

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. Ikede, 2015 NSSC 264

Date: 20151023

Docket: Ken. No. 437863

Registry: Kentville

Between:

Her Majesty the Queen

v.

Ajirogho Enakeno Ikede

Decision

Judge: The Honourable Justice Jamie Campbell

Heard: September 15, 2015 in Halifax, Nova Scotia

Written Decision: October 23, 2015

Counsel: James Fyfe for the Appellant
Ajirogho Ikede (personally) for the Respondent

Campbell, J.

[1] This appeal is about the distracted driving provision in s.100 D (1) of the *Motor Vehicle Act*.¹ It deals with the definition the word “use” in the context of using a hand held cellular telephone while operating a vehicle. The Honourable Judge Claudine MacDonald found Dr. Ajirogho Enakeno Ikede not guilty. The Crown has appealed.

[2] The appeal is denied.

Summary

[3] The meaning of the phrase “to use a hand-held cellular telephone” is not as clear as it might at first appear. It has been interpreted to mean using electronic devices such as smartphones that happen to have cellular telephone functions. It has been held to be broader than having a conversation and to include accessing other applications. It does not include just holding the device in the hand though. The legislation does not provide a precise description of what is prohibited. Case law has had to define the terms, gradually. The result is a law that is difficult for people to understand.

¹ R.S.N.S. 1989, c. 293, as amended.

[4] How far the scope of the prohibition goes in this case and in its current form is governed by the context, which is distracted driving. “Use” does not encompass all interactions with hand-held devices that have cellular telephone functionality. When the driver, without looking at the screen of the device, engaged a voice-activated navigational system related directly to the safe operation of the vehicle, through a hand-held electronic communication device, he was not “using” a cellular telephone.

Facts

[5] The trial was heard in Kentville on 10 March 2015. The facts as found by the trial judge were not substantially in dispute. The police observed Dr. Ikede driving his vehicle along Commercial Street in New Minas. He had what appeared to be a cellular telephone in his right hand. He was pulled over and the constable saw an iPhone in the centre console. Dr. Ikede had put the device to “voice level”, meaning that he brought it up to his face and spoke into it. He was using the Siri feature on the iPhone to ask for directions.²

² Siri is a software program available on Apple Inc. products. It uses a natural language user interface to allow a person to interact with the device using spoken words. Siri can be used to direct the device to play music, access pictures, or to do almost anything the device itself can do, including obtain current location information and provide directions. Siri can be activated by voice.

[6] He was charged with using a hand-held cellular telephone while operating a motor vehicle on a highway.

Trial Decision

[7] Judge MacDonald accepted Dr. Ikede's evidence about how the system in his car operated and how it was being operated by him at the time he was seen by the police. He was not using the cellular telephone in the traditional sense of using the phone to make or receive a phone call or even in the sense of checking or leaving a voice mail message or changing the telephone settings on the device. He was not communicating with anyone, either by voice or by text. He was not looking at the screen but speaking into the voice-activated navigation system. There was in fact nothing for him to even see on the screen of his iPhone. He would ask the system for directions by speaking into it and could then put it down and receive those directions just by listening.

[8] The Crown argued that "use is use". "Use" means applying the device to some purpose. He was using the cellphone. He was applying it to a purpose.

[9] The trial judge concluded that Dr. Ikede was not "using" a hand-held cellular telephone. She concluded that "use" in s. 100 D (1) has to be interpreted "in the context of distraction". Driver distraction is what the law is intended to address.

She acknowledged that the Crown did not have to prove that Dr. Ikede himself was distracted. It only had to prove that he was using the hand-held phone. The offence is a strict liability offence. The contextual interpretation of “use” would not change that. It would not require more than proof of use. In the context though, some ways of interacting with the device, given its multifunctional nature, are “use” and some are not. She concluded that because he was accessing a voice-activated navigational system to assist in the safe operation of the vehicle, and was not even required to look at the device, he was not “using” a hand-held cellular telephone as the word “use” is intended in the legislation.

