

CANADA / JUDGMENT

R. v. Ghadban

2020 BCSC 664

COURT

Supreme Court of British Columbia

DECIDED

29 April 2020

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2020 BCSC 664 R. v. Ghadban IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Ghadban, 2020 BCSC 664 Date: 20200429 Docket: X081468 Registry: New Westminster Between: Regina Respondent And Ali Moussa Ghadban Appellant Before: The Honourable Mr. Justice Jenkins Reasons for Judgment Summary Conviction Appeal Counsel for the Crown: B. Kielmann Counsel for Mr. Ghadban: B. Moscoe Place and Date of Hearing: New Westminster, B.C. January 21, 2020 Place and Date of Judgment: New Westminster, B.C. April 29, 2020

- [1] In this case, Mr. Ghadban has appealed the decision of a Judicial Justice in which Mr. Ghadban was found guilty of driving without a driver's license, contrary to s. 24(1) of the Motor Vehicle Act, RSBC 1996, c. 318 (the "Act"), and driving without insurance, contrary to s. 24(3) of the Act.
- [2] Violation Tickets for the offences had been issued to Mr. Ghadban on July 24, 2018, in Surrey, British Columbia.
- [3] The primary issue in the hearing before the Judicial Justice was whether or not Mr. Ghadban was operating a "motor assisted cycle" ("MAC") as defined by s. 1 of the Act. If the vehicle being operated by Mr. Ghadban was a MAC, it would be excluded from the definition of a "motor vehicle" defined under s. 1 of the Act, and the requirement for the vehicle to be operated by a person with a valid driver's license, and for the vehicle to be insured would not apply.
- [4] The Judicial Justice found that the vehicle Mr. Ghadban was operating, which was known as a Motorino XMr, was not a MAC, and since Mr. Ghadban did not have a valid driver's license, and the MAC was not insured, he was found guilty of the offences by the Judicial Justice.
- [5] I will set out the applicable legislative framework and a description of the vehicle in the following paragraphs. Legislative Framework
- [6] The relevant provisions of the Act are as follows. Section 1 defines a "motor assisted cycle": "motor assisted cycle" means a device
- a) to which pedals or hand cranks are attached that will allow for the cycle to be propelled by human power;

- b) on which a person may ride;
 - c) to which is attached a motor of a prescribed type that has an output not exceeding the prescribed output, and
 - d) that meets the other criteria prescribed under section 182.1(3)
- [7] Section 119 states: "cycle" means a device having any number of wheels that is propelled by human power and on which a person may ride and includes a motor assisted cycle, but does not include a skate board, roller skates or in-line roller skates;
- [8] Of note is that a "cycle" must be "propelled by human power".
- [9] Section 182.1(3) authorizes the Insurance Company of British Columbia to make regulations respecting MACs.
- [10] The applicable Motor Assisted Cycle Regulation, B.C. Reg. 56/2018 ("MAC Regulation"), which includes amendments to March 22, 2018, states: Motors 1 The motors of a motor assisted cycle must
- (a) be electric motors,
 - (b) have continuous power output ratings that in total do not exceed 500 watts, and
 - (c) not be capable of propelling the motor assisted cycle at a speed greater than 32 km/hr on level ground. Wheels 2 (1) The wheels of a motor assisted cycle must be 350 mm or more in diameter.
- (2) A motor assisted cycle must not have more than 3 wheels in contact with the ground. Motor shut-off requirement 3 (1) A motor assisted cycle must be equipped with a mechanism, separate from the accelerator controller, that
- (a) allows the driver to turn the motors on and off from a normal seated position while operating the motor assisted cycle, or
 - (b) prevents the motors from turning on or engaging before the motor assisted cycle attains a speed of 3 km/hr.
- (2) The motors of a motor assisted cycle must turn off or disengage if
- (a) the operator stops pedaling,
 - (b) an accelerator controller is released, or
 - (c) a brake is applied. The Motorino XMr
- [11] Photographs of the Motorino XMr and an Owner's Manual were before the Judicial Justice at the Provincial Court hearing and were marked as Exhibits "D" and "F", respectively.

