

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

MATHEW G. DAGELMAN

Before Justice of the Peace S.-É. Bourbonnais
Heard on February 15, 2018
Reasons for Judgment released on March 15, 2018

Steph Salo for the prosecution
Ben Dawkins for the defendant Mathew G. Dagelman

JUSTICE OF THE PEACE BOURBONNAIS:

[1] This is a case where Mr. Mathew Dagelman is charged with “Driving with a hand-held communication device” based on s. 78.1(1) of the *Highway Traffic Act* (“HTA”).

[2] Mr. Dagelman does not dispute that on the date and place in question, while at the wheel of his Toyota pick-up truck, he was holding and handling his cell phone when he was at a stop sign, at the intersection of Gervais and King Streets, in the City of Timmins.

[3] However, the Defendant, represented by Mr. Ben Dawkins, claims that he was not *driving* at the time when Constable McGee of the Timmins Police Service saw him with his head down and both hands off the steering wheel, holding his cell phone at chest level.

[4] When asked how long he was stopped at the stop sign, Mr. Dagelman testified that he was there for a minute or two. He could not recall how long exactly he said. He also indicated that he was not texting anyone since his phone was dead. He said that he was in the process of plugging his cell phone into its charger and that he had placed his engine in parked mode.

[5] Therefore, the sole issue of this case is whether or not Mr. Dagelman was in fact “*driving*” in accordance with the *HTA*.

[6] In his submissions, Defence Counsel admits that the *actus reus* was made out. That is, he

concedes that a cell phone consists of a device capable of transmitting messages and that it is well established that it is not a defence to a charge of “distracted driving” whether the mobile phone is dead or alive. However, Mr. Dawkins points out the differences between s.253 of the *Criminal Code* regarding ***care and control of a motor vehicle*** as opposed to s.78.1(1) of the *HTA* which strictly refers to ***driving*** but ***not care and control*** of a motor vehicle. Mr. Dawkins then refers the court to ***R. v. McConnell***, [2017] O.J. No. 2018, where this issue of ***driving*** as opposed to simply having ***care and control*** of a motor vehicle is addressed.

[7] Specifically, defence counsel refers me to paragraphs 120 and 121 of the ***McConnell*** decision wherein Justice West states:

[8] “120 The learned justice of the peace, I have great respect for, indicates that, in effect, she accepts Mr. McConnell’s evidence that he was stopped, the car was in park. She found that he was still in the process of travel. She makes reference to being aware of some case law that I have been unable to find, and in my view, Mr. McConnell was not driving his vehicle. At most he was in care or control of it, stopped at a red light, and that he put the charger into the bottom of his phone while he was stopped and that’s all he did with it. There are no findings of fact by the Justice of the Peace that are contrary to that.

[9] 121 In all of the circumstances, in my view, the learned justice of the peace erred in finding that because he was parked in a live lane that that meant he was driving, and in my view that was an error. That was an essential element of the offence that was not proven by the prosecution beyond a reasonable doubt, and in my view, that should lead to an acquittal.”

[10] Therefore, essentially Mr. Dawkins argues, based on the ***McConnell*** decision that the prosecutor, who bears the onus of proving that Mr. Dagelman ***was driving***, failed to do so. Mr. Dagelman readily admits that he had both hands off his truck’s steering wheel while handling his cell phone, therefore it is logical that he would have been in “*parked*” mode says defence counsel. And since he was in “parked” mode, he was certainly not driving he submits.

[11] Mr. Dawkins also points out that Police Constable McGee confirmed in cross-examination that when he observed Mr. Dagelman holding his black cell phone, Mr. Dagelman was stopped at all times on the highway. When being cross-examined, Constable McGee also confirmed that he was unable to see the defendant’s parking lights because of his position and due to the fact that it was a bright sunny day, in the middle of the afternoon.

[12] Therefore, since we have un-contradicted evidence that Mr. Dagelman was parked, argues the Defence, in line with the ***McConnell decision***, Mr. Dagelman must be acquitted.

