

Date: 20111110
Docket: 10/87
Citation: *R. v. Mahoney*, 2011 NLCA 71

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL**

BETWEEN:

GARRETT MAHONEY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Coram: Welsh, Harrington and Hoegg, JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (General) 201001T2133

Appeal Heard: November 10, 2011

Judgment Rendered: November 10, 2011 (Orally)

Memorandum of Disposition Filed: November 14, 2011

Counsel for the Appellant: Self Represented

Counsel for the Respondent: Jeff Summers

MEMORANDUM OF DISPOSITION

Welsh, J.A.:

[1] On March 18, 2010, Garrett Mahoney was convicted in provincial court of operating a motor vehicle while using a hand-held cellular phone contrary to section 176.1 of the *Highway Traffic Act*, RSNL 1990, c. H-3. Section 176.1 provides, in relevant parts:

(2) A person shall not use a hand-held cellular phone while driving a motor vehicle on a highway.

(3) A person who uses a hand-held cellular phone contrary to subsection (2) is guilty of an offence.

[2] The police officer who laid the charge testified that he was with his partner in an unmarked police car. It was daylight and the conditions were clear. He was in the passenger seat of the vehicle. The officer testified:

As we were traveling behind the Jeep, I observed through the rear window the driver holding what appeared to be a cellphone to his right ear in his right hand. As the vehicle took a left onto the on-ramp to the Trans Canada Highway, I observed in the driver's side mirror that the individual did have a cellphone up to his right ear. It was a dark-coloured cellphone. When it was safe to do so, we activated our lights and siren, and I pulled the vehicle over on the TCH. At that point, the driver, who was Mr. Mahoney, he produced his driver's licence and registration, and the ticket was issued.

[3] On cross-examination by Mr. Mahoney, the officer testified that he had "a clear view", and that because he was a passenger in the police car, he did not have to pay attention to the road as if he had been the driver. He went on to testify that he was positive about his observation and that he would not have issued the ticket if he was not sure.

[4] Mr. Mahoney testified in his defence. The trial judge considered the testimony of both witnesses. She accepted the evidence of the police officer noting that Mr. Mahoney merely provided a "simple denial without an explanation". The trial judge explained why the photographs taken by Mr. Mahoney after the fact were not helpful. She concluded that the offence was proven beyond a reasonable doubt.

[5] Mr. Mahoney appealed his conviction to the summary conviction appeal court. Appeals are governed by the relevant provisions of the *Criminal Code (Provincial Offences Act, SNL 1995, c. P-31.1, section 6)*. Section 839 of the *Criminal Code* applies to appeals to this Court. That section requires two conditions to be satisfied: first, leave of the Court must be obtained; and, second, the appeal is restricted to "any ground that involves a question of law alone". In determining whether leave to appeal should be granted, the test to be applied is set out in *R. v. Newfoundland Recycling Ltd.*, 2009 NLCA 28, 284 Nfld. & P.E.I.R. 153:

[9] Thus, to obtain leave to appeal pursuant to s. 839(1):

(a) the appeal must “be taken on a ground that involves a question of law alone”, and

(b) the ground(s) of appeal must be such that:

(i) either the ground of appeal has a “reasonable possibility of success”, or

(ii) “the proposed question of law [has significance] to the administration of justice”.

[6] These requirements are not satisfied in this case. Even if Mr. Mahoney’s appeal involved a question of law alone, the appeal had no reasonable possibility of success and does not raise a question of significance. Accordingly, leave to appeal was denied at the hearing.

[7] To explain briefly, at the summary conviction appeal hearing, Mr. Mahoney was denied the opportunity to enter into evidence what was described as a CD. (While reference is made throughout to a CD, it appears Mr. Mahoney wished to provide video evidence.) A request to enter such evidence was not made at trial. As stated by the summary conviction appeal judge, an appeal is not intended to provide an opportunity to re-open the case for the submission of evidence which should have been entered at trial. The trial judge must make a determination based on the evidence adduced. It is on that basis that an appeal may be taken. In this case, Mr. Mahoney had submitted photographs at trial. Had he wanted to enter video evidence as well, it was incumbent on him to make that request at the time of trial.

[8] Mr. Mahoney took the position that he was treated unfairly because he did not have an advance copy of the transcript of the proceedings in provincial court. However, he was an active participant in the trial having represented himself. He heard the testimony of the police officer, cross-examined the officer, and gave evidence. This was a short trial; the transcript was just twenty-three double spaced type written pages. During an adjournment while the Court proceeded with other matters, Mr. Mahoney was given ample opportunity to review the transcript.

[9] In any event, there is nothing in the transcript which would support a reasonable possibility of success of an appeal. In accordance with her role, the trial judge made findings of fact and credibility, accepting the evidence of the police officer which, taken together with the evidence of Mr. Mahoney, led her to conclude that the offence had been proven beyond a

reasonable doubt. There is no basis on which an appeal court would interfere with the trial judge's conclusion.

[10] Accordingly, leave to appeal was denied.

B. G. Welsh, J.A.