

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

VIBHESH TRIPATHI

Appellant

- AND -

HER MAJESTY THE QUEEN

Respondent

Transcript of the Appeal Hearing held before The Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 13th day of May, 2019.

APPEARANCES:

Mr. V. Tripathi: On His Own Behalf
Mr. K. Sulzer: Counsel for the Respondent

(Charges under s. 102.2(1) of Highway Traffic By-law No. 4063)

1 THE COURT CLERK: Order. All rise. Court is
2 reconvened, the Honourable Justice Smallwood
3 presiding. You may be seated.

4 THE COURT: Okay. Good afternoon. So we
5 are here for the Tripathi appeal?

6 MR. TRIPATHI: Yes.

7 THE COURT: So you are Mr. Tripathi?

8 MR. TRIPATHI: Yes.

9 THE COURT: Okay. And you are Mr. Sulzer?

10 MR. SULZER: That's correct, yes.

11 THE COURT: Okay. So, Mr. Tripathi, are
12 you ready to -- to argue your appeal today?

13 MR. TRIPATHI: Yes, I am.

14 THE COURT: Okay. And I know that in the
15 past you had requested a translator, but then you
16 had advised the clerk's office that you did not
17 need a translator.

18 MR. TRIPATHI: That's correct.

19 THE COURT: All right. So you are
20 prepared to proceed today without a translator?

21 MR. TRIPATHI: That's correct, yes.

22 THE COURT: Okay. All right. So I
23 have -- just to let you know what I have, I have
24 your notice of appeal that you filled out back in
25 September indicating that your grounds of appeal
26 are no proof provided by the city of Yellowknife
27 bylaw and judgment passed over -- it says over

1 credibility. So I have that. I also have the
2 transcript of the trial that was filed, and I
3 have reviewed that, and I also have the
4 information from the Justice of the Peace Court.
5 So I have the ticket itself, as well as the DVD
6 that was entered at the trial of the video and
7 the audio of the traffic stop, and I have
8 reviewed that, and, as well, I have the other
9 exhibits which were entered, which were the --
10 the information from the bylaw. And so I have
11 reviewed all of that. So what I would like you
12 to do now is to tell me about your appeal, why --
13 why you -- why you think the justice of the peace
14 erred or made a mistake in -- in the decision.

15 MR. TRIPATHI: There's a few things that I
16 would like to say.

17 THE COURT: Okay.

18 MR. TRIPATHI: Well, 'A', I was not able to
19 see any proof or any indissmissible (sic) proof
20 that was provided that I was holding a cell
21 phone, and as I explained in the pages of my
22 transcript that came around, I explain that I was
23 not using a cell phone, my cell phone at all. It
24 was in front of me, and I did not need to see
25 my -- physically to touch my phone or anything
26 along those lines in order for me to know that my
27 phone went off. So Constable Rowan was next to

1 me, and he saw my phone go off. The lights came
2 on. It's a bright phone, bright light in the
3 middle of the night, you can see it, and I'm not
4 going to deny that, but at no point in time did I
5 operate my cell phone device while I was behind
6 the wheel.

7 THE COURT: Okay. Now, one of my
8 functions as an appeal court judge in this case
9 is to review the decision. So that does not mean
10 we have a trial over again or I make a new
11 decision. What I have to do is review the
12 decision of the justice of the peace. So that
13 means usually that I look for errors that they
14 made, whether it is an assessment of the facts or
15 an error of law, and so what I would like you to
16 tell me is what errors you think the justice of
17 the peace made.

18 MR. TRIPATHI: Well, the biggest error, I
19 would -- sorry, I'm not fully prepared for this
20 particular question, but the biggest error, I
21 would say, is not providing me with proof,
22 indissmissible proof for the -- for the ruling
23 that was made.

24 THE COURT: Is there anything else that
25 you want to say?

26 MR. TRIPATHI: Nothing at this point. I --
27 not to that matter that you asked.

1 THE COURT: Okay. You can continue if you
2 have anything else that you would like to say
3 about the appeal.

4 MR. TRIPATHI: Nothing per se regarding the
5 appeal. I would kind of just state that --
6 stating that this is, again, my second time
7 coming into the court system. I am unfamiliar
8 with the rules. I am unfamiliar with
9 proceedings. Credibility happening to be a big
10 factor when the decision was made last time, it
11 was very shocking to me. With that said, I had a
12 few -- a list of things that I had made which I
13 guess should prove that I am a relatively
14 credible person and I'm not trying to find a way
15 out of the ticket or anything along those lines.
16 If the Court has time, I would like to mention
17 that to the Court.