[13] I took the time to review applicable case law on the matter. In a more recent case: ***R. v. Toma***, [2017] O.J. No. 6940, Justice Leroy upheld the Justice of the Peace decision that the defendant was driving while holding a handheld communication device when he was stopped at a red light. He held that stopping was a necessary and important part of the operation of a motor vehicle. As per the headnotes of this case: “A vehicle stopped at a red light was still being driven by its operator. Whether a vehicle was stopped at a traffic light, *stop sign* or in a traffic jam, the danger of distraction from proper driving which the *Act* sought to address was present because of the temporary nature of the stop. Given the definition of “driving” accepted by the Justice of the Peace, the appellant was driving the motor vehicle on a highway when he was stopped at the red light and he was using a hand held communication device at the time.”

[14] At paragraph 8 of his decision, Justice Leroy recognizes that the words “drive” and “driving” are *not* defined in the *HTA* and to find the meaning of these words a court must start with the *Interpretation Act* that provides that: “*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.*”

[15] In the next paragraph, Justice Leroy then talks of the importance of taking the broad purposive approach “adopted by several decisions of the Supreme Court of Canada as noted in Elmer A. Driedger, *The Construction of Statutes*, 2nd Edition, Toronto, Butterworths, 1983 ...”

[16] After reviewing the dictionary definitions of “drive” Justice Leroy continues at paragraph 13:

[17] “These dictionary definitions of “drive” all impart the notion of the driver operating the vehicle by having control over its mechanisms and causing it to function as a motor vehicle. They do not, however, require that the vehicle be in motion. Stopping is a necessary and important part of the operation of a motor vehicle. One cannot drive without being required to stop, whether it is at a *stop sign (emphasis added)* or a red light, or to allow another vehicle to merge, or because the rate of traffic flow prohibits further movement temporarily, or to permit a pedestrian to cross the street. In my view, a stopped vehicle in those circumstances is still being driven by its operator.”

[18] I totally agree with this line of reasoning based on this ordinary dictionary definition of “drive” which I accept and based on S. 10 of the statutory provisions of the *Interpretation Act* to the effect that a court must interpret the applicable legislation so that it receives “*such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.*”

[19] However, unlike the case herein, in *Toma, supra* although there was evidence that the defendant was stopped at a red light, there was no evidence that the motor vehicle was in *parked* mode. As such, Justice Leroy abstained from commenting on whether or not the *McConnell, supra* decision was rightly decided.

[20] Therefore, what the Court must further determine is whether or not a person who is stopped at a red light, or a stop sign, “*and who puts his vehicle in park mode*” is driving on a highway under the *HTA*. This legal issue, was actually addressed by the Ontario Court of Appeal in *York (Regional Municipality) v. Tassone*, [2007] O.J. No. 1109; 2007 ONCA 215; 2007 CarswellOnt 1736. That particular case deals with a defendant charged under s.106 of the *HTA* for driving on a highway when his seatbelt was not fastened. The defendant had argued that he was not driving since he was stopped at a red light “*with his car engine in park*” when he unfastened his seat belt just for a few seconds to reach for his wallet.

[21] Similarly to the *McConnell, supra* decision, in *Tassone*, the Justice of the Peace who tried the case found the defendant guilty of driving even though he had put his vehicle in park while stopped at a red light. And here too his decision was overturned by the Provincial Offences Judge who held that once the motor vehicle was in park, the respondent was no longer driving. However, in contrast to the *McConnell, supra* decision, the case was then further appealed by the prosecutor. The Court of Appeal set aside the decision of the Provincial Offences Judge and reinstated the Justice of the Peace’s conviction. More specifically, as in the *Toma, supra* decision, the Court of Appeal at paragraph 7 indicates that when interpreting the words “drives on a highway”: “*it is important to take the broad purposive approach adopted by several recent decisions of the Supreme*

court of Canada from *Elmer A. Driedger, Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at p. 87:

[22] “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, the intention of Parliament.”

