SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Ferguson, 2013 NSSC 191

Date: 20130625
Docket: Bwt.411073
Registry: Bridgewater

Between:

Her Majesty the Queen

Appellant

v.

Pamela B. Ferguson

Respondent

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	May 29, 2013 at Bridgewater, Nova Scotia
Counsel:	Sharon A. Goodwin, for the appellant Richard W. Norman, for the respondent

[1] Pamela B. Ferguson was acquitted of a charge pursuant to section 100D (1) of the *Motor Vehicle Act* R.S.N.S. 1989 c. 293. Section 100D 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) This Section does not apply to a person who uses a hand-held cellular telephone or other communications device to report an immediate emergency situation. 2007, c. 45, s. 7 .

[2] The Crown has appealed the acquittal.

[3] The facts as found by the trial judge are as follows. On May 27, 2012, Ms. Ferguson was operating a motor vehicle at or near exit 14 off highway 103 in Lunenburg County, Nova Scotia. Ms. Ferguson an operator of a motor vehicle had her cellular telephone in her hand while waiting in traffic to make a left turn. The telephone was held up above the steering wheel. The police constable who testified was not able to tell what Ms. Ferguson was doing with the cellular telephone but it did not appear she was talking into it and he did not observe Ms. Ferguson doing any texting. The constable did note Ms. Ferguson had a Bluetooth device in her ear when she was stopped. The cellular telephone was held in Ms. Ferguson's right hand when the constable approached the vehicle. Ms. Ferguson testified she had her device connected to Google MapQuest. The judge found that checking Google MapQuest on the cellular telephone qualifies as a use. Ms. Ferguson at no time had her cellular telephone up to her mouth or ear. She was not otherwise texting.

[4] After making his findings of fact the trial judge addressed what is meant by the phrase "hand-held cellular telephone". The term is not defined in the *Motor Vehicle Act*, *supra*. The *Highway Traffic Act* of Newfoundland and Labrador prior to 2010 defined "cellular telephone" and "hand held cellular phone" in section 176.1 (a) and (b) as follows:

> (a) Cellular telephone means an apparatus which can send and receive 2 way voice telecommunications without the aid of a wire or cord, except where that wire or cord is used as a power source, and excludes a 2 way radio device.
>
> (b) Hand-held cellular phone means a cellular phone the use of which requires being placed in proximity to the mouth and ear by being held in the hand or by another means that uses one or more parts of the body, but does include a cellular phone that is equipped with and used with an external speaker or ear phone and microphone that may stand alone, be mounted in the vehicle, or worn on the body.

[5] The above definitions of cellular telephone and hand-held cellular phone were deleted in amendments to s. 176.1 in 2010.

[6] The trial judge adopted the definition of "hand-held cellular telephone" as in the *Highway Traffic Act* of Newfoundland and Labrador prior to the 2010 amendment. Using that definition the trial judge concluded Ms. Ferguson was not using a hand-held cellular telephone and acquitted Ms. Ferguson.

[7] The role of a Summary Conviction Appeal Court was set out by Cromwell, J.A., as he then was, in giving the Court of Appeal's judgment in *R. v. Nickerson* (2000), 178 N.S.R. (2d) 189 at p. 191:

> "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 ss. 822(1) and 686(1)(a)(I) and *R. v Gillis* (1981), 45 N.S.R. (2d) 137; 86 A.P.R. 137; 60 C.C.C. (2d) 169 (C.A.), 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. Burns (R.H.),* [1994] 1 S.C.R. 656; 165 N.R. 374; 42 B.C.A.C. 161; 67 W.A.C. 161; 89 C.C.C. (3d) 193, at p. 657 [S.C.R.], 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."

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

[9] This is a strict liability offence. The *actus reus* must be proved beyond a reasonable doubt. The trial judge found as a fact checking Google MapQuest on the cellular telephone was a "use". There is no reason to question that finding.

[10] Use is defined in the Shorter Oxford English Dictionary 5th ed. as:

> "Act of using, fact of being used." gen. The action of using something, the fact or state of being used; application or conversion to some purpose."

[11] Ms. Ferguson was using her cellular telephone when checking Google MapQuest on it.

[12] Ms. Ferguson was acquitted by the trial judge. He did not consider she was using a "hand-held cellular telephone" as once defined in the *Highway Traffic Act* of Newfoundland and Labrador. Was the device Ms. Ferguson held in her hand and described in her evidence as a "cell phone" a "hand-held cellular telephone"?

[13] Ms. Ferguson submits I should take judicial notice of the fact mobile telephony technology changes rapidly. Since 2007 numerous companies have introduced products commonly called "smart phones" which have a cellular telephone function but may also have other functions such as a camera, web browsing capabilities, and digital maps. That section 100D(1) of the *Motor Vehicle Act*, *supra* only applies to "cellular telephones" and the traditional function of that device - i.e.; transmitting sound for the purpose of communicating and not other electronic devices such as the one used by Ms. Ferguson.