The Issue

[10] The issue is whether in some limited circumstances, a driver holding in his or her hand a device with cellular telephone functionality and speaking into the device, is not using a cellular telephone under s. 100 D (1) of the *Motor Vehicle Act*. The limited circumstances are where the driver is engaging a voice-activated navigational system that is directly related to the safe operation of the vehicle.

The Legislation

[11] Section 100 D (1) of the *Motor Vehicle Act* says,

It is an offence for a person to use a hand-held cellular telephone or engage in text-messaging on any communication device while operating a motor vehicle on a highway.

[12] The legislation provides no definition of the term “hand-held cellular telephone” and no definition of “to use”. The meaning of the section is not as self-evident as it might at first appear. Nova Scotia was a relatively early adopter of distracted driving legislation. Other provinces have subsequently addressed the issue and have provided more direction on both terms.

[13] If the word “use” is singled out of the sentence and defined alone it does admit of the definition of employing something to achieve an end or a purpose. That is one of the widely understood meanings of “use”. In the context of distracted driving and “using” a cellular telephone or other electronic device it needs a more specific meaning.

[14] In 2010 the British Columbia *Motor Vehicle Act* was amended to add s. 214.1, which sets out a more precise definition of the word, in the context of using an “electronic device”.

[15] “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;

- (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.³

[16] The New Brunswick statute was also amended in 2010 to add a very similar definition.

“use”, in relation to a hand-operated electronic device,
includes any of the following actions:

- (a) holding the device in a position in which it may be used, whether it is turned on or off;
- (b) operating any of the device’s functions;
- (c) communicating by means of the device with another person or another device, by spoken word or otherwise;
- (d) looking at the device’s display; and
- (e) taking any other action with or in relation to the device that is prescribed by regulation.⁴

³ *Motor Vehicle Act*, R.S.B.C. 1996 c. 318 s. 214.1.

⁴ *Motor Vehicle Act*, R.S.N.B. 1973, M-17 s..265.01.

[17] The provision in Manitoba is virtually identical.⁵ In Alberta the definition is less expansive but clear. What is prohibited is the “holding, viewing or manipulating”⁶ of a device. “Use” in Nova Scotia should not necessarily be interpreted to be consistent with “use” in other provinces. That is a legislative choice. What the legislation elsewhere shows however is that “use” does not have a definition that is the same in all circumstances.

[18] The word “use” needs that kind of context related definition. The Nova Scotia legislation does not appear to include the mere act of holding a device, whether it is turned on or not. In New Brunswick “use” means holding a device in a position in which it may be used. The word has two different meanings in two neighbouring provinces. That would suggest that “to use” an electronic device or cellular telephone is a concept that is open to interpretation and is not as simple as “use is use”.

⁵ *Highway Traffic Act*, C.C.S.M. H60, s. 215.1.

⁶ *Highway Traffic Act*, R.S.A. 2000 c. T-6, s. 115.1(1)(a).

[19] The object of the prohibition in the legislation is also important. What exactly is a “cellular telephone”? If the modifiers are removed, the sentence would read like this:

It is an offence for a person to use a ... telephone....while operating a motor vehicle on a highway.

[20] The object of the sentence is “telephone”. “Use” only makes sense in the context of “telephone”.

[21] A telephone is widely understood to be a communication device that converts sound into electronic signals that can then be transmitted over long distances. It can convert those electronic signals back into sound. The transmission was originally by cables but can now be done through radio transmissions on what is called alternatively a cellular telephone or a mobile telephone. The modifying word “cellular” can be inserted back into the sentence to make it clear that what is forbidden is the use of a telephone that is cellular, or one that makes use of radio transmissions rather than cables.

[22] It is against the law for a person to use a telephone that employs cellular technology while driving a vehicle. Since the days of Alexander Graham Bell “using” the telephone has meant communicating with another person by speaking,

listening or pretending to listen through the telephone. What the legislature may have meant, based on the wording used, was to stop people from carrying on the dangerous activity of driving while distracted by carrying on a conversation on a telephone held in the driver's hand. The section goes on to make it illegal to send or receive text using any kind of device. Both activities involve communication. People should not be text –messaging or talking on hand-held cellular telephones while they are driving. It doesn't matter whether the driver is actually distracted or not. That part at least seems fairly plain.

