment is logically connected to one's moral culpability because it addresses the "principal wrong" that the refusal offence is aimed at – impaired driving – and a proportionate sentence must take that fact into account.[3] The Court of Appeal reached the same conclusion, holding that the presence or absence of impairment informs the principle of proportionality that remains paramount to Parliament's objectives of sentencing.[4]

[3] The offence of refusal, in its various forms, incorporates a consideration of impairment as a condition precedent to justifying a demand pursuant to **s. 254(3**) of the ***Criminal Code***. The offence exists, however, as ancillary legislation required to both deter impaired driving and detect impaired drivers.[5] In ***R v Thomsen***, the Supreme Court upheld the power of peace officers to demand roadside screening device tests of drivers suspected to have alcohol in their bodies without recourse to their right to counsel under **s. 10(b)** of the ***Charter***.[6] The limitation on the right to counsel was justified by the legislative purpose behind the roadside demand, which was

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[1] *Criminal Code of Canada,* RSC 1985, c C46. Any section numbers in this factum will relate to *Code* provisions, unless otherwise specified.

[2] Provincial Court Decision at paras 66-70 [Tab 1 of A.R]; Court of Appeal Decision at paras 54-59 [Tab 2 of A.R.]

[3] Provincial Court Decision at paras 66 and 70.[Tab 1 of A.R]

[4] Court of Appeal Decision at paras 54 and 58. [Tab 2 of A.R]

[5] *R v Hufsky,* (1998) 1 SCR 621; *R v Thomsen,* [1988] 1 SCR 640; *R v Bernshaw*, [1995] 1 SCR 254.

[6] *Thomsen*, at para 22.

not only to increase the detection of impaired drivers, but also to increase the perceived risk of detection, and thus, the effective deterrence against impaired driving.[7] Put another way, impaired driving is *malem in se* and refusal offences are *malem prohibitum*.

[4] The distinction between the "evil" of impaired driving and the "mischief" of refusal offences was recognized by Anderson ACJ at paragraph 52 of his judgment:

> [52] The offence of refusal, however, is different. Refusing a breath demand is not the cause of the carnage. The offence of refusal is a legal decision, in the sense that involves an interpretation of the law. It is a decision to withhold evidence. The mischief caused is that by an individual failing to provide reliable evidence, it becomes harder for the state to determine whether the individual's driving is or is not criminal due to impairment. The offence exists, not because it constitutes an inherent evil; it exists to help detect a social evil. The behaviour is criminalized not as an end in itself; the offence is a means to an end – it is a means to the truth about the driver's condition.[8] [Emphasis added]

[5] Although the offences of impaired driving and refusing to blow are distinct they are also interdependent and proximate because they place the concept of "impairment" on different places on the same scale.[9] While impairment must be proven beyond a reasonable doubt to convict for impaired driving, a peace officer need only *believe* on reasonable grounds that the driver was impaired to obtain a conviction for a refusal to provide a sample. The officer's belief of impairment is the predicate for the demand, with the view to *determining* whether the driver was criminally impaired by use of the breathalyzer. However, if the available evidence at a sentencing hearing for a refusal offence persuades the court on a balance of probabilities that the offender was not actually impaired, this would prove that the conclusions of the officer, though reasonably and honestly held, were incorrect. It would then be illogical and contrary to principle to conclude that this offender, who was proven sober at the time of driving, should be punished to the same extent as the impaired driver.

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[7] *Ibid* at para 21.

[8] *Ibid* at para 52 (emphasis added).

[9] Excepting for the present argument liability for refusal in the face of an approved screening device demand pursuant to s. 254(2).

[6] To be clear, the gravamen of refusal after death does not involve actual impairment or proof that impairment was a cause of the accident. Rather, the offence addresses the deprivation to the administration of justice that arises when authorities are precluded from having the best available evidence to determine whether a driver was impaired or not. When that determination can later be resolved through credible, remedial evidence, the administration of justice has largely achieved the same result as if the offender had provided a sample to the investigating peace officer and *blown under the legal limit*. That is, the offender has filled the evidentiary gap that he created by his refusal.[10] Although this does not absolve the offender of criminal liability, as the failure to provide a sample is culpable in its own right, it distinguishes his culpability quite clearly from the driver who was impaired while driving and caused a death, as well as from the driver who refused to provide a sample and did not fill the evidentiary gap caused by his refusal.

