

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

MATAR MAHAMED MAHAMUD

Appellant

Transcript of the Reasons for Decision by the Honourable Justice
S.H. Smallwood, sitting in Yellowknife, in the Northwest
Territories, delivered orally on the 25th day of January, 2021.

APPEARANCES:

B. Wun:

Counsel for the Respondent,
appearing via teleconference

No one appearing for the Appellant

Charge under s. 267(b) of the *Criminal Code*

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1 THE COURT: Okay. Good afternoon. So we are here
2 for the Mahamud matter, and I see we have the
3 interpreter again?

4 THE INTERPRETER: Yes, here I am.

5 THE COURT: Good afternoon. And there is no one
6 appearing at this moment for the Crown or for
7 Mr. Mahamud, it appears. I will just confirm --

8 B. WUN: Your Honour --

9 THE COURT: Oh.

10 B. WUN: Your Honour, it's Billi Wun on the telephone for
11 the Crown.

12 THE COURT: Okay. Good afternoon, Mr. Wun. Sorry, I
13 did not see that we had a line also active. Okay. And
14 so Mr. Mahamud, I understand, is not present, is that
15 correct, Mr. Clerk?

16 THE CLERK: Yes, Your Honour.

17 THE COURT: Madam Clerk. Yes, and I understand
18 that he had sent an email, I believe, requesting that this
19 matter be adjourned as he was still out of the country,
20 but that further attempts to find out what his travel
21 itinerary was and whether he could connect by phone
22 were not successful in getting a response from
23 Mr. Mahamud.

24 So we are going to proceed today with
25 the decision. A copy of the decision of the transcript
26 will be sent to Mr. Mahamud so that he will be aware of
27 the results. Mr. Interpreter, I am just going to ask that

1 you remain on the line in the event that Mr. Mahamud
2 does connect and we will require interpretation.

3 THE INTERPRETER: I will.

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

5 So this is a summary conviction appeal
6 by the appellant, Matar Mahamed Mahamud, following
7 a trial held in Territorial Court on March 14th to 16th,
8 2018, May 24th, 2018, and October 10th, 2018. The
9 appellant was charged with assault causing bodily
10 harm, contrary to section 267(b) of the *Criminal Code*.
11 The appellant pleaded not guilty and a trial was held.

12 The Crown called three witnesses at trial:
13 Constable Terry Boutcher, Nancy Larocque and the
14 victim, Angus Durrie. Mr. Mahamud testified in his own
15 defence. The Territorial Court Judge found the
16 appellant guilty and imposed a sentence of eight
17 months imprisonment to be served conditionally and 12
18 months of probation.

19 The appellant appeals from his conviction
20 and sentence on the following grounds, as stated in his
21 Notice of Appeal:

22 1. The verdict was unreasonable and not
23 supported by the evidence; and

24 2. The sentence was not reasonable in
25 all of the circumstances.

26 Facts. It is undisputed that the appellant
27 was operating a taxicab in Yellowknife on July 24th,

1 2017, and that the victim, Mr. Durrie, was a passenger
2 in the appellant's taxicab and that there was a physical
3 altercation between the two outside of the taxicab after
4 the appellant drove Mr. Durrie to Ciara Manor here in
5 Yellowknife.

6 The trial judge found that Angus Durrie
7 was at the Kilt & Castle Pub after work on July 23rd,
8 2017, and consumed a number of alcoholic beverages.
9 When he left the bar, he flagged down Mr. Mahamud's
10 taxi. He requested to go to McDonald's and then to
11 Ciara Manor.

12 After arriving at Ciara Manor, there was
13 an argument about how to pay for the cab fare. This
14 argument escalated into a physical confrontation.
15 During this physical confrontation, Mr. Durrie ended up
16 on the ground and he was punched three times in the
17 face by Mr. Mahamud. This was observed by Nancy
18 Larocque, who lived in an apartment in Ciara Manor.
19 Ms. Larocque observed this from a window in her
20 apartment.

21 Following the incident, Mr. Mahamud left
22 the scene. Mr. Durrie called the police shortly after the
23 incident and the police arrived at Ciara Manor at 12:20
24 a.m. on July 24th, 2017. Mr. Mahamud called the
25 police just before 1:00 a.m. and was arrested shortly
26 after at the Yellowknife RCMP detachment. Mr. Durrie
27 suffered two black eyes as a result of the incident.

1 story.

2 Essentially, the issue on this appeal is:
3 Whether the verdict was unreasonable and not
4 supported by the evidence.

5 The standard of review on a summary
6 conviction appeal is the same as stated in section
7 686(1) of the *Criminal Code*, which states:

8 On the hearing of an appeal against a
9 conviction [...], the court of appeal
10 (a) may allow the appeal where it is of the
11 opinion that
12 (i) the verdict should be set aside on the
13 ground that it is unreasonable or cannot
14 be supported by the evidence,
15 (ii) the judgment of the trial court should
16 be set aside on the ground of a wrong
17 decision on a question of law, or
18 (iii) on any ground there was a
19 miscarriage of justice;

20 The standard of review is whether the
21 verdict is unreasonable, that is, whether the verdict is
22 one that a properly instructed jury, acting judicially,
23 could reasonably have rendered.