[23] It becomes less plain.

[24] Other provinces have addressed in much more detail what the distracted driving provision is intended to prohibit. British Columbia has prohibited the use of an "electronic device" which 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;⁷

⁷ *Motor Vehicle Act*, s. 214.1.

[25] In British Columbia there is a recognition that a hand-held cellular telephone is one thing and hand-held electronic device that includes a telephone function may be another. Both are included in the prohibition.

[26] New Brunswick has banned the use of hand-operated electronic devices and set out a detailed definition of the term.

“hand-operated electronic device” means

(a) a cellular telephone;

(b) a two-way radio

(c) a portable global positioning system navigation device

(d) a portable entertainment device;

(e) another electronic device that

(i) includes a telephone function, and

(ii) normally is held in the user’s hand during use

or requires the user to use his or her hand to operate

any of its functions;

(f) an electronic device that is not otherwise described

in paragraph (a), (b), (c), (d) or (e) but that

(i) is capable of transmitting or receiving e-mail or

other text-based messages, and

(ii) normally is held in the user's hand during use
or requires the user to use his or her hand to operate
any of its functions; or

(g) any other hand-operated electronic device prescribed by regulation;⁸

[27] Once again a cellular telephone and another electronic device that includes a cellular telephone function are separately referenced. Nova Scotia prohibits the use of hand-held cellular telephones. That has been interpreted in the context of distracted driving to include smartphone devices.⁹ That required a contextual interpretation of the term. The legislation used the term cellular telephone. Probably for many people “cellular telephone” conjures up the image of a telephone in a box plugged into the car’s cigarette lighter. For some, a smartphone is a “device”. But, in the context of preventing distracted driving, that distinction doesn’t matter. A smartphone is a cellular telephone.

[28] The meaning of the terms in the Nova Scotia legislation is not plain and obvious. “Cellular telephone” requires context and so does “to use”.

⁸ *Motor Vehicle Act*, s. 256.01

⁹ *R. v. Fergusson*, 2013 NSSC 191

“Hand-held”

[29] What Dr. Ikede had was an iPhone. It is designed to be held in the hand and he was in fact holding it in his hand. The device was in any sense “hand-held”.¹⁰

¹⁰ Presumably a hand-held cellular telephone is either a cellular telephone that is designed to be held in the hand or a cellular telephone that is actually functioning in the hand of the driver. There is a difference.

If design is what governs, playing music on an iPhone, through the vehicle’s sound system, would be using the “cellular telephone.” That would be the case even if the driver doesn’t touch the device, look at the device or deal with the device at all while the vehicle is in motion. With a hands free system the driver doesn’t hold the phone in his or her hand but what is used, employed for the purpose of making the telephone call, is a device designed as a hand-held cellular telephone. It is modified so the driver doesn’t have to hold it while speaking, but it is that hand-held designed device that is used to make the call. That would suggest that what matters is more likely the actual holding of the device in the hand of the driver. (Other jurisdictions have dealt specifically with hands free devices.)

If actual functioning in the hand is what governs, a person might use the speaker phone feature on a device that is designed to be held in the hand but which in the circumstances remains in the console. The driver while using it doesn’t hold it in his or her hand. Instead he or she reaches down into the console or toward the front passenger seat where the device has been placed specifically to avoid holding it in the hand. As long as the driver doesn’t actually pick up the cellular telephone, on that interpretation, he or she would not be in breach of the section. He or she would be using a device designed to be hand-held but would not actually be holding it. (It might also be argued that a device held by the now much maligned selfie stick, it is not hand-held. It is not being held in the hand. It might be held by the hand, but not in the hand.) Manipulating the device is not illegal as long as it is not held in the hand.

