SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. MacDonald*, 2014 NSSC 442

Date: 2014-12-17
Docket: Hfx No. 426934A
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Cullen Edward MacDonald

Respondent

Revised Decision:	The original decision has been corrected according to the attached erratum dated April 15, 2015.
Judge:	The Honourable Justice James L. Chipman
Heard:	December 17, 2014, in Halifax, Nova Scotia
Oral Decision:	December 17, 2014
Written Release of Decision:	December 18, 2014

Counsel:	Joshua Judah and Tara Gault, articled clerk, for the Appellant Cullen Edward MacDonald, Respondent

Orally by the Court:

Introduction

[1] Cullen Edward MacDonald was acquitted of a charge pursuant to section 100D(1) of the *Motor Vehicle Act* R.S.N.S. 1989 c.293 (the "*MVA*"). Section 100D(1) provides:

> **Cellular telephones**
>
> 100D (1) It is an offence for a person to use a hand-held cellular telephone or engage in text messaging on any communications device while operating a vehicle on a highway.

[2] The Crown appeals the acquittal.

Background

[3] The facts as found by the trial judge are as follows. On November 3, 2013, Mr. MacDonald was operating a motor vehicle at or near Power Terrace and St. Margaret's Bay Rd in Timberlea, Halifax Regional Municipality, Nova Scotia. At approximately 11:34 a.m., RCMP Cst. Rodney Pierre, while parked in a police vehicle at a church on St. Margaret's Bay Rd, observed Mr. MacDonald drive past him. Cst. Pierre testified he observed Mr. MacDonald holding a "device" in his right hand while driving. Consequently, Cst. Pierre initiated a traffic stop of Mr. MacDonald. During the course of the traffic stop, Mr. MacDonald stated, "I was just looking at my cellphone."

[4] The adjudicator went on to find:

> "But in the Crown's case, the only evidence of using a hand-held cellular telephone or text messaging device amounted to Mr. MacDonald holding the cellular telephone in his right hand while driving. There's no evidence that he was either operating it with his hand or speaking into the device."

[5] The trial judge found on the basis of Mr. MacDonald's testimony:

> "He [Mr. MacDonald] agreed he was holding the device in his hand because he had sent a text message to a friend five minutes earlier and was awaiting a response."

[6] The trial judge noted Mr. MacDonald offered by way of evidence a copy of his cellular telephone records confirming that he had not sent any text messages at the material time (11:34 a.m.).

[7] In the course of his oral decision, the adjudicator summarized the evidence which he said showed Mr. MacDonald had the device in his hand while operating his motor vehicle. He went on to state:

> "The only evidence of use while driving was Mr. MacDonald's evidence establishing he had sent a text five minutes prior to the traffic stop.
>
> …
>
> The Crown has a burden of proving each essential element of the offence beyond a reasonable doubt. I'm not satisfied here that there's proof beyond a reasonable doubt that Mr. MacDonald did, in fact, operate… use the cellular phone or text messages at the time relevant to the charge."

Standard of Review

[8] The scope of review of a Summary Conviction Appeal Court was set out by Cromwell, J.A., as he then was, in giving the Court's judgment in *R. v. Nickerson*, [1999] NSJ 210 as follows:

> [6] The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. B (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.) at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[9] This description has been repeatedly endorsed by the Nova Scotia Court of Appeal; for example: *R. v. RHL*, 2008 NSCA 100; *R. v. Francis*, 2011 NSCA 113; *R. v. MacGregor*, 2012 NSCA 18 and *R. v. Prest*, 2012 NSCA 45. This standard

of review was repeated without reference to *R. v. Nickerson* in *R. v. Pottier*, 2013 NSCA 68.

[10] Given my review of the authorities it is fair to say that the responsibility of the Summary Conviction Appeal Court is to review the evidence at trial, re-examine and re-weigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusion.

Analysis and Disposition

[11] The trial judge heard the evidence presented and made findings of facts which are supported by the evidence.

[12] This is a strict liability offence. The *actus reus* must be proved beyond a reasonable doubt. The trial judge found as a fact that the police officer observed Mr. MacDonald driving past him holding a "device" in his right hand while driving. He went on to find that the traffic stop resulted in the accused admitting to the officer that he was looking at his cellphone at the time in question. Accordingly, one may reasonably infer that the device Cst. Pierre observed Mr. MacDonald holding in his right hand was a hand-held cellular telephone.

[13] The trial judge acquitted the accused because he did not believe the evidence established Mr. MacDonald was using his cellular phone, when observed by Cst. Pierre. Rather, the trial judge determined Mr. MacDonald was not guilty because the Crown did not prove beyond a reasonable doubt that Mr. MacDonald was texting at the time (11:34 a.m.) relevant to the charge.

[14] In the course of his ruling, the trial judge distinguished *R. v. Ferguson*, 2013 NSSC 191, a decision of Justice Coughlan. In so doing, he had this to say:

> "In that case, the driver, Ms. Ferguson, was operating a navigation application, Google Map Quest, on her cellular telephone while driving. She was using the telephone to assist her in her navigation.
>
> She was actively engaged in the use of her telephone, albeit it was not for a purpose to use that as telephone nor a text message device. But she was using it. And under this legislation and the wording in the legislation, her actions made out the offence. Applying the *Ferguson* case to Mr. MacDonald's circumstances that are before the Court tonight, I think they are readily distinguishable."

