

CANADA / JUDGMENT

## R. v. Rajani

2020 BCSC 779

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 779 R. v. Rajani

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Rajani,

2020 BCSC 779

Date: 20200525

Docket: 29404

Registry: Vancouver

Regina

v.

Zahir Rajani

Before: The Honourable Madam Justice MacNaughton

On appeal from: An order of the Provincial Court,

dated September 10, 2019 (R. v. Rajani, Vancouver

Docket No. AJ15332646-1).

Reasons for Judgment

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K. Gagnon

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 13, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 25, 2020

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## Introduction

- [1] On March 15, 2019, Zahir Rajani was issued a violation ticket 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]. He disputed the ticket but was convicted by a Judicial Justice ("JJ") on September 10, 2019, and fined \$300. Mr. Rajani appealed his conviction to this Court.
- [2] There was very little difference between Constable Eric Doyon's and Mr. Rajani's evidence at the trial before the JJ. Constable Doyon testified that he observed Mr. Rajani looking down while driving his vehicle. Believing that Mr. Rajani could be looking down at a cell phone, Constable Doyon approached Mr. Rajani's vehicle and observed what appeared to be a cell phone on Mr. Rajani's "right" lap connected to a cord. He described seeing the glassy surface. He could not say whether the screen on the cell phone was lit.
- [3] Mr. Rajani agreed that he had been looking down when Constable Doyon first saw him. He testified that his cell phone was wedged between his right thigh and his car seat, facing up, and that it was connected to a cord.
- [4] The issue at trial was whether Mr. Rajani was "using" his cell phone as prohibited by s. 214.2(1) of the MVA. The JJ concluded that he was and convicted Mr. Rajani. After explaining that Mr. Rajani denied that he was using his cell phone, the JJ said:
- [3] But he admits the facts. I have difficulty comprehending what is the nature of his defence. The phone was perched, if not on his lap, rather precariously beside his lap. What difference does it make? Nothing. In the event of a driver making an evasive action to avoid a collision, the phone would be dislodged causing the driver to be distracted to the point where there

could be an accident. It is a serious matter. That is the reason the legislature wants drivers to have their mobile or handheld devices securely placed inside some sort of receptacle firmly attached to the vehicle, in case they want to use any function of their electronic device, including charging a phone.

- [4] [O]ur BC Supreme Court in the case of *R. v. Jahani* was fairly clear. Madame Justice Maissonville writes that if any function of the phone is engaged, even if it is not being held in one's hand, it is tantamount to using that phone.
- [5] I am applying that case, and [find] Mr. Rajani guilty[,] as driver of the vehicle[,] of using an electronic device while driving.

### The Right to Appeal and the Available Remedies

- [5] The right to appeal from a summary conviction is governed by Part XXVII of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Section 822(1) of the Code provides that, in a summary conviction appeal pursuant to s. 813, ss. 683-689 relating to appeals of indictable offences apply with the exception of two subsections.
- [6] Section 686(1) of the Code provides that, on the hearing of an appeal against a conviction, the appeal court may allow the appeal where it is of the opinion that:
- i. the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
  - ii. the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
  - iii. on any ground there was a miscarriage of justice.
- [7] Section 686(1)(b)(iii) of the Code sets out what is often referred to as the "curative proviso" and permits the court to dismiss the appeal where:
- iii. notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred
- [8] Justice Butler recently summarized the circumstances in which the curative proviso can be applied in *R. v. Heltman*, 2019 BCCA 468 at para. 51:
- [51] To apply the curative proviso in s. 686(1)(b)(iii), the Crown must demonstrate that the error was so harmless that it could not have affected the verdict, or that the error, while serious, did not result in a miscarriage of justice or substantial wrong because the case against the accused was overwhelming. Errors that are harmless fall into two categories: those that are harmless on their face or those that are harmless in effect. In order to apply the curative proviso, the court must be satisfied that a conviction was inevitable... The first category includes more serious errors where it is possible to trace the effect of the error on the

verdict and conclude the verdict would have been the same...

[Citations omitted.]

### The Applicable Standard of Review

- [9] The parties agree about the applicable standard of review in this case. The JJ must be correct concerning a question of law.
- [10] The Crown, in my view, properly concedes that the JJ's judgment contains legal errors. I agree.
- [11] To the extent that para. 3 of the JJ's reasons for judgment suggest that Mr. Rajani was convicted because his cell phone was potentially distracting, regardless of where it was located, the JJ made a legal error. The MVA does not prohibit the presence of an electronic device in a vehicle solely on the possibility that its mere presence may be a distraction. The prohibition is against the use of an electronic device, including a cell phone.
- [12] Further, to the extent that the JJ interpreted *R. v. Jahani*, 2017 BCSC 745, as determining that simply charging a cell phone in a vehicle, without touching it, constitutes "use", he erroneously interpreted and applied that case. In *Jahani*, the driver was observed both holding the phone and plugging it in to charge it. Justice Maisonville's decision merely clarified that "use" extends to plugging a phone in to charge; it not just transmission or receipt of data.
- [13] The JJ's reasons for judgment are unclear about which of the two potential errors, or both, formed part of his line of reasoning leading to conviction.

