COURT FILE No. Toronto
Citation: *R. v. Kazemi*, 2012 ONCJ 383

ONTARIO COURT OF JUSTICE

B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	**Mr. G. Katz**
(Respondent)	)	**for the Respondent**
	)	
— AND —	)	
	)	
KHOJASTEH KAZEMI	)	
(Appellant)	)	**Mr. A. Dekany**
	)	**for the Appellant**
	)	
	)	**Heard: June 5, 2012**
	)	
	)	

NAKATSURU J.:

[1] The appellant appeals her conviction of the offence of holding or using a hand-held wireless communication device pursuant to ss. 78.1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8. For the following reasons the appeal is allowed.

INTRODUCTION

[2] The resolution of this appeal depends upon the statutory interpretation of this relatively new section of the *Highway Traffic Act* which received royal assent in 2009. The facts are simple. The appellant was observed by a police officer holding her cell phone while stopped at a red light. On July 26, 2011, after a trial, the justice of the peace convicted the appellant and fined her $200.

[3] The appellant raises three issues on appeal:

- That her right to a fair trial was compromised by the misleading notice of trial and an ambiguous charge.

- That the "holding" of the cell phone within the meaning of ss. 78.1(1) of the *Highway Traffic Act* should be interpreted in such a fashion that the holding must be for the purpose of sending or receiving wireless communication.

- That the prosecution must prove that the cell phone was operative at the time of the holding in the sense it was capable of sending or receiving wireless communication.

SUMMARY OF THE FACTS

[4] On the late afternoon of April 26, 2010, a police officer, P.C. Miller, standing at the corner of Gerrard Street East and River Street in the City of Toronto observed the appellant stopped in her car at a red light. He observed the appellant who was driving a grey coloured SUV glancing down and back up at the traffic light several times. It appeared to the officer that she was punching numbers on her cell phone although he did not actually observe this. P.C. Miller walked over the vehicle on the passenger side front door. He observed the appellant holding an opened black Nokia flip cell phone in her right hand. The officer knocked on the window to get the appellant's attention and motioned her to pull over. The driver identified herself with a valid Ontario driver's licence. P.C. Miller did not examine the cell phone to determine whether it was capable of sending or receiving messages. The appellant was adamant she was not on her cell phone. P.C. Miller wrote her a ticket under ss. 78.1(1) of the *Highway Traffic Act*.

[5] The appellant testified that she was returning home from work with the Children's Aid Society in Oshawa. While driving on the Don Valley Expressway, her cell phone which was on the seat, dropped to the floor. She could not pick it up as she was driving. When she arrived at the red light at Gerrard Street East and River Street, after exiting from the Expressway, she had the opportunity to retrieve her phone and did so. She did not use it nor did she intend to use it. She did not even know how to text from her phone and she did not believe that her cell phone was open. The appellant testified that she had the phone for her security but usually turns it off on the drive home since she did not want to receive any calls. The appellant introduced her cell phone records for that month which showed that her phone had not been used at the relevant time. She testified that she had simply retrieved it when the officer came to her window.

THE REASONS OF THE JUSTICE OF THE PEACE

[6] At trial, the defence submitted that the prosecution had to prove that the appellant was in fact using the device while it was in her hand when the police officer came upon her. The learned justice of the peace rejected this argument finding that the offence was made out if the accused was either holding or using the device. The appellant had admitted she was holding it. This sufficed for the purpose of the subsection. Whether it was in use or not was irrelevant given the wording of the section.

[7] The justice of the peace also rejected the defence argument that the subsection required proof that the device was operable. The officer had not checked to see if the device was working. In her reasons, the justice of peace found that so long as the phone was capable of operating, the offence was made out. The reason the legislature introduced the subsection was to combat the mishaps and accidents caused by people using such a device. The officer testified that the device was a brand name cell phone and that it was flipped open. The justice of the peace accepted this evidence and held that this element of the offence was made out.

[8] The appellant was convicted and fined $200.

ANALYSIS

A. Fairness of the Trial

[9] The appellant submitted that she did not have a fair trial because due to a misleading notice of trial, she came prepared to defend only the "using" of a hand-held wireless communication device and not the "holding" of one. I reject this ground of appeal.

[10] First of all, the offence certificate that the appellant was arraigned upon refers to ss. 78.1(1) in its entirety and is not limited to just the "using" of the device.

[11] Secondly, the appellant was represented by a professional agent experienced in defending such cases. At no time was this issue ever raised by the defence at trial. Rather, the defence argued, albeit unsuccessfully, that the appellant was not holding her cell phone within the meaning of the section since she had no intention of using it.