18 THE COURT: Okay. Go ahead.

19 MR. TRIPATHI: So as (INDISCERNIBLE) right
20 now, I am a community leader. I am a community
21 member as well. With that said, I take active
22 parts in volunteer service and help with a lot of
23 different societies, starting with -- I am a
24 trainer, an active member, treasurer, and a board
25 member of the Yellowknife search and rescue. I
26 am -- I am an instructor for women's self-defence
27 training programs that are run in NWT, primarily

1 starting with Tree of Peace and training as
2 required in anywhere around NWT. I also am an
3 instructor for youth self-defence programs
4 wherein we teach youth why bullying is not
5 acceptable and how to stand up to bullying in a
6 constructive way. I am also an instructor at
7 Arctic Combat Fitness, a member of Kamikaze
8 Punishment. That was one of the initiatives
9 started by an anti-bullying program that is in
10 place in Northwest Territories. For my work, I
11 work at Brinks Canada. On a daily basis, I am
12 responsible for safe handling of firearms and
13 comply with federal firearm regulation and safety
14 in place, both for work and (INDISCERNIBLE). I
15 volunteer primarily also at the Falcon Road SPCA
16 and other locations. And in personal life, I'm
17 good friends to a lot of members in this
18 community. I've been -- I do life coaching for
19 friends, where people can turn towards me and ask
20 me questions during their down days, when they're
21 not feeling great, for their family, extended
22 companions. I'm a full-time employee and a
23 student working towards a master's degree. And
24 that's basically essentially what my entire
25 summary is. This is my fifth time appearing in
26 the Court itself, and two have been -- has been
27 based on this ticket. The past three

1 convictions, I have them in front of me to
2 discuss it if needed.

3 THE COURT: Okay. So you -- you've talked
4 a bit about credibility. Now, one of the things
5 in my role as the reviewing court, the appellate
6 court, is I don't make assessments of credibility
7 because I am not -- we are not having the trial.
8 So what you have to do is point to me errors that
9 you think the justice of the peace made in
10 assessing credibility because the justice of the
11 peace is the person who makes the assessments.
12 And so what I am doing is I'm reviewing that
13 decision. So what you need to do is point out
14 where you think the justice of the peace erred in
15 assessing credibility.

16 MR. TRIPATHI: It kind of falls down on me,
17 sadly enough, because, 'A', I was not ready to
18 provide my level of credibility at that point in
19 time when this was brought up to me, and as I
20 explained, that this is me -- second time coming
21 into the court system, and this has never been
22 something that has been an issue. At several
23 points in time, questions were asked by the
24 justice of the peace, but I'm -- I did not
25 understand the questions that he was asking. So
26 I was not able to make a full appeal, I guess, at
27 that point in time. And again, I would go back

1 to the major point, justice of the peace through
2 the proceeding was not able to provide me any
3 indissmissible evidence but based on credibility
4 awarded the case to the City of Yellowknife.

5 THE COURT: Okay. Is there anything else
6 you want to say?

7 MR. TRIPATHI: I -- I think that's all I
8 have.

9 THE COURT: Okay. I noticed that on your
10 notice of appeal, you've checked the box that
11 says you are appealing from conviction and
12 sentence. Is there anything you want to say
13 about the sentence that was imposed?

14 MR. TRIPATHI: Sentence not so much. It's
15 the conviction that bothers me most.

16 THE COURT: Okay. And is there anything
17 else you want to say?

18 MR. TRIPATHI: Nothing at this point.

19 THE COURT: Okay. All right. Thank you.

20 So, Mr. Sulzer, I have reviewed your factum
21 and the cases that have been provided, so just so
22 that you know that before you start your
23 submissions. So you can go ahead.

24 MR. SULZER: Sure. Thank you, Your Honour.
25 Understanding that you've reviewed my factum, I
26 don't feel the need to go through it in detail,
27 and you've also alluded to addressing the

1 appellant, some of the questions that you may
2 need to address in make a decision here. Unless
3 you have any questions on the -- on the -- those,
4 I just point to -- I -- I did -- at the
5 beginning, I'll say the -- I -- I requested a
6 dismissal for want of prosecution based on the
7 appellant's failing to provide a factum. Having
8 heard what the appellant has said today, I am
9 comfortable that what he has said is fairly in
10 line with what's on the notice of appeal. If
11 anything more comes to light through our
12 proceedings today, I do think that those
13 questions of prejudice, in terms of the City
14 being able to address what is raised, could be
15 raised, but I'm satisfied that the notice of
16 appeal essentially touches on the main things, so
17 I'm not too concerned about that; however, I'll
18 leave that to the Court's discretion regarding
19 the dismissal for want of prosecution.

