

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Bada*, 2018 ONCJ 563

DATE: 2018 08 22

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

LORENZO BADA

Before Justice P.T. O'Marra
Heard on January 19, 2018
Ruling released on August 22, 2018

R U L I N G

F. Capizzanocounsel for the Crown
C. Boada.....counsel for the Appellant

P.T. O'Marra J. – (Orally):

[1] This is the Provincial Offences appeal in the case of *Regina v. Lorenzo Bada*. He was charged with operating his motor vehicle while using a handheld device; contrary to section 78.1(1) of the *Highway Traffic Act*. He was convicted after trial on April 10th, 2017, by Justice of the Peace Gunness.

[2] The appeal in this matter sets out a number of grounds. The grounds can be merged together into one.

[3] With respect to the second ground of appeal contained in the Notice of Appeal, it seemed when the officer at the time observed the appellant, he claimed that he saw a cell phone in the appellant's hand. However, according to the appellant when the officer testified at trial he did not provide enough detail as to whether or not, the appellant was holding the same cell phone that was later found or observed inside the car. This was the same argument advanced at trial. The appellant argued that the verdict was unreasonable based on the evidence.

[4] The only witness that testified for the Crown was PC Mortotsi.

[5] The Crown argued that there were no errors in law, which is the standard of an appellate review. It is whether or not Justice of the Peace erred in law.

[6] The appellant argued that the Justice of the Peace did not appreciate, or take into consideration, discrepancies in the contents or the lack of detail in the officer's notebook when juxtaposed with the officer's testimony.

[7] The appellant provided Justice Duncan's decision of *Regina v Zack*, [1999] O.J. No. 5747. Justice Duncan issued a further decision subsequent to *Zack* which dealt with the absence of information in an officer's notebook and how it affects an officer's credibility. In his decision of *Regina v. Golubentsev*, [2007] O.J. No. 4608, Justice Duncan said at paragraph 30:

My own decision in *Zack*, [1999] O.J. No. 5747, is often relied on in support of an argument to the effect that "if it's not in the notes it didn't happen." That is not what *Zack* stands for. Rather, in that case I intended to convey the idea that police officers could not withhold disclosure or crucial evidence on important points by saying "I didn't note it because I would remember it". *Zack* is a case about disclosure, not note taking, and it speaks to important matters – in that case the foundational observation of unsteadiness on the feet that was the basis for the opinion of impairment and demand – effectively holding that the police can't keep aces up their sleeve. It is necessary for the officer to at least somewhere, maybe not necessarily in his notebook, to disclose the significant observations that he made. *Zack* should not be interpreted as holding that police notes must be a comprehensive script of everything that occurred.

[8] The appellant further argued that during his investigation the officer did not take reasonable steps to investigate the call log of the cell phone. This area was already explored in cross-examination of the officer and, in my view, the Justice of the Peace dealt with it accordingly.

[9] The Crown provided to me two decisions from the Ontario Court of Appeal that were released on the same day, *R. v. Pizzuro*, [2013] O.J. No. 4299, and *R. v. Kazemi*, [2013] O.J. No. 4300. Both decision addressed the appellant's argument that the Crown must prove that the device in a driver's hand is a wireless communications device that is capable of sending or receiving signals. In my view, the Crown does not have to prove this fact as an essential element of the offence. This is clear from *R. v. Pizzuro*, supra at paragraphs 11 - 13:

The significant challenge for law enforcement is readily apparent. There can be no doubt that s. 78.1(1) was targeted principally at cell phones. Observing a driver holding or using a cell phone while driving would not be enough if this requirement existed. For each case, the police would also have to find ways to immediately acquire and test the cell phone in order to determine that it was capable of receiving or transmitting. I do not think that the legislature would have intended such a burden to be imposed by a section that is otherwise designed to operate in a simple and straightforward way.

It would also be unreasonable for prosecution where, for example, the charge is using a cell phone while driving, to require the Crown, once it has proven the use of a cell phone to communicate, to also prove that the cell

phone that was being used to communicate is capable of doing so is unnecessary. It would be unreasonable to read s. 78.1(1) to impose such a burden.

Finally, the legislative purpose of s. 78.1(1) must be considered. In *R. v. Kazemi*, (and that is a case released simultaneously) this court described that the purpose as ensuring road safety and driver attentiveness to driving. It is best served by applying the requirement that the device be capable of receiving or transmitting only to prescribed devices, but not to cell phones. Road safety and driver attentiveness to driving are best achieved by entirely prohibiting a driver from holding or using a cell phone while driving. To hold out the possibility that the driver may escape the prohibition because the cell phone is not shown to be capable of communicating, however temporarily, is to tempt the driver to a course of conduct that risks undermining these objectives.