[12] Finally, the appellant filed as fresh evidence an affidavit pursuant to ss. 136(3)(b) of the *Provincial Offences Act*, R.S.O. 1990, c. P. 33: see *R. v. Gill* (2003), 46 M.V.R. (4th) 230 (Ont. C.J.). Cross-examination on the affidavit made it abundantly clear that the appellant was not misled by the notice of trial. Prior to her trial, she discussed the subsection with her legal representative as well as colleagues at work. As a result of these discussions and further research conducted, she came to the view that "holding" a cell phone within the meaning of the section, had to be more than just having it in one's hand. There had to be a purpose for the holding. In my opinion, given the appellant's testimony, there is no merit to this ground of appeal. She was very prepared to deal with the question of whether she was "holding" a hand-held wireless communication device.

B. The Interpretation of "Holding" in ss. 78.1(1)

[13] Section 78.1 of the *Highway Traffic Act* states:

> **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.
>
> **Entertainment devices**
>
> (2) No person shall drive a motor vehicle on a highway while holding or using a hand-held electronic entertainment device or other prescribed device the primary use of which is unrelated to the safe operation of the motor vehicle.
>
> **Hands-free mode allowed**
>
> (3) Despite subsections (1) and (2), a person may drive a motor vehicle on a highway while using a device described in those subsections in hands-free mode.
>
> **Exceptions**
>
> (4) Subsection (1) does not apply to,

(a) the driver of an ambulance, fire department vehicle or police department vehicle;

(b) any other prescribed person or class of persons;

(c) a person holding or using a device prescribed for the purpose of this subsection; or

(d) a person engaged in a prescribed activity or in prescribed conditions or circumstances.

Same

(5) Subsection (1) does not apply in respect of the use of a device to contact ambulance, police or fire department emergency services.

Same

(6) Subsections (1) and (2) do not apply if all of the following conditions are met:

1. The motor vehicle is off the roadway or is lawfully parked on the roadway.

2. The motor vehicle is not in motion.

3. The motor vehicle is not impeding traffic.

Regulations

(7) The Minister may make regulations,

(a) prescribing devices for the purpose of subsections (1) and (2);

(b) prescribing persons, classes of persons, devices, activities, conditions and circumstances for the purpose of subsection (4).

Definition

(8) In this section,

"motor vehicle" includes a street car, motorized snow vehicle, farm tractor, self-propelled implement of husbandry and road-building machine.

[14] The issue to resolve in this case is the statutory interpretation of "while holding or using a hand-held wireless communication device or other prescribed device" in ss. 78.1(1). The starting point is the oft-cited definitive formulation of statutory interpretation at p. 87 of Driedger's *Construction of Statutes*:

> Today 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 intention of Parliament.

See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 33.

[15] It is argued by the appellant that the "holding" of a hand-held wireless communication device must be interpreted in the context that the legislature also prohibited the "using" of such a device. "Using" must refer to the use of the device to receive or transmit telecommunications. "Holding" should also be interpreted similarly in that the "holding" must be for the purpose of receiving or transmitting telecommunications. The appellant resorts to the interpretative rule of

noscitur a sociis; that an expression's meaning may be revealed by its association with other words used. While this canon of interpretation is generally applied to interpret terms forming a part of an enumeration, it is not only confined to enumerations and is a useful reminder of the influence of the textual environment of word or a phrase: see P.A. Cote, *The Interpretation of Legislation in Canada,* 4th Ed., at pp. 332-33. Otherwise, the appellant submits, a literal interpretation of "holding" would lead to absurd results where a person could be penalized for holding a cell phone even when he or she had no intention of using it.

[16] I do not find this interpretation of the appellant persuasive. First of all, from a plain and ordinary grammatical reading of ss. 78.1(1), the subsection prohibits the "holding *or* using" of a wireless communication device. If "holding *for the purpose* of receiving or transmitting" is read into the provision, then the meaning of "holding" would collapse into "using" and would make the employment of the word by and large redundant. This could not have been the intention of the legislature. Within the framework of the various subsections of s.78.1, where the legislature wished to only refer to the "use" of a device, it specifically has only utilized the word "use" or "using" without reference to "holding". Some substantive content must be ascribed to the legislature's use of the term "holding." I note that the little reported case law that exists, none binding on this court, does not support the appellant's position: see *R. v. Chadwick*, [2011] O.J. No. 3748 (C.J.); *Mississauga v. Osman*, [2010] O.J. No. 4618 (C.J.); *R. v. Schafer* (2011), 367 Sask. R. 316 (Q.B.).