20 So you touched on it -- and sorry, Your
21 Honour, you touched on the -- the question before
22 us, and I just want to reiterate at paragraph 32
23 of my factum the relevant law can be summarized
24 as follows. So as is mentioned, it's -- it is
25 the Court's position to review if there are any
26 errors in the justice of the peace decision. So
27 in deciding whether to allow an appeal, a Court

1 must assess whether the verdict was one that a
2 properly instructed jury or judge could
3 reasonably have rendered, so as you pointed out,
4 not reassessing the situation. If assessments of
5 credibility are made by the trier of fact, an
6 appeal court cannot interfere with those
7 assessments unless it is established that they
8 cannot be supported on any reasonable view of the
9 evidence. This is the key point at issue today.
10 And third, limited details on why a trier of fact
11 accepted particular evidence despite
12 contradictions is not in itself a basis for
13 allowing an appeal. So, in essence, just because
14 it was briefly mentioned does not mean that the
15 trier of fact did not actually assess
16 credibility.

17 So in this case, the question is -- I
18 presume what the appellant is relying on is
19 Section 686 of the *Criminal Code*, that the
20 verdict should be set aside on the ground that it
21 is unreasonable or cannot be supported by
22 evidence. If this Court were to make a decision,
23 I submit that that would be the -- the section of
24 the *Criminal Code* to do so under. And the City
25 submits that if there is reasonable evidence on
26 which to support the -- the Justice of the Peace
27 Wharton's decision, as mentioned, it's not -- the

1 Court's role is not to substitute itself, and
2 when we are discussing credibility, we must bear
3 in mind the advantageous position that in this
4 case the justice of the peace had in assessing
5 that credibility of both witnesses. So in order
6 to overturn that -- a verdict based on
7 credibility, it would need to be -- the decision
8 would need to be not supported on any reasonable
9 view of the evidence, and the City submits that
10 that is not the case in this situation.
11 Primarily, we have testimony from Constable
12 Rowan (phonetic) that he observed the appellant
13 using his cell phone while driving, and there is
14 also the -- the video evidence, and the -- the
15 justice of the peace does make mention that it is
16 of limited value, but it is -- that the justice
17 of the peace did consider it.

18 So based on the constable's clear and
19 unequivocal testimony, the City submits that
20 there is plenty of evidence on which to support a
21 conclusion of guilty in this case. Subject to
22 any questions, those are my submissions.

23 THE COURT: All right. Thank you.

24 Mr. Tripathi, having heard Mr. Sulzer, is
25 there anything that you want to say in reply?
26 Anything you want to add at this point?

27 MR. TRIPATHI: I would like to reply by

1 saying that the video submitted by the City has
2 no proof whatsoever of me holding a cell phone.
3 Constable Rowan did mention -- on the transcript,
4 basically, Constable Rowan and the Crown, between
5 pages 20 and 29, it was discussed that there was
6 about eight to ten seconds of time that Constable
7 Rowan had while he said -- while he was next to
8 me, while he observed the phone. I would like to
9 point out that at no point in time did Constable
10 Rowan make any effort to turn the camera to
11 capture me on my cell phone. Again, I would like
12 to see indissmissible proof of me holding a cell
13 phone, and eight to ten seconds being a fairly
14 large amount of time to just turn a camera.

15 THE COURT: Okay. Is there anything else
16 you want to add?

17 MR. TRIPATHI: No, that should be all for
18 that.

19 THE COURT: Okay. Thank you. I'm going
20 to take a few minutes. So we will adjourn for
21 20 minutes, and I will give you a decision.

22 THE COURT CLERK: All rise. Court is adjourned
23 for 20 minutes.

24 **(ADJOURNMENT)**

25 THE COURT CLERK: Order. All rise. Court is
26 reconvened. You may be seated.

27 THE COURT: This is a summary conviction

1 appeal by the appellant, Vibhesh Tripathi,
2 following a trial in justice of the peace court
3 before a justice of the peace -- Mr. Tripathi?

4 MR. TRIPATHI: Oh --

5 THE COURT: Oh, no. You do not have to
6 stand. You can remain seated.

7 Before a justice of the peace on August
8 15th, 2018. The appellant was charged with using
9 a restricted electronic device, contrary to
10 Section 102.2(1) of the City of Yellowknife's
11 Highway Traffic By-law Number 4063. The
12 appellant pleaded not guilty, and a trial was
13 held. The City of Yellowknife called the officer
14 who stopped the appellant and introduced a video
15 and audio recording of the traffic stop. The
16 appellant testified on his own behalf. Following
17 the trial, the justice of the peace found the
18 appellant guilty and imposed a fine of \$140.