In the New Brunswick section, for example, a hand-held device is one that is normally held in the hand or one that requires a person to use his or her hand to

“Cellular Telephone”

[30] The term “cellular telephone” means a telephone that uses a cellular network. Satellite telephones don’t use cellular technology. Presumably a person could carry on a conversation on a hand-held satellite phone but could not carry on the same conversation on a cellular telephone, even though the devices are identical except for the technology used to relay the signals. The legislature is entitled to make that distinction even though it seems to have nothing whatsoever to do with driver distraction. Had the phrase “mobile telephone” been used, it may be that both cellular telephones and satellite telephones would be caught.

[31] Section 100 D (1) was passed in 2007. That was at time when the iPhone and so called smartphone technology were coming onto the mass market. Most cellphones of 2007 now, only 8 years later, seem embarrassingly, or for some proudly, out of date. Their function was largely to just make telephone calls.

Smartphone technology has fundamentally changed what the device is, both in

operate any of the functions. Putting the device on speaker phone in the console would be using a hand-held device.

Under the Nova Scotia section, if Dr. Ikede had left the iPhone in the console, and shouted into it, he would have been just fine. He would not have been holding it in his hand.

terms of the functions it is capable of performing and in terms of its unrelenting hold over the attention of those who cling to it.¹¹ It has been argued, unsuccessfully in Nova Scotia, that a smartphone is not a cellular telephone at all.¹² It is a device with a mobile operating system that combines the functions of a personal computer with those of a mobile or cellular telephone. The cellular telephone is one increasingly unimportant feature of a smartphone. It isn't a cellular telephone as that term was widely understood in 2007. But, it has been determined that smartphones are indeed cellular telephones. What Dr. Ikede had was a cellular

¹¹ People use a vast array of devices to communicate and it's very rare to see one that has telephone communication as its only function. For that matter it's rare to see one that has communication in any form as its only function. They serve as alarm clocks, e-readers, calendars, contact lists and address books, notepads, flashlights, compasses, GPS systems, gaming systems, music and movie libraries and players, word processors, cameras, video recorders, voice recorders, calculators, radios, and a mind boggling array of other things.

The motor vehicle industry has responded to consumer demand for ever more complicated systems within reach of the driver. Cars are marketed with built in internet connections that will make it even easier to access the internet in the car. In some vehicles the driver can have emails read to him or her, respond to text messages with what amounts to a "busy" message, scroll through thousands of songs on various playlists while seeing the album covers displayed, get directions from a map, adjust the size of the map, check the route, find out where coffee shops, gas stations and hotels are located with a radius of 50 kilometers or more, make adjustments to the vehicles sound system, and make hands free telephone calls while driving.

¹² *R. v. Fergusson*, supra.

telephone. The broad range of applications does not change that it is a cellular telephone but it should have some bearing on what it means to use that device.

[32] Using Face Time or Skype on a tablet device held in the hand is not using a hand-held cellular telephone in Nova Scotia. A tablet is not a cellular telephone. Making a telephone call on an iPad using an application like Google Voice, which actually uses telephone technology, is not using a cellular telephone. An iPad is not referred to as a cellular telephone, even though the device itself is making a telephone call. If an iPhone is, simply by definition a cellular telephone, there is a question as to whether it remains a cellular telephone if does not have cellular telephone functionality because the owner has not enabled the telephone by purchasing a plan. It could hardly be a cellular telephone. It can't perform the central function of any telephone. An iPhone that doesn't have a telephone plan, functions like an iPad, a tablet or a small personal computer. A driver who accesses an application on an iPhone with cellular telephone functionality would be caught by the section. One accessing the same application on an identical device with no telephone functionality would not be caught.

[33] Looking at a map on a hand-held GPS device would not be using a cellular telephone.¹³ Doing the same thing on an iPad, held in the hand, would not be using a cellular telephone. If the iPad had the ability to use Google Voice to make a phone call perhaps that might change and the iPad might perhaps become a cellular telephone. If the GPS were engaged on an iPhone with no telephone plan, the iPhone may or may not still be cellular telephone. But, if the GPS application is used on an iPhone, that is using a cellular telephone. It seems like a distinction without a difference.

[34] Dr. Ikede did not argue, and Judge MacDonald did not find, that his iPhone was not a cellular telephone.