[14] In support of this submission Ms. Ferguson cites *R. v. Perka*, [1984] 2 S.C.R. 232 where Dickson, J., as he then was, in giving the majority judgment stated at page 264:

> ... 'The doctrine of *contemporanea expositio* is well established in our law. "The words of a statute must be construed as they would have been the day after the statute was passed…" *Sharpe v. Wakefield* (1888), 22 Q.B.D. 239, at p. 242 (per Lord Esher, M.R.). See also Driedger, *Construction of Statutes* (2nd ed. 1983) at p. 163: "Since a statute must be considered in the light of all circumstances

> existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held"; *Maxwell on the Interpretation of Statutes, supra*, at p. 85: "The words of an Act will generally be understood in the sense which they bore when it was passed".

[15] However, Dickson, J. went on to explain not all terms in all statutes are confined to the understanding of the meaning at the time it was passed stating at page 265:

> ... "This does not mean, of course, that all terms in all statutes must always be confined to their original meanings. Broad statutory categories are often held to include things unknown when the statute was enacted. In *Gambart v. Ball* (1863), 32 L.J.C.P. 166, for example, it was held that the *Engraving Copyright Act* of 1735, which prohibited unauthorized engraving or "in any other manner" copying prints and engravings, applied to photographic reproduction—a process invented more than one hundred years after the Act was passed. (See also *Maxwell, supra*, at pp. 102 and 243-44.) This kind of interpretive approach is most likely to be taken, however, with legislative language that is broad or "open-textured". ...
>
> ... "But where, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted. It is clear that Parliament intended in 1961, by the phrase "*Cannabis sativa L.*", to prohibit all cannabis. The fact that some, possibly a majority, of botanists would now give that phrase a less expansive reading in the light of studies not undertaken until the early 1970's, does not alter that intention. ..."

[16] In interpreting a statutory provision if no ambiguity arises on the face of the provision, then its clear words should be given effect. In giving the majority judgment in *R. v. McIntosh*, [1995] 1 S.C.R. 686 Lamer, C.J., stated at paragraph 18:

> "In resolving the interpretive issue raised by the Crown, I take as my starting point the proposition that where no ambiguity arises on the face of a statutory provision, then its clear words should be given effect. This is another way of asserting what is sometimes referred to as the "golden rule" of literal construction: a statute should be interpreted in a manner consistent with the plain meaning of its terms. Where the language of the statute is plain and admits of

> only one meaning, the task of interpretation does not arise (Maxwell on the Interpretation of Statutes (12th ed. 1969), at p. 29)."

[17] Is the item Ms. Ferguson described as a cell phone and the trial judge found to be a cellular telephone not a hand-held cellular telephone. It is well known that mobile telephony technology changes rapidly. So called "smart phones" while still functioning as telephones have many other functions.

[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."

[19] Recently, in *R. v. Hiscoe,* 2013 NSCA 48 the Court of Appeal was dealing with a search incident to arrest of the accused's cell phone which was described as a "regular smart phone, a Blackberry sort of phone". In the course of giving the court's judgment Oland, J.A., stated at paragraph 75:

> "The judge was right to identify the informational component of the smartphone as the subject matter of the search. In view of the variety and breadth of personal information on cell phones, there was support for his statements that they are not comparable to notebooks or briefcases. Such items, and others like the briefcases, purses and wallets, address books and locked boxes described by the Crown and the diaries and logbooks described in Giles, do not contain the extent or the multiple types of information, including histories of searches, now regularly found on cell phones. Moreover, these devices are not simply inanimate objects; they are a means of communication. The right to privacy includes privacy against misuse or receipt of private communication without private authorization."

and at paragraph 79:

> "In my opinion, the trial judge in his voir dire decision committed no error of law in finding that the full content download of the respondent's cell phone by the police who had not obtained a warrant, infringed s. 8 of the Charter which guarantees everyone the right to be secure against unreasonable search or seizure. I would dismiss the appeal."

[20] In *R. v. Hiscoe, supra*, Oland, J.A., referred to decisions of other courts in which "smart phones" were referred to as cell phones.

[21] If a person on the street was asked whether the device was a hand-held cellular telephone - he or she would answer it was. The device was a cellular telephone. Ms. Ferguson said so and she held it in her hand. It was a hand-held cellular telephone.

[22] The trial judge erred in adopting the definition of hand-held cellular telephone once contained in the *Highway Traffic Act* of Newfoundland and Labrador. Section 100D of the *Motor Vehicle Act, supra,* is not ambiguous - its clear words should be given effect. Although Ms. Ferguson had a Bluetooth device in her ear when using Google MapQuest, she had the cellular telephone in her hand. On the facts as found by the trial judge, Ms. Ferguson was using her 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 Paula B. Ferguson of the charge pursuant to section 100D(1) of the *Motor Vehicle Act*, *supra*.

[24] I will receive submissions from counsel as to sentence.

Coughlan, J.