[10] As I have already stated, the submissions made to me today were made to the trial judge. The appellant argued that there was not enough detail provided by the officer. The Justice of the Peace found as a fact that the appellant did have a cell phone in his hand. The Justice of the Peace said in his or her reasons that the officer observed the appellant holding a cell phone. The officer testified that the cell phone was, "In his right hand to his right ear." The officer observed his lips moving and his head nodding.

[11] Although the officer did not provide extensive detail as to the type of iPhone or cell phone he did provide 'some' detail. The following exchange occurred:

Q. So, if I was – suggested to you that at this point that it actually appeared to be a cell phone, could that be a correct assumption?

A. To me it looked like a cell phone.

Q. A cell phone yet that you can't describe, correct?

A. An electronic communication device, black in colour.

Q. Can you tell me if it has a keypad or not?

A. It was – I saw the back of the phone. It was black because at that – at the – at the point I arrived at the vehicle he placed it away from my view.

[12] Justice Ready in her unreported decision of *R. v. Gill*, (May 4th, 2012) dealt with the same ground of appeal as to whether or not there was proof that the object in the driver's hand was a cell phone. Her Honour decided that there was compliance with the section. She stated:

This is in – this court's estimation, this is the 21st century. Cell phones are virtually used everywhere in the world by young and by old alike; who doesn't have a cell phone? You carry a cell phone with you everywhere to all parts of the world. You use it to communicate with others. It is used virtually non-stop daily. The police officer said, "The object in the hand of the defendant was cell phone." He is a trained observer. He was out on the road that day for the very

purpose of checking vehicles and drivers for compliance of the cell phone legislation and to see they were using cell phones during driving.

[13] I note that in the officer's testimony at page 6 of the transcript he observed what he believed to be a cell phone:

That I was in lane 3 of 3. The driver was in lane 1 of the 3 in a pickup truck. At this time I observed the driver holding a cell phone in his right hand up to his ear. He was speaking into the phone and indications of that to me were his mouth was moving, his head was nodding, and his left hand was gesturing as if it was in a conversation. At this point I began to count. I count to approximately 45 seconds prior to traffic moving and in this time span I notice those observations.

[14] The officer was a trained police officer working in a uniform capacity on the road. In my view, he had a reasonable belief at the time that he observed the appellant was holding a cell phone.

[15] I have been provided with the case from Justice Schreck, *R. v. Tesla*, [2016] O.J. No. 1914. He analyzed a similar ground of appeal that the evidence was too sparse as to the description of the cell phone. I agree that in the case at bar there was a vague description that the object was black and shiny. But, I have to query: How much more detail did the court require when the police officer testified that he observed a driver with a cell phone held to his/her ear? Every day I drive and I see people on cell phones. I could not for the life of me be able to tell you what are the particular details of a cell phone. I just see an object held to someone's ear driving a car.

[16] Justice Schreck stated at paragraphs 104 and 105:

With respect to the verdict being unreasonable, the submission that is made is that there are – were no details given with respect to the cell phone that was observed, such as what colour it was or whether it was a flip phone and the like and the appellant relies, in particular, on the Justice of the Peace's own recognition that the evidence in this case was, as she described it, sparse. I believe it was sparse, but that is not really the issue. The issue is whether or not, based on the evidence that was heard, it was open for the Justice of the Peace to find that the device was a cell phone. It may well be that there could have been more evidence, but I cannot say that in the circumstances it was not open to her to make the finding that it was a cell phone, such that I would be entitled to interfere with the finding on appellant review.

[17] I have reached the same conclusion. Based on my review of the court's reasons it was a reasonable belief by the officer that what was, in fact, in the appellant's hand was a cell phone based on the evidence before the court. As described by the police officer it was a cell phone that he observed. There is no evidence to the contrary to say it was not a cell phone. Therefore, in my view, the Justice of the Peace did not misapprehend the evidence. The Justice of the Peace did not impose a different standard of proof and was satisfied that there was evidence such that the case was proven beyond a reasonable doubt. So for those reasons the appeal is dismissed.

[18] But thank you very much for your submissions.

Released: August 22, 2018
Signed: Justice P.T. O'Marra