

CANADA / JUDGMENT

R. v. Shelford

2021 BCSC 918

COURT

Supreme Court of British Columbia

DECIDED

13 May 2021

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2021 BCSC 918 R. v. Shelford IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Shelford, 2021 BCSC 918 Date: 20210513 Docket: 73142 Registry: Prince George Regina v. Tania Louisa Shelford Before: The Honourable Mr. Justice Schultes On appeal from: An order of the Provincial Court of British Columbia, dated February 26, 2020 (R. v. Shelford, Prince George Docket EA60012080-1) Reasons for Judgment The Appellant, appearing on her own behalf: T.L. Shelford Counsel for the Crown Respondent (appearing via teleconference): B. Bouchard F. Ju, Articled Student Place and Date of Hearing: Prince George, B.C. November 4, 2020 Place and Date of Judgment: Prince George, B.C. May 13, 2021

Introduction

- [1] This is an appeal by Ms. Shelford of her conviction for using an electronic device while driving on July 29, 2019 in Prince George, contrary to s. 214.2 (1) of the Motor Vehicle Act . She was convicted following a trial before a judicial justice[1].
- [2] The issue on appeal is whether the justice erred in finding that Ms. Shelford's use of a microphone connected to a radio in her vehicle was not excused by s. 9 of the Use of Electronic Device While Driving Regulation, which permits such microphones to be used in certain circumstances. Legislation
- [3] The evidence and arguments in this case will make more sense if they are considered in the context of the applicable legislation.
- [4] The relevant parts of the Act are: Definitions 214.1 In this Part: "electronic device" means
- (a) a hand-held cellular telephone or another hand-held electronic device that includes a telephone function,
 - (b) a hand-held electronic device that is capable of transmitting or receiving electronic mail or other text-based messages, or
 - (c) a prescribed class or type of electronic device; "use", in relation to an electronic device, means one or more of the following actions:

- (a) holding the device in a position in which it may be used; Prohibition against use of electronic device while driving 214.2 (1) A person must not use an electronic device while driving or operating a motor vehicle on a highway. Exceptions to prohibition -- by regulation 214.5 Section 214.2 does not apply to
- (b) a person who uses an electronic device while engaged in a prescribed activity or in circumstances or under conditions set out in the regulations Power to make regulations 214.6 The Lieutenant Governor in Council may make regulations as follows:
 - (a) prescribing classes or types of electronic devices for the purposes of paragraph (c) of the definition of "electronic device" in section 214.1;
 - (f) exempting or excluding, with or without conditions, classes or types of electronic devices, classes of persons or classes of vehicles or classes of persons while driving or operating a motor vehicle or class of motor vehicle from the operation of a provision of this Part.
- [5] The relevant parts of the Regulation are: "Use" further defined 2 A person who watches the screen of an electronic device uses the device for the purposes of paragraph (d) of the definition of "use" in section 214.1 of the Act. Prescribed electronic devices 3 (1) The following electronic devices are prescribed for the purposes of paragraph (c) of the definition of "electronic device" in section 214.1 of the Act:
 - (e) hand microphones;
- (2) In subsection (1), "hand microphone" means a communication device consisting of a hand-held unit that
 - (a) is both receiver and microphone,
 - (b) is operated by a push and hold-to-talk function, and
 - (c) allows for oral communication, but not for the transmission and receipt of oral communication at the same time. Hand microphone 9 A person may use a hand microphone while driving or operating a motor vehicle on a highway if
 - (a) the device is within easy reach of the driver's seat, and
 - (b) is securely fixed to the motor vehicle or worn securely on the person's body in a manner that does not obstruct the person's view of the front or sides of the motor vehicle or interfere with the safety or operating equipment of the motor vehicle. [Emphasis added] Evidence at Trial
- [6] The investigating officer, Cst. Hallmark of the RCMP, testified that he was conducting traffic enforcement, looking specifically for electronic device and seatbelt violations, with respect to vehicles in the eastbound lanes of 15th Avenue in Prince George. He was outside of his vehicle, in a parking lot that was elevated about four feet above the roadway, providing him with a view of the activities of drivers within their vehicles.