19 The appellant appeals from his conviction
20 and sentence on the following grounds as stated
21 in his notice of appeal: no proof provided by
22 City of Yellowknife bylaw, judgment passed over
23 credibility.

24 With respect to the facts, it is undisputed
25 that the appellant was operating a motor vehicle
26 at approximately 8:54 p.m. on March 15th, 2018,
27 in Yellowknife. Constable Roland, a municipal

1 enforcement officer employed by the City of
2 Yellowknife, was on duty and was on patrol
3 travelling northbound when he stopped at a red
4 light at the intersection of Old Airport Road and
5 Borden Drive. The appellant was operating a
6 vehicle going in the same direction and stopped
7 in the left turn lane beside the officer.

8 Constable Roland testified that he observed
9 the appellant holding a rectangular device in his
10 lap and saw him manipulating it with both hands.
11 He testified that the appellant was using both
12 hands to operate the device, and he could see
13 text or chat bubbles appearing on the device
14 screen. When the light turned green, the officer
15 initiated a traffic stop and issued a ticket to
16 the appellant. The City also presented dash cam
17 evidence from the officer's vehicle which
18 captured the audio of the traffic stop but
19 because of the angle of the video camera was not
20 able to provide evidence of the actions of the
21 appellant while stopped at the red light.

22 The appellant testified in the trial and
23 disputed that he was using his cell phone. The
24 appellant testified that he did not have his cell
25 phone in his hand while stopped and that he did
26 not use his cell phone. He testified that his
27 cell phone was in a cup holder in the centre

1 console of the vehicle and that he had looked
2 over at the screen as he received a message from
3 his friend and never held or operated or
4 manipulated the device.

5 The appellant argues that the decision of
6 the justice of the peace does not provide
7 sufficient proof that he is guilty of the
8 offence. He disputes the factual findings made
9 by the justice of the peace.

10 Essentially, the issue, the legal issue, on
11 this appeal is whether the verdict was
12 unreasonable, not supported by the evidence, or
13 such that it constituted a miscarriage of
14 justice.

15 This is a summary conviction appeal, which,
16 pursuant to Section 2 of the *Summary Convictions*
17 *Procedures Act*, R.S.N.W.T. 1988, c.S-15, states
18 that the provisions of the *Criminal Code* relating
19 to summary conviction offences apply to municipal
20 bylaws.

21 The standard of review on a summary
22 conviction appeal is the same as stated in
23 Section 686(1) of the *Criminal Code*, which
24 states:

25 On the hearing of an appeal against a
26 conviction[...] the court of appeal
27 (a) may allow the appeal where it

1 is of the opinion that
2 (i) the verdict should be set
3 aside on the ground that it is
4 unreasonable or cannot be
5 supported by the evidence,
6 (ii) the judgment of the trial
7 court should be set aside on
8 the ground of a wrong decision
9 on a question of law, or
10 (iii) on any ground there was a
11 miscarriage of justice.

12 The standard of review has been stated in
13 the case of *R. v. Okpatauyak*, 1997 CanLII 4497
14 (NWTSC), that it is

15 [...] whether the verdict is
16 unreasonable, not whether it is
17 unjustified. The function of the
18 Court is not to substitute itself for
19 the jury but to decide whether the
20 verdict is one that a properly
21 instructed jury acting judicially
22 could reasonably have rendered.

23 When it comes to assessments of credibility,
24 deference is shown to the trial judge because of
25 their ability to observe the witnesses and to
26 assess their credibility. The assessment of the
27 credibility of witnesses is a question of fact in

1 which deference is shown, and the assessments of
2 credibility will not be interfered with
3 [...]. unless it is established that
4 they "cannot be supported on any
5 reasonable view of the evidence."

6 *Okpatauyak, supra; R. v. Wetzel, 2013 SKCA*
7 143 at para. 21.

8 In assessing a trial court's decision, the
9 appellate court should not substitute their own
10 view for that of the trial judge. The appellate
11 court is entitled to review, re-examine, and
12 reweigh the evidence, but only for the purpose of
13 determining if the evidence was reasonably
14 capable of supporting the trial judge's
15 conclusion. *R. v. Bobyn, 2010 SKQB 240* at para.
16 9.

