

CANADA / JUDGMENT

R. v. Bakhsheshi

2022 BCSC 152

COURT

Supreme Court of British Columbia

DECIDED

28 January 2022

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2022 BCSC 152 R v. Bakhsheshi IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R v. Bakhsheshi, 2022 BCSC 152 Date: 20220128 Docket: 71473 Registry: Chilliwack Regina v. Massoud Fazel Bakhsheshi Before: The Honourable Madam Justice Walkem On appeal from: An order of the Provincial Court, dated May 11, 2021 (R. v. Bakhsheshi, Chilliwack File No. AH88563096-1) (By teleconference with Farsi interpreter) Reasons for Judgment Re Summary Conviction Appeal Counsel for the Crown Respondent (appearing via videoconference): D.J. Williams The Appellant appearing on his own behalf, (appearing via teleconference): M.F. Bakhsheshi Place and Date of Trial/Hearing: Chilliwack, B.C. January 6, 2022 Place and Date of Judgment: Chilliwack, B.C. January 28, 2022

Introduction

- [1] Mr. Bakhsheshi appeals his conviction for using an electronic device while driving contrary to s. 214.2(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [MVA].
- [2] As a result of his conviction, Mr. Bakhsheshi was fined \$368 by the Judicial Justice. No driving prohibition was entered.
- [3] In argument, Mr. Bakhsheshi said that as a result of the points he received from this violation, in addition to other existing points on his record, his driver's licence was suspended by ICBC for a period of approximately four months.
- [4] The appellant, Mr. Bakhsheshi, has a language barrier and said when this appeal was scheduled that he did not feel comfortable producing a written argument. Due to the COVID-19 precautions in place, this summary conviction appeal was heard over the telephone, with the assistance of a Farsi interpreter. Mr. Bakhsheshi was given the option of having his appeal heard at a later date when the parties could appear in person, but expressed that he would prefer to proceed rather than cause further delay.

- [5] At trial, Mr. Bakhsheshi was self-represented, and proceedings were interpreted by a court-appointed interpreter. Mr. Bakhsheshi testified that he is a commercial driver. At the time of the offence, he was driving from Kamloops and he had lost his cellphone. Around Hope, Mr. Bakhsheshi heard a sound from his door, he reached down and discovered it was his phone. He picked it up with his left hand then transferred it to his right hand, which he then used to place it on the dash.
- [6] In the process of transferring the phone, Mr. Bakhsheshi's tractor trailer swerved. The Judicial Justice found at para. 8 of his decision that: He not only held it in his left hand. He transferred it into his right hand in the process, demonstrating the telltale signs of a duly distracted driver by swerving. With his large tractor-trailer combination, six axles, swerved from his lane onto another lane.
- [7] Officer Hogg, who ultimately stopped Mr. Bakhsheshi and issued the traffic citation, happened to be in the adjacent lane, and had to take evasive action when Mr. Bakhsheshi's vehicle swerved into her lane. Officer Hogg witnessed the phone in Mr. Bakhsheshi's left hand, but she did not see him transfer it to his right and then place it on the dash.
- [8] Mr. Bakhsheshi argued on appeal that he was not "using" the phone as defined by the MVA. He pointed out that he was not talking on the cellphone, or texting with it. He argued that his action of picking the phone up, transferring it between his hands, and placing it on the dash did not constitute use. Mr. Bakhsheshi argued that ICBC brochures only show talking and texting on cell phones as being prohibited activities. He suggested that he was unaware that picking up and holding the cell phone would be considered "using" it. Mr. Bakhsheshi further argued that his trailer had only moved within his own lane.
- [9] The Crown argued that the decision below was not based on a credibility assessment. Even if Mr. Bakhsheshi's version of events was accepted, it still did not constitute a defence as the Judicial Justice found that he was "using" the cell phone within the meaning of the MVA.
- Discussion
- [10] This appeal turns on the definition of "use" of a cellphone in s. 214.2(1) of the MVA. Section 214.2(1) states that "A person must not use an electronic device while driving or operating a motor vehicle on a highway". Section 214.1(a) of the MVA defines "use" for this part as including "holding the device in a position in which it may be used".
- [11] Some courts have found that "use" requires a holding and an accompanying act: *R. v. Jahani*, 2017 BCSC 745 at para. 57. The accompanying act requirement suggests that there must be some aspect of distraction. People have been found to not be using their devices where they were resting on their lap (see *R. v. Wylie*, 2020 BCPC 17); plugged in to charge (see *R. v. Ali*, 2019 BCSC 2268); or wedged into the passenger seat (see *R. v. Partridge*, 2019 BCSC 360).
- [12] In *R. v. Sangret*, 2019 BCSC 2131 [Sangret], this Court discussed the definition of use in s. 214.1 of the MVA:

- [12] The definition of "use" encompasses a broad range of actions. A driver does not need to physically touch the device to have used it in a prohibited manner. A driver can "use" a device by watching the screen, speaking into it, or otherwise utilizing one of its functions in any way. On the other hand, prohibited use includes the driver simply holding the device in a manner which enables further use.
- [13] In this way, the legislature has balanced the ubiquitous presence of electronic devices in modern life against the dangers of distracted driving. As the Judicial Justice noted, all electronic devices have a latent potential for distraction. A device in plain view is more likely to tempt a driver to distraction than one that has been safely stowed away in a pocket or a glove compartment. To commit an offence, however, the driver must do something to actualize or heighten this latent risk of distraction. In this sense, the offence can be said to require an "accompanying act" on the part of the driver [citation omitted]. As defined in the MVA, that act may be as simple as holding the device in a manner that enables further use
- [13] In *R. v. Sangha*, 2020 BCSC 466 at para. 15, the accused braked his vehicle, causing his cellphone to fall to the floor. He picked it up and held it next to his thigh. On appeal, Mr. Sangha's conviction was upheld, and the Court adopted similar reasons to Sangret, noting that the accompanying act required is that the device be held "in a manner that enables further use". In *R. v. Tannhauser*, 2020 BCCA 155, the Court emphasized that the MVA "repeatedly makes clear its desire to limit contact between drivers' hands and their cellphones": at para. 58.
- [14] In this case, there are findings of fact that Mr. Bakhsheshi was holding the cell phone when Officer Hogg saw him. The Judicial Justice found that Officer Hogg "saw the driver [Mr. Bakhsheshi] holding a cellphone in his left hand" and that she was concerned because "earlier the driver had swerved into the lane that she was driving, and she had to take evasive action": at para. 3. The Judicial Justice further noted that Mr. Bakhsheshi had "swerved from his lane onto another lane" and that "[i]f it were not for Officer Hogg's presence of mind, she would have been in an accident I do not think that she signed on to die on a highway because of some driver's thoughtlessness": at para. 8.

Conclusion

- [15] In these circumstances, I agree with the submissions of the Crown. The "use" of an electronic device, such as a cell phone, prohibited under s. 214.2(1) under the MVA prohibits far more than talking on, or texting with, a cellphone while driving. It is a provision aimed at ensuring safety. Here, there is a finding of fact, that Mr. Bakhsheshi held the cell phone in his left hand, transferred it to his right, and placed it on the dash. The Judicial Justice found that this action fell within the definition of "use" in s. 214.2(1) of the MVA. Mr. Bakhsheshi's distraction while reaching for and holding the cell phone, transferring it to his other hand, before placing it on the dash, caused him to partially swerve into another lane. Mr. Bakhsheshi's argument on appeal that he was not talking on, or texting with, the cellphone is not sufficient to prove that he was not using it. This is the kind of event that the

prohibitions against electronic devices in the MVA are intended to curtail.

[16] The appeal is dismissed. "A. Walkem J."

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