[7] This illustrates the fundamental unfairness of the Respondent's position. If, as the Respondent argues, and both courts below have held,[11] a sentence for refusal after death should presumptively match the punishment reserved for the impaired driver who has caused a death, and if positive evidence of sobriety is not allowed to mitigate the sentence of one who has refused after having caused a death, it would be tantamount to sentencing a refuser to the same penalty as that of the impaired driver notwithstanding a carefully considered judicial finding of fact to the contrary on a fundamental issue. More gravely, it would offend the presumption of innocence because it would treat the refuser as if he were responsible for impaired driving causing death – by way of an *irrebuttable* presumption. Indeed, it would be a declaration that the truth does not matter. This would not only greatly offend the principle of proportionality – it likely violates **s. 12** of the ***Charter***. Such measures are unknown to Canadian criminal law, and antithetical to the truth-seeking goal of a criminal court. Notwithstanding Parliament's intention to deter refusal after death cases by raising the maximum sentence to life imprisonment, it could not have intended what the Respondent has proposed. Parliament is presumed to legislate in a constitutional manner.

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[10] Provincial Court Decision at paras 69-70. [Tab 1 of A.R]

[11] Provincial Court Decision at paras 66-70 [Tab 1 of A.R]; Court of Appeal Decision at paras 38,58,59.[Tab 2 of A.R]

(b) Parliament's intention to increase the maximum punishment is only one factor to consider and is not determinative of the moral culpability of a crime.

[8] The Respondent has argued that Parliament's decision to impose a maximum penalty of life in prison for both **ss. 255(3.2)** and **255(3)** renders their moral culpability equivalent. This comparison is flawed, in particular because it fails to recognize that the two crimes have entirely distinct *actus reus* and *mens rea* requirements. Though the two offences share the similar objective of deterring impaired driving, they punish different actions or omissions. Rather, the moral culpability for the offenders of each crime requires a careful and qualitative analysis of the gravity of the offence and degree of responsibility of the offender as demanded by **s. 718.1** of the ***Criminal Code***. As this Honourable Court stated in ***R v C.A.M.,***[12] "sentencing is an inherently individualized process." As such, a "one size fits all" approach to sentencing for even one single crime defies this long established principle of sentencing. Therefore, such an approach even more greatly offends the principle of proportionally should a court attempt to match penalties between completely separate offences.

[9] The use by Parliament of matching sentencing ranges is but one factor to be considered. There are over 50 offences in the ***Criminal Code*** that carry a maximum sentence of life imprisonment. It can hardly be said that they all share the same degree of moral culpability. If Parliament were to alter the maximum penalty for an offence, it would not necessarily alter the moral culpability of the crime as the *actus reus* and *mens rea* remain unchanged.

[10] The true effect of Parliament legislating **s. 255(3.2)** is to caution an arrestee that a refusal to comply may result in the same sentence as blowing over 0.08 and impaired driving causing death. In essence, it is a deterrence proclaimed by Parliament – not, as the Respondent suggests, evidence that the offence axiomatically shares the same moral culpability as impaired driving causing death. As such, a judicial finding of fact that the targeted "evil" has been refuted must be recognized in mitigation if a court is to preserve the paramountcy of the principle of proportionality over the objective of deterrence.

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[12] *R v C.A.M.*, [1996] 1 SCR 500 at para 92; *R v Lacasse*, [2015] 3 SCR 1089 at paras 53-54.

(c) Allowing sobriety to mitigate does not create an incentive to refuse

[11] The Respondent further contends that the Court of Appeal and Anderson ACJ's respective rulings defeat Parliament's intention by creating an incentive to refuse. In the Respondent's view the Appellant benefitted from his decision to refuse, effectively eliminating the scientifically certain intoxilyzer evidence and "compell[ing]" Anderson ACJ to rely upon less reliable subjective and competing observational evidence.

[12] The Respondent's argument is problematic on a number of levels. First, it amounts to an attempt to relitigate a finding of fact made by Anderson ACJ that Mr. Suter was sober at the time of the accident[13] because the Respondent is essentially arguing that had the Appellant provided a breath sample he would have blown over the legal limit, but was undeservedly found to be sober based on less reliable evidence. On the contrary, the Appellant placed himself in a *worse* position by refusing to provide a breath sample.