- [12] Testimony of the officer who issued the Violation Ticket included the following statements regarding the Motorino XMr: P. 7 of the transcript: Your worship, on the 24th day of July 2018 at approximately 6:45 in the morning . . . I was working in uniform and was at the King George Skytrain Station . . . At that time I observed a vehicle being ridden on the access road to the station. This is a road that's used by traffic to come and drop off passengers or to [park] and is a highway under the meaning - the definition in the Motor Vehicle Act. My attention was drawn to this vehicle which appeared to be a small motorcycle to me. Was a male person driving with a male child or younger male on the back. That vehicle drove up onto the plaza area, . . . It's an area for service vehicles at that point. And as it rode past in front of me I noted that it had what appeared to be pedals attached to it, which attracted my attention, because at that point I thought perhaps it was supposed to be a motor assisted cycle, however, the operator was not pedaling the vehicle at all. As I watched, the vehicle pulled up to a doorway which is an entrance to a bicycle locker area. The young male got off the bike. The door was opened and held by that male, at which point the operator caused the vehicle to drive forward, and I noted that he did not need to use the pedals to do so. He was able to do that just by turning the throttle on the vehicle.
- [13] The officer then prepared the violation ticket after noting the vehicle was not licensed and the operator did not have a driver's license.
- [14] Mr. Ghadban testified at the trial and stated: P. 20 of the transcript - line 19 ff: Your honour, this machine that I bought it was the first of its kind in 2014. P. 21 of the transcript - line 39 ff: A . . . a few more facts. Yes, the maximum speed of this scooter is 32 kilometers per hour. . . . P. 21 of the transcript - line 47 ff: A . . . They will not insure it because it is a 500 watt P. 23 of the transcript -- line 20 ff: Q Okay, are those pedals in any way connected to the motor on that motor - - on that vehicle? A They are connected to the back tire which has the motor in it with the chain. Q Okay, so A. But when the vehicle is moving the pedals don't move forward, but when you step back the pedals move with the reverse action not with the forward action. Q Okay, so A Just like a regular bicycle. Q . . if you are pedalling your vehicle and the motor is on and you stop pedaling, does the motor stop? A So to be honest with you, I have never pedaled the vehicle since 2014 when I first got it, because I've never had the reason to SGt. Hemm No other questions. A Like, it's The Court Hold on, hold on, so the question was if you are pedalling the cycle and then you stop - - A Yeah The court - -cycling, does the motor stop. Was that the question? Sgt. Hemm It was, Your Worship, but since Mr. Ghadban has indicated he's never had any opportunity - - A Yeah. . . . P. 24 of the transcript -- line 16 ff: Questions by the Court Q - - - you stop pedalling, does the motor stop? A Motor doesn't start when you're pedalling, so, no, because when you're pedalling, the motor will not go. Like, the motor will not work when you're pedaling. There's no assisted pedalling. It's jut an e-scooter, just like every other scooter on the street. P. 25 of the transcript - line 35 ff: Q Mr. Ghadban, you just stated that the motor is not designed to assist pedaling? A Yes, so for that motor there is no like when you pedal with your manpower there's not an automatic device that makes it give you help, but for those scooters they just run on the throttle. P. 26 of the transcript - line 8 ff: A You can pedal it without motor coming on because it's just a

chain to the pedals to the back tire, so I can pedal it all day long if I wanted to pedal a 300 [pound] vehicle around I would, but I don't want to pedal that heavy of a weight. P. 26 of the transcript - line 26 ff: A There's no requirement to pedal at all in order to engage the electric motor.

- [15] An Owner's Manual was entered as Exhibit "F" at trial and both Sgt. Hemm and Mr. Ghadban were referred to various portions of the manual during cross-examination. At p. 18 of the manual there is a sketch which replicates the ignition shift of the Motorino into which the key is inserted and directs the operator where to turn the key to turn the motor on and off among other features. From observing the photos of the Motorino and the manual, that switch "allows the driver to turn the motors on and off from a normal seated position while operating the motor assisted cycle", as per s. 3(1)(a) of the MAC Regulation. The Standard of Review
- [16] Crown counsel has correctly described the standard of review in an appeal of a summary conviction matter by quoting from Rogers J. in the case of *R. v. Jalifi*, 2015 BCSC 1085:
- [21] The function of the summary conviction judge is to determine whether the trial judge could reasonably have reached the conclusion that the appellant was guilty beyond a reasonable doubt: *R. v. W.(R.)*, [1992] 2 S.C.R. 122; *R. v. Grosse* (1996), 29 O.R. (3d) 785 (Ont. C.A.). An appeal judge must consider the evidence at trial, and must, to a limited extent examine and weigh it. That exercise has a limited purpose though, and that is to assess whether the evidence is reasonably capable of supporting the trial judge's conclusions. If it is, the appeal court is not entitled to substitute its own view of the evidence for that of the trial judge: *R. v. Burns*, [1994] 1 S.C.R. 656.
- [22] When it comes to reviewing the trial court's findings of fact, an appellant court must give due deference to the trial judge. See, for example, *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, where Iacobucci and Major JJ. Said at paras 22 and 24: [T]rial courts are in an advantage position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.
- [17] From my review of the evidence before me on appeal, including transcripts of the hearing, the exhibits, including photos of the Motorino and the Owner's Manual, there would appear to be agreement on the facts. The substantive issue is whether the Motorino is a MAC, as defined in the Act and MAC Regulation. Carrying the question further, and referring to para. 21 of *Jalifi*, I must determine whether "the evidence is reasonably capable of supporting the trial judge's conclusions". The Trial Judgment
- [18] In his analysis, the trial judge based his decision firstly on a finding that the size of the wheels on a Motorino did not comply with s. 2(1) of the MAC Regulation.