[15] With respect, I find that the trial judge erroneously distinguished *R. v. Ferguson*. In this regard, Justice Coughlan made the point that the legislature's purpose in enacting s. 100D(1) was to prevent drivers from being distracted while operating a motor vehicle. In this regard, I refer to para 18 of his decision:

> [18] The purpose of prohibiting the use of a hand-held cellular telephone or text messaging on any communication device while operating a vehicle on the highway is clear: to prevent drivers from being distracted while operating a motor vehicle. In moving second reading of the amendments to the *Motor Vehicle Act, supra* in 2007 which first introduced the provision, the Minister of Transportation and Infrastructure Renewal stated:
>
> > "Mr. Speaker, this bill addresses serious concerns Nova Scotians have about cellular phone use and other driver distractions in motor vehicles. This bill makes it an offence to use a hand-held cellular telephone while operating a motor vehicle. Driver distraction and inattention are leading causes of crashes and taking action to address distractions will help to reduce injuries and deaths in Nova Scotia. It is estimated that about 20 per cent of crashes are linked to driver distraction.
> >
> > Mr. Speaker, we are concerned for the safety of all Nova Scotians and evidence points to the fact that our young drivers are at the greatest risk of distractions inside the motor vehicle. Driver distraction is a growing concern for government and for Canadians. About 70 per cent of Canadians consider distractive driving a serious issue - up from just 40 per cent in the year 2001. An Angus Reid Poll conducted in 2007 found that 76 per cent of Canadians would support a federal ban on cellphones while behind the wheel. Here in our own province, a survey conducted by my department indicated that 88 per cent of Nova Scotians think it is unsafe to use a hand-held cellular phone while operating a motor vehicle.
> >
> > Other road safety stakeholders have advocated for a total ban on mobile devices while operating a motor vehicle. To them, I would say consult with police forces as they are the agencies that have to enforce this legislation. Discussions I have had with Nova Scotia's policing community have convinced me that a ban on hand-held devices while operating a motor vehicle is enforceable while a hands-free ban would be problematic from an enforcement perspective.
> >
> > Mr. Speaker, I believe it is incumbent upon all members of this House to create laws that are measured and enforceable. Cellular phone use, while it is just one form of driver distraction, is a growing problem. The amendments will also give us the ability, through regulation, to prohibit other specific distractions and include other electronic devices as

> technology changes so the government can respond effectively to new concerns as they arise."

[16] In my view, the adjudicator erred in law by interpreting "use" in a manner that is inconsistent with the purpose of the specific section as well as the overall purpose of the *MVA*. In this regard, the purpose of s. 100D(1) is to prevent people from driving while distracted. Further, the purpose of the *MVA* is to regulate highway traffic in the interest of public welfare and safety.

[17] In coming to his decision, the adjudicator did not have the benefit of Justice Murphy's oral decision of July 17, 2013 in *R. v. Lumsden*. In that case, Mr. Lumsden was observed having a hand-held cellular telephone in his hand as he drove by a police officer. He was charged contrary to s. 100D(1). Mr. Lumsden's evidence was that he was using his cell phone as a clock. The adjudicator found that using a telephone as a clock did not constitute "use" and acquitted Mr. Lumsden.

[18] On appeal, Justice Murphy cited *R. v. Ferguson* and found that any action involving a cellphone while driving constitutes use. At p. 8, line 4-14, Justice Murphy stated as follows:

> "I do not find that there's any ambiguity in the word "use". And as I say, I follow Justice Coughlan's decision in the *Ferguson* case. And I find also that the purpose of the section is as Justice Coughlan found. It's to avoid distraction in driving. It's not to interfere with communication. And while it may seem an innocent act to look at a cell phone to see what time it is, in fact that is something I find which does involve the use of a cell phone. And to do that while you have operation of a motor vehicle is under the *Act* an offence. So the offence has been established. So the appeal is allowed. The conviction… and the acquittal is set aside, and a conviction is entered."

[19] In all of the circumstances, I find the purpose of s. 100D(1) is to prevent traffic accidents. The method of prevention is to prohibit distracted driving. The section aims to accomplish this purpose through a ban on hand-held cellular telephone use and text messaging while driving. In my view, the adjudicator did not consider the purpose of this section is to prohibit distracted driving caused by hand-held cellular telephone use. The adjudicator's narrow interpretation of cellular telephone use is inconsistent with the purpose of the section. Accordingly, this was an error of law.

[20] In the present case, the evidence established the respondent was using his hand-held cellular telephone while driving. The evidence demonstrated that he was distracted in two ways. First, by looking at his cellular phone while driving to check and see whether he had received a text. Second, Mr. MacDonald was holding the cellular phone in his hand while driving. Once again, the section in question prohibits the use of hand-held devices. In my view, physically holding one's phone is important to the interpretation of "use" in the context of the purpose of the section; i.e., to prevent accidents.

[21] Mr. MacDonald acknowledged looking at his device to see if he had received a text. In my view, he was clearly using the device notwithstanding that he was not speaking on phone or texting. Recall, the section in question says it is an offence to use a hand-held cellular telephone OR engage in text messaging. In my view, the plain meaning of the word "use" includes holding a hand-held cellular telephone and looking at it in anticipation of an incoming text message. Both of these activities would distract a person from keeping his or her eyes on the road.

Conclusion

[22] The trial judge erred in distinguishing *R. v. Ferguson* in his interpretation of the word "use" as it pertains to s. 100D(1) of the *MVA*. The section in question is not ambiguous, and clear words should be given effect. On the facts as found by the trial judge, Mr. MacDonald was using his hand-held cellular telephone while operating a vehicle on a highway.

[23] I allow the appeal, set aside the acquittal and enter a conviction of Cullen Edward MacDonald of the charge pursuant to s. 100(D)(1) of the *MVA*.

[24] I will receive submissions as to sentence.

Chipman, J.

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Counsel:	Joshua Judah and Tara Gault, articled clerk, for the Appellant Cullen Edward MacDonald, Respondent

ERRATUM

Change paragraph 1 from:

Cullen Edward Ma2014-12-17cDonald

To:

Cullen Edward MacDonald