[23] And then, at paragraph 8:

[24] “Read in light of the important statutory purpose of minimizing driver and passenger injuries resulting from car collisions, the words “drives on a highway”, in our view, do not render the seat belt requirement inapplicable to the situation of drivers waiting at red traffic lights. Such an interpretation would be inconsistent with the purpose of this statutory provision. Accidents occur even when vehicles are stopped at traffic lights. In our view, s. 106(3) must be interpreted as requiring the driver to wear a seat belt continuously from the time he or she puts the vehicle in motion on the highway to the time the driver leaves the highway, parks the vehicle in a position in which the vehicle can be left unattended, or gets out of the vehicle.”

[25] Similarly, in the present case, read in light of the important statutory purpose of minimizing distracted driving, in my view the words “*drive on a highway*” under s. 78.1(1) of the *HTA* must be interpreted as requiring the driver to not hold a communication device “*from the time he or she puts the vehicle in motion on the highway to the time the driver leaves the highway, parks the vehicle in a position in which the vehicle can be left unattended, or gets out of the vehicle.*”

[26] For obvious reasons, a vehicle cannot be left unattended on a highway at a red light or a stop sign. Even if a driver puts his engine in park mode he or she is certainly not “parked” in a live lane at a red light, nor at a stop sign. Like in the case of Mr. Dagelman, he is merely stopped momentarily, as part of his driving. Anyone who is handling a handheld communication device in such circumstances is clearly distracted and not paying attention to what is happening on the road. In my view, this is precisely the purpose and intent of s.78.1 of the *HTA*, to curb distracted driving.

[27] In the present case, was Mr. Dagelman distracted when he was handling his cell phone at the stop sign? Based on the evidence, he certainly was. According to Constable McGee, when he observed Mr. Dagelman handling his cell phone, he was only approximately six to ten feet away from Mr. Dagelman. Clearly, Mr. Dagelman was focussed on his cell phone for it is only *after* he had made his right hand turn onto King Street that he first noticed Constable McGee who, by then, had made a U-turn onto King Street, activated his police cruiser’s lights to stop Mr. Dagelman at the roadside.

[28] Addressing Defence Counsel’s assertion that I am bound by the *McConnell, supra* decision. In my view, it is more important to focus on the definition of the word “drive” under the *HTA* as provided in *Toma, supra* than to focus on the distinction made in the Criminal Code of driving as opposed to having care and control of a motor vehicle mentioned in the *McConnell, supra* decision. As mentioned in *Toma, supra* as well as the Ontario Court of Appeal in *Tassone, supra*, it is essential for a court to take into account the ordinary dictionary definition of words as well as the provisions of the *Interpretation Act* cited above while considering the *raison d’être* of s.78.1(1) of the *HTA*.

[29] In line with the Court of Appeal’s decision in *Tassone, supra*, the words “*drive on a*

highway” under s.78.1 of the *HTA* must also encompass stopping momentarily at stop signs or red lights, whether or not one puts his or her engine in park. Clearly, the intention of the Legislature that enacted s.78.1 of the *HTA* was to curb distracted driving. As such, in my view there is no doubt that placing one’s engine in park mode like Mr. Dagelman allegedly did, while stopped momentarily at a stop sign, consists of driving under the *HTA*.

[30] Since the element “driving on a highway” is common to both s. 106 and s. 78.1 of the *HTA*, in accordance with the principle of *stare decisis*, I am bound by the Court of Appeal decision in *Tassone, supra* when it comes to the interpretation of “driving on a highway” under the *HTA*. In that decision, the Court of Appeal found that a driver stopped at a red light with his or her motor vehicle placed in park mode is “driving on a highway”. That is, the Court of Appeal rejected the decision of the Provincial Offences Appeal Judge to the effect that the driver may have had care or control of the vehicle but was not driving it. Similarly, based on the evidence and applicable case law, I also find that Mr. Dagelman, while stopped at a stop sign with his motor vehicle allegedly in park mode, was “driving on a highway” when he handled his cell phone.

[31] Accordingly, the defendant, Mr. Dagelman, is found guilty as charged of the offence. The conviction is hereby registered by the Court and I will now hear submissions as to penalty.

Released: March 15, 2018

Signed: “Justice of the Peace S.-É. Bourbonnais”