### The Appropriate Remedy

- [14] Mr. Rajani submits that, as a result of the JJ's legal error, his conviction should be set aside. The Crown submits that, based on the curative proviso contained in s. 686(1)(b)(iii) of the Criminal Code, Mr. Rajani's appeal should be dismissed.

### Analysis and Conclusion

- [15] The objective of the MVA distracted driving provisions is straightforward: to ensure that drivers are paying attention to the road and to reduce the risk of accidents as a result of distracted driving: *Jahani* at para. 39.
- [16] Part 3.1 of the MVA, Use of Electronic Devices While Driving, accomplishes this objective by prohibiting the "use" of electronic devices while driving, except in emergencies. The term "use" is defined in s. 214.1 of the MVA as constituting one of the following prohibited actions:
- a) holding the device in a position in which it may be used;
  - b) operating one or more of the device's functions;

- c) communicating orally by means of the device with another person or another device;
  - d) taking another action that is set out in the regulations by means of, with or in relation to an electronic device.
- [17] The Use of Electronic Devices While Driving Regulation, B.C. Reg. 308/2009, s. 2, extends the definition of "use" to include that "[a] person who watches the screen of an electronic device uses the device" for the purposes of the MVA.
- [18] What amounts to "use" of an electronic device has been the subject of a number of decisions of this Court.
- [19] In *R. v. Sangret*, 2019 BCSC 2131, the issue was whether an electronic device mounted to the dashboard of a vehicle amounted to "use" of the device. Justice Watchuk said the following about the meaning of "use" of a device, particularly as it related to "holding the device in a manner in which it may be used" in s. 214.1(a):
- [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: see *R. v. Partridge*, 2019 BCSC 360: para. 6. As defined in the MVA, that act may be as simple as holding the device in a manner that enables further use. Merely driving within sight of a device, however, is not enough to constitute use.
- [20] Justice Watchuk went on to conclude that there was no evidence in *Sangret* that the appellant had performed any accompanying act. She said:
- [14] There was no evidence that [the appellant] watched, operated, or communicated by means of the device in any way. Nor was there evidence that he was "holding" the device as prohibited by s. 214.1(a) of the MVA. In its plain meaning, holding means physically grasping, carrying, or supporting something. In my view, s. 214.1(a) is to be interpreted as a prohibition against a device being personally held by the driver. In this case, the device was installed in a position in which it was visible to the appellant, but the appellant was not personally holding it.

- [16] Thus, "holding a device in a position in which it may be used" is a prohibited act, but installing a device in a position in which it may be used is not. The prohibited act is "use" as defined, not installation.
- [21] I agree with Justice Watchuk's description of the ordinary meaning of "holding." In particular, I agree that it extends to "physically grasping, carrying, or supporting."
- [22] The issue in this case is whether having a cell phone on your right lap, or wedged between your right thigh and the seat with the screen facing up, is holding it in a position in which it may be used.
- [23] In his evidence, Mr. Rajani admitted that Constable Doyon saw him looking down toward where his cell phone was located. Of course, this does not prove that he was watching his cell phone, but whether it was on his right lap or wedged between his thigh and the seat, facing up, it is possible that by looking down he could watch it, which is included in the definition of "use" in the Regulation, or otherwise operate one of its functions.
- [24] Constable Doyon observed Mr. Rajani with his phone supported on his lap, in a position where it could be used. I agree with Justice Watchuk that supporting a phone amounts to holding it.
- [25] Even on Mr. Rajani's evidence, the phone was being supported in a way that permitted its use. Having the phone wedged between his thigh and the seat, facing up, is having it supported by a part of his body and it put the phone in a position in which it could be used. It was "held" in a position in which it could be used.
- [26] The fact that Mr. Rajani's leg placement would have impacted the phone's position supports a conclusion that it was being "held" for the purposes of this provision. If the phone was wedged between his leg and the seat, and he moved his leg farther away from the phone, the phone would have moved to a different position. This evidences that wedging the phone between one's leg and the seat is supporting or "holding" the phone in a position that permits its further use.
- [27] To interpret "holding" as being restricted to an action done with one's hands is not in harmony with the scheme of the distracted driving provisions of the MVA. Such an interpretation would allow drivers to operate their vehicles with electronic devices in their laps, between their thighs, tucked under their arms or chins, or supported by other parts of their bodies.
- [28] I conclude that Mr. Rajani's behaviour, as described either by Constable Doyon or by Mr. Rajani, amounted to "holding the device in a manner in which it may be used" as proscribed by the definition of "use" in s. 214.1 of the MVA.
- [29] As a result, I conclude that the JJ's legal error(s) were harmless in the result, insofar as the evidence on the record was "so overwhelming that a trier of fact would inevitably convict."

[30] I therefore conclude that the Crown has met the onus of establishing that the curative proviso should be applied and Mr. Rajani ought to have been convicted, albeit on different reasons than those given by the JJ after trial.

[31] Mr. Rajani's appeal is dismissed.

"MacNaughton J."

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