[35] Regardless of the device, if the action is actually distracting the driver there is the provision under s. 100 the *Motor Vehicle Act* to deal with that. That section requires drivers to drive in a careful and prudent manner. What s. 100 D (1) does is to make it illegal “to use a cellular telephone” regardless of whether that use is actually prudent and careful in the circumstances. It presumes that use of the hand-held cellular telephone is unsafe. That presumption of unsafeness is based on the

¹³ It would be using an electronic device as defined in the New Brunswick legislation.

unsafe nature of the behaviour. Having a telephone conversation on a hand-held phone is not safe when driving. Did the legislature intend that the same presumption would apply in all circumstances, for every application on all hand-held devices that also are capable of functioning as telephones?

[36] That's where the word "use" comes in.

"Use"

[37] With a narrow context, "use is use" definition of "to use", any interaction by a driver with a hand-held device to achieve a purpose is illegal if the device also has as one its functions a cellular telephone. The identical interaction with the very same device, except lacking the cellular telephone function, would not be illegal.¹⁴ The legislature is entitled to make arbitrary distinctions that have no connection to the purpose of the law. The legislature can distinguish between the same acts done on devices that are identical except for features that are wholly unrelated to safety or driver distraction. But when arbitrary distinctions of that kind are intended, they should be clear.

¹⁴ Had Dr. Ikede accessed Siri on an iPad or perhaps on an iWatch or an iPhone with no telephone function he would not have been charged.

[38] Judges do not presume randomness to be legislative intent. Where there is room for interpretation, the interpretation that avoids meaningless distinctions should be privileged over the one that imposes them.

[39] The *Motor Vehicle Act* is not a living tree. The *Charter of Rights and Freedoms* is. But the *Motor Vehicle Act* is not. The *Motor Vehicle Act* should not be interpreted to keep up with technology and catch behaviours enabled by new technologies that were not contemplated by the wording and that are not analogous to those were. When the legislature banned hand-held cellphone use, it could be said to have banned the use of the telephone to do what telephones do, which is to make telephone calls. Or it could be interpreted to have banned the use of cellular telephones to do what cellular telephones were broadly understood to do at the time, which was to make telephone calls. Or it could cover all purposeful interactions with any hand-held device that has a cellular telephone function, regardless of whether the interaction involves the cellular telephone function at all and regardless of whether the application is related to driver distraction. It could have gone farther and covered holding or manipulating such a device.

[40] In the face of those alternatives, the word “use” should be given a nuanced and contextual interpretation. It should have regard to the object of the verb, the hand-held cellular telephone and the evolving meaning of the term and functions of

the device. A smartphone is considered to be cellular telephone. But “using” a smartphone is not always the same as using an older cellular telephone. The device has evolved and the meaning of “use” should evolve with it. “Use” as Judge MacDonald reasonably interpreted it, evolved to capture the vast majority of ways of interacting with hand-held devices that are enabled by smartphone technology. It recognizes that one form of interaction, that does not involve communication or looking at the screen of the device and is directed toward the safer operation of the vehicle by accessing a voice -activated navigation system is not “use”. It deals with this case. It does not purport to resolve some of the other apparently arbitrary distinctions in a law that technology seems to have left behind.

Case law

[41] The trial judge carefully and properly considered the case law that has dealt with the section in Nova Scotia. Her application of context to the definition was not inconsistent with those cases. In *R. v. Ferguson*, 2013 NSSC 191, the driver had a cell phone in her hand while waiting in traffic to make a left turn. She was not seen either talking or texting. Ms. Fergusson said that she was using Google MapQuest. The trial judge in that case concluded that the device was not a hand-held cellphone because Ms. Ferguson had a Bluetooth device in her ear and at no time had the device placed up to her mouth or ear.

[42] Justice Coughlan concluded on appeal that Ms. Ferguson had indeed been using a hand held cellular telephone, while operating a motor vehicle on the highway. She was not using the device for either making a telephone call or texting, but was indeed using the cellular telephone. Her use was one that required her attention to the screen of the device as it accessed the internet.