- [7] As Ms. Shelford's vehicle, which he described as "a service van or delivery vehicle", approached, he saw her looking down and to the right. As her vehicle passed him, he could see that she was looking down at "a phone" in her hand, in the centre console area, and that its screen was "pointing [that is, facing] up". He returned to his vehicle, pulled her over and issued her the tickets. He did not testify about seeing any phones in the vehicle while he was issuing the tickets.
- [8] In her testimony, Ms. Shelford explained that she had been using her "mic", which was attached to her hard-wired company radio. It is a two-way voice radio. She further explained that the radio was bolted to the van. She said that when she uses the microphone, she holds it low and that she may have glanced at it, which I took to be her explanation for what Cst. Hallmark saw. She had used that van for two years and "instinctively" knew where the microphone was located. She did not have a cellphone in her hand, she maintained.
- [9] She submitted photos of the interior of the vehicle, which show the main radio unit mounted on the right side of the centre console, with a cable running from it to the microphone, which appears to rest in a mounted holder in the lower centre area of the console. She pointed out that this put the microphone within "easy reach" of the driver's seat. She agreed in cross-examination that she had to "pull it out [that is, remove it from its attached position] to use it" and that it might have been in her hand when Cst. Hallmark saw her. She had held it prior to being stopped, to acknowledge the upcoming end of her shift by stating "ten-four".
- [10] She also provided a document titled "Use of Electronic Devices While Driving", issued by "RoadSafetyBC", which appears to be under the auspices of the Ministry of Public Safety and Solicitor General. The document provides descriptions and photos of the various kinds of devices that are covered by the Regulation, accompanied by summaries of the approved circumstances of their use.
- [11] In addition to describing "Hand Microphones", in essentially the terms of the Regulation, the document goes on to describe "Two-Way Radios", including the following: A two-way radio consists of a hand-held microphone connected to a transceiver unit that is operated by a push and hold-to-talk function and allows for oral communication, but not for the transmission and receipt of oral communication at the same time. A person may use a two-way radio while driving if the transceiver: · Is within easy reach of the driver's seat; and · Is securely fixed to the motor vehicle or worn securely on the person's body in a manner that does not obstruct the person's view of the front or sides of the motor vehicle or interfere with the safety or operating equipment of the motor vehicle Note: Hand microphones, including two-way radios, may only be used in the push and hold-to-talk function while driving. Other functions on these devices cannot be operated by a driver while driving.

- [12] As a review of the legislation reveals, "two-way radio" is neither defined as an electronic device in s. 214.1 of the Act, nor prescribed as such a device in the Regulation. The circumstances in which such a radio can be used while driving, according to this document, are identical to the ones in which the Regulation allows a hand microphone to be used.
Decision at Trial
- [13] In addition to her own testimony, Ms. Shelford had also planned to call her employer as a witness, to confirm her need to use the radio in the course of her duties. However, the justice told her that while she was free to do so, she had actually already "admitted both of the offences" in her own evidence. He explained that because, as Ms. Shelford had testified, the microphone had to be removed from its holder, it was not "securely fixed to the motor vehicle", as the exemption in s. 9 of the Regulation requires.
- [14] The justice then proceeded directly to sentence. Discussion
- [15] On appeal, the Crown seeks to uphold the conviction essentially for the reasons given by the justice. Crown counsel focus on the question of whether the hand microphone was securely fixed, either to the vehicle, or to the driver's body. In support of this analysis they refer to the decision of R. v. Klause, 2019 BCPC 226. Although it was not the ratio of the judgment, in that case a cellphone that had its charging cord plugged in was found not to have been securely fixed to the vehicle.
- [16] In contrast, Ms. Shelford argues that one does not even get to the exemption pertaining to hand microphones, because the device she was using does not meet that definition.
- [17] I am satisfied that she is correct.
- [18] In his analysis, the justice overlooked the requirement in the definition of hand microphones in s. 3(2)(a) of the Regulation, that it must be "both receiver and microphone". In the case of mounted two-way radios, the hand unit is just the microphone for the user and the receiver is the mounted radio unit to which is connected. Despite the fact that this microphone could be removed from its holder, Ms. Shelford explained in cross-examination that "[t]he radio [that is, the part that functions to receive and broadcast signals] was permanently attached".
- [19] This obvious application of the legislation makes it unnecessary to decide whether the document from RoadSafetyBC that Ms. Shelford provided can properly be referred to for interpretative purposes. It now becomes clear why that document purports to permit the use of two-way radios while driving - they are not "hand microphones" as the Regulation defines them.
- [20] Accordingly, I conclude that the justice erred in his interpretation of the provisions, and that the appeal of that conviction must be allowed.

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- [21] With respect to remedy, by cutting short Ms. Shelford's defence to convict her on the basis of her own description of the device she was using, the justice implicitly preferred her evidence to that of Cst. Hallmark, who had described her using a phone. In my opinion, it would be unfair to allow the Crown a second opportunity to prove the use of the phone that they unsuccessfully attempted to prove in this trial, even though a conviction resulted. An acquittal will be entered on that count.
- [22] By consent, Ms. Shelford's appeal against the littering conviction will be dismissed. "Schultes J."
- [1] Ms. Shelford's notice of appeal also addressed her conviction for littering, which arose out of the same events, but she did not ultimately contest that conviction during the hearing.
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Prepared on 28 October 2026 · Esheria