17 In this case, the appellant was charged with
18 using a restricted electronic device. The
19 officer testified that he saw the appellant using
20 a rectangular device with both hands while the
21 appellant was stopped at a traffic light. The
22 officer was in a vehicle beside the appellant's
23 vehicle, and the officer testified that he saw
24 the appellant manipulating the device with both
25 hands and observed text or chat bubbles appearing
26 on the device screen.

27 The appellant testified that he did not have

1 his cell phone in his hand and did not use his
2 cell phone, and he testified that his phone was
3 in the cup holder, and he looked over at the
4 screen but never held, operated, or manipulated
5 the device.

6 The audio recording of the traffic stop
7 indicated that the officer said to the appellant
8 that the reason for the stop was that "when you
9 were beside me there, you were on your cell
10 phone, using it with both hands." The appellant
11 responded, "Well, I was at a stop sign. I just
12 wanted to -- I was asking my friend if they
13 wanted a coffee." The appellant then went on to
14 say to the officer that he did not know that he
15 could not use his cell phone while stopped at a
16 red light or a stop sign.

17 When the appellant testified, he explained
18 that he had asked his friend if he wanted coffee
19 and that as he was parked at or stopped at the
20 traffic light, the friend had responded to say
21 that they did want coffee and that he had looked
22 over to the device in the cup holder to see the
23 response, but he had not been holding the device.

24 The justice of the peace had evidence before
25 him from the officer and the audio recording.
26 The officer was clear in his evidence about his
27 observations, and his evidence was not undermined

1 in cross-examination. The justice of the peace
2 concluded that the City of Yellowknife had proven
3 its case and found the appellant guilty.

4 While the appellant in his arguments today
5 refers to not seeing indisputable proof that he
6 was guilty of the offence, it is the justice of
7 the peace who must be satisfied that the Crown --
8 in this case, the City of Yellowknife -- has
9 proven the guilt of the appellant beyond a
10 reasonable doubt. It is not to the standard of
11 absolute certainty. In this case, it is clear
12 that the justice of the peace felt the City had
13 met its burden.

14 While the justice of the peace initially
15 stated that he found both witnesses to be
16 credible, it is apparent from the rest of the
17 decision that the justice of the peace accepted
18 the evidence of the officer in conjunction with
19 the statements made by the appellant at the
20 traffic stop, which led him to reject the
21 appellant's evidence and find the appellant
22 guilty.

23 While the reasons of the justice of the
24 peace are not extensive, it is apparent that the
25 justice of the peace analyzed the evidence of the
26 officer, of the appellant, and of the audio
27 recording of the traffic stop in coming to his

1 decision. In reviewing the decision, it is clear
2 that the evidence of the officer, along with the
3 audio recording of the stop, were sufficient to
4 satisfy the justice of the peace beyond a
5 reasonable doubt that the appellant was guilty of
6 the offence charged. In my view, there was
7 sufficient evidence to support the justice of the
8 peace's conclusion, and I keep in mind that it is
9 not my role to retry the case or to decide what
10 decision I would have made, but it is to assess
11 the justice of the peace's decision.

12 It was open to the justice of the peace to
13 assess the officer's and the appellant's
14 credibility. My function is not to reweigh the
15 evidence or to determine the issues anew but to
16 determine whether the justice of the peace's
17 assessment can be reasonably supported by the
18 evidence. In my view, the justice of the peace's
19 assessment accepting the officer's credibility,
20 in conjunction with the audio evidence presented,
21 is reasonably supported by the evidence. In
22 order to come to a different conclusion, the
23 decision would have to be unreasonable,
24 unsupported by the evidence, or amount to a
25 miscarriage of justice. I am not satisfied that
26 any of those circumstances exist; therefore, I am
27 dismissing the appeal from conviction.

1 In addition, I have not heard any arguments
2 against the sentence. The appellant stated that
3 his real issue is with the conviction; therefore,
4 having not heard any arguments against the
5 sentence, I also dismiss the appeal from
6 sentence.

7 All right. Thank you.

8 THE COURT CLERK: All rise. Supreme Court is
9 now closed.

10 -----
11 **CERTIFICATE OF TRANSCRIPT**

12
13 I, the undersigned, hereby certify that the
14 foregoing transcribed pages are a complete and
15 accurate transcript of the digitally recorded
16 proceedings taken herein to the best of my skill and
17 ability.

18 Dated at the City of Edmonton, Province of
19 Alberta, this 3rd day of June, 2019.

20
21 Certified Pursuant to Rule 723
22 of the Rules of Court

23 

24
25 _____
26 Joanne Lawrence
27 Court Transcriber