

ONTARIO COURT OF JUSTICE

DATE: 2024 10 10
COURT FILE No.: Newmarket 4911 999 00 1667323X 00

IN THE MATTER OF an appeal under subsection 135(1) of the
Provincial Offences Act, R.S.O. 1990, c. P.33, as amended;

B E T W E E N :

HIS MAJESTY THE KING

Respondent

— AND —

JACKAL NGAI

Appellant

Before Justice Jessica Sickinger
Heard on August 9th, 2024
Reasons for Judgment released on October 10th, 2024

C. Gabriel..... for the respondent
M. Mahadeo..... for the applicant Jackal Ngai

On appeal from conviction by Justice of the Peace T. Rotondi on June 13th, 2023

SICKINGER J.:

[1] Mr. Ngai appeals his conviction for one count of driving while using a handheld communication device. He argues that the verdict was unreasonable, and not supported by the evidence at trial. The appeal was argued based on the trial transcript and reasons for judgment.

Evidence at Trial

[2] PC Lefavre testified that he was driving northbound on Highway 404 when he observed a blue Toyota Yaris. He pulled up beside the Yaris on the left-hand side. He stated that he saw Mr. Ngai's face illuminated by a light, and observed what he believed to be a cellphone in Mr. Ngai's hand. He pulled Mr. Ngai over. He stated that he did not observe a cellphone in the motor vehicle when he pulled Mr. Ngai over.

[3] PC Lefavre gave no evidence as to the communication capabilities of the device he observed. He was cross-examined as to his observations and notes. He could not recall in which hand Mr. Ngai held the device he observed.

Reason for Judgment

[4] The Justice of the Peace correctly described the elements of the offence as follows:

No person shall drive a motor vehicle on a highway while holding or using a handheld wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages.

[5] The Justice of the Peace accepted the officer's evidence, and found that PC Lafavre observed Mr. Ngai to be holding a device while driving. The Court made no finding as to the nature of the device, specifically whether or not it was a device capable of receiving or transmitting communications.

[6] The Justice of the Peace then held that "[T]here is no evidence to the contrary, and as such the prosecution has made out its case on all of the elements. The Court registers a conviction".

The Law and Analysis

[7] The issue to be decided on this appeal is whether or not the verdict is reasonable, based on the evidence. This appeal is conducted pursuant to s. 136 and 138 of the *Provincial Offences Act*.

[8] The standard of review on these proceedings was set out by the Supreme Court of Canada in *Housen v. Nikolaisen*. The standard of review for a question of law is one of correctness. The Court stated that in the case of an error in law the appellate judge is free to replace the opinion of the trial judge with its own. The court further sets out the standard of review for findings of fact; holding that findings of fact are not to be reversed unless it can be established that there is "palpable and overriding error".¹

[9] The test to be applied in the case of unreasonable verdict has been established by the Supreme Court of Canada in *Biniaris*. The test is whether or not "the verdict is one that a properly instructed jury acting judicially, could reasonably have rendered." This is equally applicable to a judge sitting at trial without a jury. Justice Arbour, speaking for the Court in *Biniaris*, stated:

"The review for unreasonableness on appeal is different, however, and somewhat easier when the judgment under attack is that of a single judge, at least when reasons for judgment of some substance are provided. In those cases, the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain

¹ *Housen v. Nikolaisen*, [2002] 2 SCR 235, at paras. 8-10

the unreasonable conclusion reached, and justify the reversal...[T]he court of appeal often can and should identify the defects in the analysis that led the trier of fact to an unreasonable conclusion. The court of appeal will therefore be justified to intervene and set aside a verdict as unreasonable when the reasons of the trial judge reveal that he or she was not alive to an applicable legal principle or entered a verdict inconsistent with the factual conclusions reached.”²

[10] The Justice of the Peace correctly identified the two elements of the offence: one that the accused held or used a device while operating a motor vehicle on a highway, and two, that the device was capable of wireless communication. She found there was no reason to reject the officer's evidence, and she accepted it.

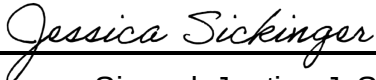
[11] Accepting the officer's evidence in its entirety supports only the first element of the offence. PC LaFavre testified that he saw a device similar to a cellphone in Mr. Ngai's hand while he was driving. He made no observation of a cellphone once he pulled Mr. Ngai over, and he did not give any evidence as to the capabilities of the device he observed.

[12] There was no evidence before the court as to the second element of the offence. When the Justice of the Peace made the finding that all of the elements of the offence were satisfied this was not based on the evidence and was unreasonable.

[13] I find that there was an error in law, the evidence before the court was incapable of supporting a finding of guilt, as there was no evidence as to the second element of the offence. The evidence at its highest makes out that Mr. Ngai held some type of the device while driving, but no evidence was called with respect to the nature of the device or its capabilities. The verdict was unreasonable. The caselaw, as set out above permits, this court to replace the finding of the trial court with its own in the case of an error in law.

[14] I find Mr. Ngai not guilty of the offence driving while using a handheld communication device.

Released: October 10, 2024



Signed: Justice J. Sickinger

² *R. v. Biniaris* (2000), 143 C.C.C. (3d) 1 (S.C.C.) at para. 37.