[13] Second, the suggestion that allowing sobriety to mitigate sentence will create an "incentive" not to provide a breath sample is, in the Court of Appeal's words, a failing "flood gates" argument.[14] It presupposes that an offender who refuses to provide a breath sample will have at that moment the sophistication to wager that he would be better off accepting certain conviction and punishment for refusal rather than simply providing a breath sample on demand. If the offender is in the same position as Mr. Suter, and is in fact sober, his stratagem would backfire tremendously. Anyone who has sufficient evidence to prove sobriety on a balance of probabilities is far better off providing a breath sample immediately rather than facing certain conviction and punishment for refusing a breath demand. On the other hand, if the offender is actually or likely impaired and refuses to provide a breath sample to avoid obvious confirmation of that fact, it is more likely than not that police authorities would have at their disposal confirmatory evidence of impairment, thus establishing the likelihood that the offender refused solely to avoid a conviction for impaired driving. *A fortiori* it is very unlikely that the offender would be able to marshal persuasive evidence at a sentencing hearing in the circumstance that he was actually sober. As such, Anderson ACJ's methodology provides a *disincentive* to refuse a

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[13] Provincial Court Decision at para 76.[Tab 1 of A.R]
[14] Court of Appeal Decision para 55. [Tab 2 of A.R]

sample as he places the onus on the offender to prove sobriety in order to avoid punishment matching that of the truly impaired driver who has caused death.

[14] Further, it should be noted that the "subjective and competing observational evidence" that the Respondent argues is by definition less reliable than the intoxilyzer machine, namely *viva voce* evidence, remains the foundation for verdicts – convictions and acquittals – for even the most serious offences and is relied upon daily in our criminal courts. In addition, Anderson ACJ was not "compelled" to accept the Appellant's evidence whatsoever, as he was fully entitled to reject it. In this case the Appellant bore the onus of proof and met it.

[15] Finally, the Respondent suggests that the Appellant has benefitted from his refusal to provide a breath sample by obtaining a lenient sentence. This could only be true, however, if the Appellant was actually impaired. Again, Anderson ACJ concluded that Mr. Suter was sober.[15] Indeed, the facts as found demonstrate that if Mr. Suter had blown he would not have faced any criminal charges whatsoever. In no way did Mr. Suter benefit from his error. To the contrary, it has cost him a conviction, imprisonment, a lengthy driving prohibition, public opprobrium, and serious physical and psychological harm.

(d) *R v Kresko* does not stand for the proposition that sobriety does not mitigate a sentence for refusal

[16] The Respondent argues that ***R v Kresko***[16] is authority for the proposition that evidence of impairment cannot mitigate a sentence for refusal. With respect, that decision has no application to the case at bar as there is a vast difference between a court having a *reasonable doubt* as to impairment and a court making a *positive finding of sobriety on a balance of probabilities*. This is what Anderson ACJ was referring to when he held that "proof even to a standard of probability will invariably be more difficult than providing a sample in the first place."[17]

[17] The facts of ***Kresko*** did not come anywhere close to showing that the offender was actually sober. Rather, the court merely had a reasonable doubt that he was impaired. There was

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[15] Provincial Court Decision at para 76. [Tab 1 of A.R]
[16] *R v Kresko*, 2013 ONSC 1631 at para 42 [*Kresko*].
[17] Provincial Court Decision at para 70. [Tab 1 of A.R]

circumstantial and eyewitness evidence of impairment, but not enough to convict.[18] This is vastly different than the case at bar where the sentencing judge found on credible evidence that the collision was caused by "non-impaired driving error".[19]

(e) Conclusion

[18] In essence, there are two objectives to criminalizing a refusal to provide a breath sample, to deter impairment and to prevent the withholding of relevant evidence. The harm targeted by the former objective is allayed when the person has proven himself to be sober. That individual must still be punished for the intentional withholding of relevant evidence, which is tantamount to an obstruction of justice. However, his moral culpability is substantially distinct from – and lower than – the impaired driver who has killed. As such, it would be contrary to the principle of proportionality to punish the sober driver who has refused after having caused a death to the same degree as the impaired driver who has killed. The Respondent's position ignores this fact and sacrifices the principle of proportionality for the sake of deterrence, contrary to the provisions of the ***Criminal Code*** and dictates from this Honourable Court.[20]

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT Edmonton, Alberta this 7th day of June, 2017.

SIGNED BY:

For: **DINO BOTTOS**
Counsel for the Appellant

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[18] *Kresko, supra* note 17 at paras 147-156.
[19] Provincial Court Decision at para 74. [Tab 1 of A.R]
[20] *R v Ipeelee*, [2012] 1 SCR 433 at para 37; *R v Nasogaluak*, [2010] 1 SCR 206 at paras 39-40.

TABLE OF AUTHORITIES

STATUTORY PROVISIONS

Criminal Code of Canada, RSC 1985, c C46.ss. 254(3), 255(3), 255(3.2), 718.1

Code criminel, LRC (1985), ch. C-46, ss. 254(3), 255(3), 255(3.2), 718.1

Charter of Rights and Freedoms, Constitution Act, 1982, ss. 10(b), 12

Règles de la Cour suprême du Canada, ss. 10(b), 12