

ONTARIO COURT OF JUSTICE

B E T W E E N:

MOHAMMAD AHMAD

Appellant

- and -

THE CORPORATION OF THE CITY OF MISSISSAUGA

Respondent

Before Justice James Stribopoulos
Heard on September 28, 2018
Endorsement On Appeal
Released September 28, 2018

Mr. G. Kang.....for the Appellant
Mr. R. Pattersonfor the Respondent

STRIBOPOULOS, J.:

[1] At the completion of his trial, the appellant was convicted of driving a motor vehicle on a highway while holding a hand-held wireless communication device, contrary to s. 78.1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8.

[2] The appellant appeals against his conviction. He argues that the trial court committed a legal error. The error alleged is that the brief oral reasons for judgment reflect a failure to apply the governing legal standard; proof beyond a reasonable doubt.

[3] The charge was the subject of a very short trial, in which Constable Michel testified for the prosecution, and the appellant testified in his defence.

[4] The offence was alleged to have occurred on the morning of February 28, 2017, in the City of Mississauga, in the southbound lanes of Highway 410.

[5] Constable Michel testified that while travelling in the rightmost lane, the appellant was driving a vehicle in the centre lane immediately to his left. The officer was driving an unmarked SUV police vehicle. He testified that his vehicle was higher than the car driven by the appellant. The officer testified that, while driving, he looked over and down into the appellant's vehicle. He made his observations through his driver's side window, and in through the slightly tinted passenger side window of the appellant's car.

[6] The officer testified that for a period of five seconds, he observed the appellant holding in his right hand what the officer was sure was a cellphone. The officer described the appellant cradling the cell phone, essentially holding it in his palm, with the screen facing up. The officer could not see whether the display of the phone was illuminated. The officer was unable to identify the make of the cellphone. However, he testified that the phone was in a case that appeared to be gold and silver in colour.

[7] The appellant testified that on the morning in question he was driving a manual transmission vehicle. He maintained that as he drove, he had his one hand on the wheel and the other hand on the gearshift. The gearshift is positioned in the area of the centre console. He testified to owning an iPhone but described it as having a blue coloured case. He produced the cell phone, with its blue case, while testifying at trial. The clear implication of the appellant's trial testimony was that he was not holding a cell phone while driving on a highway.

[8] In very brief oral reasons, the trial court briefly summarized the evidence of the two witnesses. After doing so, the Justice of the Peace announced that: "the court is going to accept the evidence of Constable Michel and I am going to render a conviction."

[9] At no point did the trial court reference the governing legal standard; proof beyond a reasonable doubt. To be sure, the Justice of the Peace is presumed to know the law. Unfortunately, her knowledge of the controlling standard is not manifest from her reasons. Instead, on a fair reading of the reasons for judgment, it appears that the trial court registered a conviction because it preferred the testimony of the police officer as compared to the evidence of the appellant.

[10] In a case where credibility is important and proof beyond a reasonable doubt is the governing standard, a conviction cannot follow simply because the trier of fact believes the complainant and disbelieves the defendant.

[11] Even if the trier of fact does not believe the defendant, it must still consider whether it has a reasonable doubt after considering the defendant's evidence in the context of the evidence as a whole. See *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at 757-58.

[12] A reading of the brief oral reasons for judgment suggests that in resolving the issue of credibility in this case, the trial court failed to consider whether, despite preferring the evidence of the police officer, the appellant's testimony gave rise to reasonable doubt in the context of the evidence as a whole.

[13] This shortcoming is significant. It represents a legal error. It requires that this court allow the appeal.

[14] This court is not in a position to resolve the credibility issue that is at the heart of this case. That is the role of a trial court, which has the advantage of seeing and hearing the witnesses as they testify.

[15] Accordingly, a new trial is necessary, and an order will issue to that effect.

Released: September 28, 2018

Signed: Justice James Stribopoulos