24 Mr. Mahamud's claim that the verdict is
25 unreasonable is based upon the trial judge's
26 assessment of the evidence of the witnesses and his
27 conclusions regarding their credibility.

1 When it comes to assessments of credibility,
2 significant deference is shown to the trial judge
3 because of their ability to observe the witnesses and
4 assess their credibility. An appellate court is not to
5 substitute their own views of or interfere because they
6 disagree with the trial judge's conclusions. An
7 appellate court should only intervene to correct a
8 palpable and overriding error. *R v Nitsiza*, 2007
9 NWTSC 53 at paragraphs 36-37.

10 The trial judge in his reasons rejected Mr.
11 Mahamud's evidence because he concluded that it did
12 not explain Mr. Durrie's injuries; it was contradicted by
13 the timeline established by the police; his evidence
14 regarding why he did not use the emergency button in
15 the taxi was contradictory; and his testimony about the
16 incident was inconsistent with the evidence of Nancy
17 Larocque.

18 The trial judge accepted the evidence of
19 Nancy Larocque, noting that she was an independent
20 witness who had no prior connection to the accused or
21 complainant. He noted that she was awake and
22 appeared to have a good vantage point to observe the
23 interaction. The trial judge found that Ms. Larocque
24 was honest and careful in her answers and her
25 evidence was corroborated by other evidence on small
26 but significant points. He noted that there was one
27 inconsistency in her testimony which he reviewed, but

1 he concluded that it did not cause him to doubt her
2 reliability or veracity.

3 With respect to Angus Durrie, the trial
4 judge noted that his recollection of events was clearly
5 affected by his consumption of alcohol. The trial judge
6 noted that Mr. Durrie appeared to be making an effort
7 to be honest while testifying, but that given his state of
8 intoxication and his inability to remember what he said
9 to the RCMP, the trial judge did not consider him to be
10 a reliable witness.

11 The trial judge concluded that
12 Mr. Mahamud punched Mr. Durrie three times while
13 Mr. Durrie was lying motionless on the ground. In
14 coming to this conclusion he relied on the testimony of
15 Nancy Larocque and the injuries of Angus Durrie. He
16 acknowledged that Ms. Larocque did not see the entire
17 interaction, but that she did see Mr. Mahamud punch
18 Mr. Durrie three times in the face while Mr. Durrie was
19 motionless on the ground. The trial judge concluded
20 that the defences of consent or self-defence were not
21 available to Mr. Mahamud at that point.

22 Mr. Mahamud, in oral submissions,
23 alleged that Ms. Larocque lied and that the trial judge
24 accepted her lies. Ultimately, he does not challenge
25 the trial judge's conclusions, but asserts that they are
26 based on Ms. Larocque's lies and that he did not hit
27 Mr. Durrie three times while Mr. Durrie lay on the

1 ground, as Ms. Larocque claimed.

2 This is an attempt to retry what has
3 already been decided by the trial judge. There has
4 already been a trial on these claims. That is not the
5 function of an appellate court. There is no evidence
6 that Ms. Larocque lied, told a completely different
7 version of her story about what happened, or colluded
8 with Mr. Durrie. These are baseless allegations.

9 The trial judge carefully assessed Ms.
10 Larocque's evidence and his conclusions regarding her
11 evidence and her credibility are reasonably supported
12 by the evidence. There is no basis upon which to
13 question the trial judge's conclusions regarding Ms.
14 Larocque's evidence.

15 Similarly, the trial judge carefully
16 assessed the appellant's evidence and provided
17 several reasons for rejecting his evidence. Those
18 reasons were explained by the trial judge and are
19 reasonably supported by the evidence. They provide a
20 valid basis for the trial judge to reject the appellant's
21 evidence.

22 The appellant has also complained about
23 the police investigation and the failure of the police to
24 interview other witnesses. In oral submissions, it
25 appears that this was based upon the evidence of
26 Nancy Larocque where she said that she saw other
27 people in other apartments looking at what occurred.

1 He also complained about the police not obtaining
2 video surveillance evidence from the apartment
3 building.

4 There is no evidence that other witnesses
5 would have observed anything which would have
6 changed the trial judge's assessment of the evidence.
7 It is speculative to assume that the other evidence
8 might have led to another conclusion. The issue on
9 appeal is the trial judge's conclusions regarding the
10 evidence which was led at trial, not on other potential
11 evidence which might have affected the trial judge's
12 conclusions.

13 The appellant also complained that he
14 told his lawyer about two other witnesses whom he
15 asked to be called and that the lawyer did not do so.
16 Upon questioning the appellant regarding his
17 knowledge of the two other witnesses, it appears he
18 was referring to witnesses that the victim said observed
19 what occurred and that Ms. Larocque had also said that
20 other people were looking at what occurred, so they are
21 not two specific individuals that Mr. Mahamud was able
22 to identify.

