COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kazemi, 2013 ONCA 585
DATE: 20130927
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Laskin, Goudge and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Khojasteh Kazemi

Respondent

Amanda Ross, for the appellant

Andrew Dekany, for the respondent

Heard: May 27, 2013

On appeal from the judgment of Justice Shaun S. Nakatsuru of the Ontario Court of Justice dated June 20, 2012, with reasons reported at 2012 ONCJ 383, allowing the appeal from the conviction entered by Justice of the Peace Ruby Wong on July 26, 2011.

Goudge J.A.:

[1] The facts of this case are simple. On April 26, 2010, the respondent was driving home from work alone. While she was stopped at a stop light, a police officer observed her to have a cell phone in her hand. She said that the cell phone had been on the seat but had dropped to the floor of the car when she

braked. She picked it up when she got to the red light. That was when she was observed by the officer.

[2] The respondent was charged with driving while holding a hand-held wireless communication device pursuant to s. 78.1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended by S.O. 2009, c. 4, s. 2 (the "*HTA*"). It reads as follows:

> **Wireless communication devices**
>
> 78.1(1) No person shall drive a motor vehicle on a highway while holding or using a hand-held wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages. [Emphasis added.]

[3] The respondent does not contest that when she was observed by the officer she was driving, and that her cell phone was a hand-held wireless communication device. The central issue on appeal is whether the respondent was "holding" the cell phone for the purposes of s. 78.1(1).

[4] The trial court held that the respondent's admission that she had the cell phone in her hand established that she was holding it for the purposes of the section. The respondent was convicted and fined $200.00.

[5] On appeal to the Ontario Court of Justice, the appeal judge allowed the appeal and dismissed the charge. He determined that there must be some sustained physical holding of the device in order to meet the "holding"

requirement, and that the momentary handling here was insufficient to establish that requirement.

[6] The Crown, represented by the City of Toronto, appeals with leave to this court. It raises two issues: first, and most important, that the appeal judge erred in his interpretation of the "holding" requirement in s. 78.1(1); second, that he misapprehended the facts found by the trial court.

[7] The respondent joins issue on both, and raises a third issue, a request for costs order against the appellant.

ANALYSIS

[8] The central issue is the meaning of "holding" in s. 78.1(1) of the *HTA*. The word is not given a statutory definition in the legislation.

[9] The definitive formulation of the modern approach to statutory interpretation is that of Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87:

> [T]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intentions of Parliament.

[10] This principle is buttressed by s. 64(1) of the *Legislation Act*, 2006 S.O. 2006 c. 21, Sched. F. It reads:

> **Rule of liberal interpretation**
>
> 64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

[11] The ordinary meaning of "holding" a cell phone is having it in one's hand. *The New Shorter Oxford Dictionary*, 1993 defines "to hold" as "to have a grip on" or "to support in or with the hands". There is no suggestion that only if one has the cell phone in one's hand for a sustained period of time is one holding the cell phone.

[12] In my view, this interpretation of "holding" best ensures the attainment of the objective of the *HTA*, which is to protect those who use the roads of Ontario: see *R. v. Raham*, 2010 ONCA 206, 99 O.R. (3d) 241, at para. 33.

[13] This interpretation also best serves the legislature's purpose in enacting the provision in which "holding" appears. Section 78.1(1) was added to the *HTA* with the enactment of the *Countering Distracted Driving and Promoting Green Transportation Act, 2009*, S.O. 2009 c.4. On third reading, on April 22, 2009, the Minister of Transportation described the purpose of the amending legislation this way:

> [O]ur eyes-on-the-road, hands-on-the-wheel legislation aims to stop the use of hand-held wireless communication devices such as cellphones while driving. The goal is not to inconvenience people but to make our roads safer for them and for everyone else who shares our roads. For safety's sake, driver should focus on one thing and one thing only: driving.

See: Ontario, Legislative Assembly, Official Report of the Debates (Hansard), 39th Parl., 1st Sess., (22 April 2009) (Hon. James Bradley).

[14] Road safety is best ensured by a complete prohibition on having a cell phone in one's hand at all while driving. A complete prohibition also best focuses a driver's undivided attention on driving. It eliminates any risk of the driver being distracted by the information on the cell phone. It removes any temptation to use the cell phone while driving. And it prevents any possibility of the cell phone physically interfering with the driver's ability to drive. In short, it removes the various ways that road safety and driver attention can be harmed if a driver has a cell phone in his or her hand while driving.

[15] The interpretation of "holding" offered by the appeal judge requires that there be some sustained physical holding. Any holding for a shorter period of time, with the accompanying risks to road safety and driver attention, would be exempt from the prohibition. With respect, I do not think this accords with the ordinary meaning of the word. Nor does it properly reflect the object of the *HTA* or best achieve the legislature's purpose in enacting the section. Moreover such an interpretation would leave the uncertainty of how long the physical holding must be sustained to be caught by the provision. It would create the enforcement challenge of requiring continued observation of the driver for that period of time if the prohibition is to be effective.

[16] I would therefore conclude that the appeal judge erred in his interpretation of "holding" in s. 78.1(1) of the *HTA*. The correct interpretation requires that the appeal be allowed and the conviction restored.

[17] Given this conclusion, it is not necessary to deal with the appellant's argument that the appeal judge misunderstood the facts found by the trial court.

[18] Finally, I would reject the respondent's request for costs of the appeal. The general rule is that no costs are awarded in a *Provincial Offences Act* proceeding such as this: see *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 100. Particularly since the respondent was unsuccessful, it would not be just and reasonable to depart from the general rule in this case.

Released: September 27, 2013 ("J.L.")

"S.T. Goudge J.A."
"I agree John Laskin J.A."
"I agree David Watt J.A."