[17] Secondly, on a general level, the appellant's proposed interpretation confuses the legal concepts of intent and motive. While this is a regulatory offence, a quick reference to the criminal law makes this misunderstanding patent. Without delving into what is exactly required to prove the mental element of ss. 78.1(1), the defence's position would require the prosecution to prove that the driver had an ulterior intention to his or her act of holding; that is the holding was for the purpose of using the device. However, the interpretive rule is when interpreting the *mens rea* required for criminal culpability, absent statutory language to the contrary, the reason or reasons that cause an accused to engage in prohibited conduct or to choose to bring about a prohibited consequence are irrelevant to culpability: see *United States of America v. Dynar*, [1997] 2 S.C.R. 462; *R. v. Khawaja* (2010), 273 C.C.C. (3d) 415 (Ont. C.A.) at para. 91.

[18] Thirdly, reference to *noscitur a sociis* is of limited assistance. As stated by the author in *The Interpretation of Legislation in Canada* at p. 333:

> *Noscitur a sociis* helpfully draws attention to the fact that a statute's context can indicate a meaning far more restrictive than that found in the dictionary. But its importance should not be exaggerated. The interpreter establishes the meaning of a text by considering numerous factors, and it may be necessary to ignore the restrictive view suggested by the immediate context if a more liberal approach is dictated by the legislation's overall environment. Although a good servant, the *noscitur a sociis* principle may prove to be a poor master. It can be misleading and should be handled with care.

[19] What then is the mischief that the s. 78.1 seeks to address? There seems to be little controversy on this point. The *Highway Traffic Act* was amended in order to promote road safety by banning the use of cell phones and other hand-held electronic devices by drivers operating motor vehicles and the distraction caused by such devices. The then Minister of Transportation, the Honourable J. Bradley, on third reading of Bill 118, *Countering Distracted Driving and Promoting Green Transportation Act, 2009,* summarized the legislature's objective in this way:

> Our eyes-on-the-road, hands-on-the-wheel legislation aims to stop the use of hand-held wireless communication devices such as cell phones 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, drivers should focus on one thing and one thing only: driving.

[20] There can be little doubt that the primary focus of the bill is the *use* of such devices. However, the manner by which the legislature acted to achieve its goal was to also prohibit the "holding" of such devices as well as the "using" of them. The overriding intent of legislation is road safety. To achieve this goal, both "holding" and "using" was prohibited. Other provincial jurisdictions have come up with different solutions by just banning "use": see *R. v. Schafer, supra*. Nonetheless, to legislate in this fashion is within the purview of Ontario's elected assembly. Although judges and not lawmakers determine the intention of the legislature, absent constitutional concerns, judges do not second guess the wisdom of the lawmakers.

[21] Prohibiting the "holding" as well as the "using" of hand-held wireless communication devices does promote the objective of the legislation. While driver distraction in using such a device is a key safety problem, the manual manipulation of such a device even when not in use poses its own safety concerns. Holding a cell phone in one's hand can interfere with the driver's physical dexterity while driving and make the driver less adept at operating his or her motor vehicle. This hands-on-the-wheel legislation addresses this by banning more than just use. In addition, holding a cell phone or a similar device while driving even when not in use can still pose a distraction. When immediately at hand, the temptation to use the device in retrieving or reviewing incoming messages is powerful; an experience very familiar to all who own such devices. Finally, it is within the legislature's right to be concerned with the enforcement and prosecution of any offences it enacts. Prohibiting and penalizing the "holding" of the device facilitates this. If only "use" or the "using" of a device was prohibited, it would then be incumbent on the prosecution to prove that the driver was at the relevant time actually "using" the phone. It would be very easy for an individual to simply deny using the phone and difficult for the police to obtain contrary evidence.

[22] On the other hand, I do agree with the appellant that "holding" must be nonetheless interpreted contextually; not only with respect to the other words used in the provision, but also, with due regard to the objective of the legislature. The respondent's position in this case goes too far. He argues that ss. 78.1(1) prohibits the mere touching of a hand-held wireless communication device or any using of such a device even if unrelated to its design or function. Cell phones are not inherently dangerous or noxious products. The framework of s. 78.1 permits their use for certain laudable purposes and in circumstances designed to minimize the dangers posed by distraction, i.e. in a hands-free mode.