[43] Judge MacDonald distinguished that case from the situation here. Ms. Ferguson had to look at the phone to see the map. Dr. Ikede was getting directions from the device in a way that did not require him to look at the device at all. It was brought up to his face so he could speak clearly into it. The trial judge here determined that looking at the map would be “use” while talking into the device was not “use” because it was not visually distracting and was related to the navigation of the vehicle.

[44] In *R. v. MacDonald*, 2014 NSSC 442, Mr. MacDonald was driving on the highway with his cell phone in his hand waiting for a response to a text message that he had sent five minutes earlier. The adjudicator found that he was not using the cell phone and was not texting. He was just passively holding the phone.

[45] Justice Chipman concluded that Mr. MacDonald was guilty. Mr. MacDonald was holding the device in his hand and looking at it. He was distracted in two

ways. First, Mr. MacDonald was looking at his phone to see if he had received a text message. Second he was holding the phone in his hand. Physically holding the phone was important to the interpretation of “using” in the context of the purpose of the section which Justice Chipman noted was to prevent accidents.

[46] Dr. Ikede was holding the phone in his hand. But was not using it to communicate with anyone else and was not in any way required to look at the device itself. He was accessing the voice activated navigational system which required almost no manipulation of the device itself. It is a different situation.

[47] In *R. v. Lumsden*, an unreported case from 7 July 2013, Justice Murphy dealt with an appeal under the same section. Mr. Lumsden was charged under s. 100 D (1) and said that he was holding his cellular telephone just to check the time. The adjudicator found that using the cellular telephone as a clock was not “use”. Justice Murphy’s conclusion was unequivocal. He found that there was no ambiguity in the word “use”. The purpose of the section, he said, was not just to prevent communication. It was to prevent any use of a cellphone.

[48] Once again, Dr. Ikede didn’t even have to look at the iPhone.

[49] The cases are instructive. They interpret the legislation in the context of distracted driving. A smartphone is a cellphone. Using the telephone is more than

just talking on the phone. Looking at a screen and waiting for a message to appear can be “using” it. Picking up a phone to check the time is “using” it. The drivers were doing things that they may have felt were not distracting them but which an objective observer would conclude were distracting by their nature. They involved looking at a map, looking at the device while waiting for message and looking at the device to tell the time.

[50] “Use” and distraction are related.

Conclusion

[51] “Use” is not just “use”. It rarely if ever is. The semantic content of the word is context sensitive. In the context of distracted driving legislation an interpretation that broadens “use” to include all purposeful interactions with a device having cellular telephone capability goes too far. It enables distinctions that have nothing whatsoever to do with distracted driving and are simply arbitrary.

[52] The legislation in Nova Scotia is simple on its face. The problem is that in its simplicity it has not kept pace with more complex evolving technology. Judges can keep interpreting the section, so that it includes smartphones and other non-communication applications, assuming that to be the intent. Should judges interpret “use” to include merely holding the device so that it can be used? The issue is how

far judicial interpretation should go to bring clarity to a law that is not so clear anymore. What Dr. Ikede did would be illegal in many other provinces because they make it clear that even holding an electronic device while driving is prohibited. In Nova Scotia the section does not provide that kind of direction. It would be unfortunate if the important safety issue of distracted driving is left to a series of judicial decisions. Needless to say at this point, that is not a recipe for clarity.

[53] The iPhone was not being used by Dr. Ikede to carry on any communication with any other person. He wasn't "using the telephone" in that sense. The iPhone was not being used in a way that required the driver to divert his attention from the task of driving. It was being used for the very purpose of driving more safely by using a voice-activated navigational system. There was no visual distraction. The driver was not looking at the screen. In those specific circumstances he was accessing an application far removed from the cellular telephone application and that was not objectively distracting.

[54] Judge MacDonald did not impose nuance where none existed. She applied the law in a nuanced way. The trial judge recognized that "use" has a range of meanings. Where she drew the line in this particular case respected the case law and the semantic integrity of the words.

[55] The appeal is denied.

J.