- [19] The trial judge's finding can be found at paras. 19 and 20 of his reasons:
- [19] It is a requirement that the wheel of a MAC must be no smaller than 350 mm while that of a limited speed motorcycle must be no smaller than 254 mm. The wheel size of the Motorino XMr is specified to be 12 inches in diameter which converts to 304 mm; less than the required 350 mm for a MAC.
- [20] For that reason alone, I would conclude that the Motorino XMr cannot be considered a MAC.
- [20] The reference to a "limited speed motorcycle" in the trial judge's reasons was not relevant to whether or not the Motorino XMr complied with the MAC Regulation. Based upon the evidence, the wheels of the Motorino XMr were smaller than those specified for a MAC, therefore, the Motorino XMr did not meet the definition of a MAC under the Act and MAC Regulation.
- [21] The trial judge continued in his reasons to disqualify the Motorino XMr as a MAC as follows:
- [21] However, quite apart from the discrepancy related to wheel size, I would disqualify it as a MAC for the simple reason that it does not function in accordance with the intention of the legislation pertinent to MACS. Arguably, the Motorino XMr is in essence an electric scooter that is capable of being pedaled, rather than a "cycle" that is assisted by electric propulsion. That is, its primary mode of propulsion is an electric motor. The functions of the pedals, while not decorative are limited in application.
- [22] The trial judge then referred to the decision of *R. v. Rei*, 2012 BCSC 1028, in which the owner of a vehicle had removed the pedals. Mr. Justice Brown found the vehicle, or "cycle" could not be a MAC without pedals. However, Mr. Justice Brown continued in *Rei* to discuss the intent of the legislation stating:
- [16] The provincial regulations derive from federal government Transport Canada provisions, with minor modifications. For example, the federal regulations refer to propulsion coming from muscle power whereas the provincial regulations illustrate the same concept by stating MACs must have a hand crank or pedal attached to them. It is not the difference in wording that is worth noticing but the concept common between them, human propulsion. This is an essential component of a MAC. This is what sets it apart from all other classes of motorized cycles. The electric motor on Mr. Rei's scooter is supposed to supplement, not supplant, human propulsion.
- [23] In *Rei*, Mr. Justice Brown subsequently found it unnecessary to determine whether the vehicle would have complied with the definition had the pedals been attached.
- [24] After referring to *Rei*, the trial judge stated:
- [23] Although the *Rei* decision is distinguishable on its facts, Mr. Justice Brown's comments on the legislative intent and meaning of "motor assisted vehicle" arguably indicated an intention to include only devices where their primary means of propulsion is human (the cycle part) and that they are only intended to be "assisted" or supplemented by means of

electric propulsion. With that principle in mind, I have concluded that the Motorino XMr is really an electric scooter with attached, removable pedals that may be used for human propulsion, but only if one is moved to do so.

- [25] In the case of Mr. Ghadban and his Motorino XMr, Mr. Ghadban testified that in the five years he had owned the Motorino XMr, he had never pedalled the cycle and clearly had no intention of doing so, seeing that the weight of the Motorino XMr, with a driver's weight of 150 pounds, for example, would total over four hundred pounds.
- [26] On this basis, even if the wheels met the regulation, I agree with the trial judge's conclusion that a Motorino XMr does not comply with the intent of the legislation which was for a MAC to supplement or assist the human power required to pedal the vehicle. As such, I find the evidence is more than reasonably capable of supporting the trial judge's conclusions.
- [27] The appeal is dismissed. "Jenkins J."

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Prepared on 25 October 2026 · Esheria