[23] In my opinion, the "holding" or the "using" of a hand-held wireless communication device must be interpreted in a manner that has regard to the design and function of such devices. Thus, for example, "holding" must mean more than simply possessing or carrying a device. Since what is prohibited is the holding of a *hand-held* device, the prohibition should only extend to the holding of such a device in one's hands. Having it otherwise on one's person, in a pocket, for instance, would not come within the meaning of the section. Furthermore, common dictionary definitions of "hold" include keeping fast, grasp, or keep, sustain in a particular position, or grasp so as to control. Consequently, to be "holding" a hand-held wireless communication device requires more than merely touching or a brief handling of such a device. This interpretation is consistent with the common meaning of the term "holding" and the objective of the legislation. Given the objective is to promote road safety by banning resort to and the use of such devices while operating a motor

vehicle, it is not necessary to prohibit a driver from merely touching a cell phone, for example, just to hand it to a passenger or to move it within the car. The short mental distraction and physical interference with the ability to drive caused by such acts are not intended to be caught by the provision. There must be some sustained physical holding of the device in order to meet the definition found within ss. 78.1(1).

[24] In the case at bar, the appellant testified that all she did was to move her cell phone from the floor of her vehicle where it had fallen, to the passenger seat while at a stop light when it was safe to do so. The police officer testified to observations that could reasonably be interpreted as the appellant using the cell phone by texting. However, it appears from the reasons, the justice of the peace accepted the appellant's testimony on this point; a finding that the justice of the peace was entitled to make. In my view, the justice of the peace erred by finding that even on the appellant's own evidence she had committed an offence by "holding" her cell phone. Such a momentary handling of a cell phone does not fall within the meaning of "holding" as found in the provision. The conviction is unreasonable and the appellant will be acquitted of the charge.

C. Whether the Prosecution Must Prove that the Device was Operable

[25] Given the above conclusion, it is not strictly necessary to deal with this ground of appeal. However, for the sake of completeness, I will consider this ground of appeal and dismiss it.

[26] The defence relies upon the case of *R. v. Pizzuro*, [2012] O.J. No. 860 (C.J.). I am advised that leave to appeal this judgment has been granted but the appeal has not yet been heard. More recently, the same issue arose in *R. v. Gill*, [2012] O.J. No. 2511 (C.J.) but the learned justice declined to decide the issue as it did not arise on the facts of that case.

[27] In *Pizzuro*, Beatty J. decided that the prosecution must prove as an essential element of a ss. 78.1(1) offence that the hand-held wireless communication device must be "capable of receiving or transmitting telephone communications, electronic data, mail or text messages" at the time of the offence. On the facts of that case, the prosecution had proven that the accused had a cell phone in his hand, one that a police officer observed emitting light, but no evidence was proffered that the cell phone was operative. As a result, the accused was acquitted.

[28] With the greatest of respect, I must disagree with Beatty J. In my opinion, the proper interpretation does not require such proof. Again, the relevant subsection states the following:

> **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]

[29] The devices subject to the provision are a "hand-held wireless communication device" or "other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text message". It is only other prescribed devices that are subject to this qualification. The legislature placed this condition upon the government in order to limit the type of devices that could properly fall within its regulatory power to prescribe. It is not meant to add an additional element that the prosecution is required to prove. The prosecution need only prove that the device held or used by the driver was a "hand-held wireless communication device". Alternatively, the prosecution could prove that it was another prescribed device. There is no

requirement that the prosecution prove in either case that the device was operable at the time.

[30] In my view, not only is this interpretation the grammatically correct one, but it is also consistent with the objective of the provision. As already analyzed above, the "holding" of such devices is prohibited by the subsection since the holding in addition to the use of such devices creates a potential danger on the road. Using such a device may require the device to be operable. However, it is not necessary for the device to be operable for a person to be liable for holding the device. The distraction and interference with driving occurs whether the device is operable at the time or not. For example, a cell phone whose battery is so low as to be unable to transmit or receive calls, will still pose a distraction to a driver who, unaware of this, decides to hold or attempt to use it.

[31] As a practical matter, if the appellant's argument was acceded to, the police would have to conduct further investigations to gain evidence that the device was operable at the time. This would include the more intrusive action of taking a cell phone at the road side and operating it in a fashion to show it was capable of receiving or sending messages. Depending on the device and an officer's familiarity with such a device, this may involve more or less time and effort; potentially transforming a brief detention to write out a ticket to a longer and more involved investigation and detention. This would also lead to greater incursions into the driver's privacy interest given the nature of information stored on these devices. It would surprise me that the legislature intended these consequences when it passed this important but simple provision; one enacted as much for its educative effect as for the regulation of traffic.

[32] In the case at bar, the appellant admitted that the device was her cell phone. A cell phone is a wireless hand-held communication device. The learned justice of the peace made no error in this regard. This ground of appeal is therefore dismissed.

D. Conclusion

[33] For the reasons given, the conviction appeal is allowed and the charge is dismissed.

Released: June 20, 2012.

Signed: _____