23 There has been no waiver of
24 solicitor/client privilege, so I am not aware of the
25 specific discussions between the appellant and his
26 lawyer and I do not have the lawyer's version of any
27 discussions that may have occurred between he and

1 the appellant. There is no evidence regarding any
2 efforts of the lawyer to pursue this evidence. There is
3 no evidence either way.

4 I would note that counsel for
5 Mr. Mahamud in his final submissions before the trial
6 judge raised the issues of the lack of surveillance video
7 and also that there were potentially other witnesses that
8 the police did not question, so these issues were raised
9 before the trial judge.

10 But, in any event, this appears to relate to
11 the previous issue, that there were other potential
12 witnesses who could have been located and called at
13 trial. Again, it is speculative what these other
14 witnesses' evidence might have been and it is not
15 apparent that this potential evidence might have
16 affected the trial judge's conclusions.

17 In my view, there was sufficient evidence
18 to support the trial judge's conclusions. The trial judge
19 assessed the evidence and the credibility of the
20 witnesses and the conclusions that he came to were
21 reasonably supported by the evidence. There is no
22 evidence that Nancy Larocque lied or colluded with the
23 victim in this case.

24 My function is not to reweigh the
25 evidence or retry the issues, but to determine whether
26 the trial judge's conclusions are reasonably supported
27 by the evidence, and I find that they were. Therefore, I

1 am dismissing the appeal from conviction.

2 Turning to the sentence appeal, the
3 appellant made no submissions regarding the
4 sentence. The only indications of a ground of appeal
5 are in the Notice of Appeal in which he claims the
6 sentence is unreasonable, and in his written letter,
7 where he refers to the trial judge not taking into account
8 his previous clean record.

9 The standard of review on a sentence
10 appeal is highly deferential. Sentencing judges have a
11 broad discretion to impose sentences that they
12 consider appropriate in the circumstances of each
13 case. Absent an error in principle, the failure to
14 consider a relevant factor, or the overemphasis of the
15 appropriate factors, an appellate court should only
16 intervene to vary a sentence imposed at trial if it is
17 demonstrably unfit. *R v Lacasse*, 2015 SCC 64.

18 Mr. Mahamud was sentenced to an
19 eight-month conditional sentence order, followed by 12
20 months of probation. A DNA order was also imposed.
21 On sentencing, the Crown sought a sentence of a
22 one-year conditional sentence order, following by 12
23 months of probation. The defence sought a suspended
24 sentence and an 18-month probation order.

25 In his reasons, the sentencing judge
26 explained the principles of sentencing. He also
27 reviewed the personal circumstances of the appellant,

1 noted that he had no prior criminal record and had been
2 a victim of a previous robbery. The sentencing judge
3 was aware that a conviction would mean that the
4 appellant could no longer drive a taxi in Yellowknife and
5 he took this into account on sentence.

6 The sentencing judge noted that the
7 victim was vulnerable because he was heavily
8 intoxicated and unable to defend himself. He also
9 noted that Mr. Mahamud, as a taxi driver, had a duty to
10 provide a safe ride for his passengers, and he also
11 noted that there was no reason for the appellant to
12 attack the victim.

13 The sentencing judge considered
14 deterrence, denunciation and rehabilitation in
15 concluding that an eight-month conditional sentence
16 order and 12 months of probation was an appropriate
17 sentence. In reviewing the sentencing judge's decision,
18 there is no basis upon which to conclude that the
19 sentence is demonstrably unfit or that the sentencing
20 judge committed an error in principle, failed to consider
21 a relevant factor, or overemphasized an appropriate
22 factor. Therefore, the sentence appeal is dismissed.

23 So, Mr. Wun, is there anything that I have
24 overlooked?

25 B. WUN: No, thank you, Your Honour.

26 THE COURT: Okay. All right. Well, as I said, a copy of
27 the transcript will be ordered and a copy will be

1 provided to Mr. Mahamud so that he can review that.
2 And I think that will conclude everything. So thank you,
3 Mr. Interpreter, for your attendance today.

4 THE INTERPRETER: You're very welcome.

5 THE COURT: Thank you. And thank you, Mr. Wun, for
6 your submissions and your materials that you filed on
7 this case.

8 B. WUN: Thank you, Your Honour.

9 THE COURT: All right. We will adjourn. Thank you.

10 **(PROCEEDINGS CONCLUDED)**

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12

13 **CERTIFICATE OF TRANSCRIPT**

14 Neesons, the undersigned, hereby certify that the foregoing
15 pages are a complete and accurate transcript of the
16 proceedings transcribed from the audio recording to the best
17 of our skill and ability. Judicial amendments have been
18 applied to this transcript.

19

20 Dated at the City of Toronto, in the Province of Ontario, this
21 15th day of February, 2021.

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25

Kim Neeson

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Principal

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