SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Sogy*, 2024 NSSC 310

Date: 20241021
Docket: *Hfx*, No. 533837
Registry: Halifax

Between:

His Majesty the King

v.

Sorav Sogy

Summary Conviction Appeal Decision

Judge:	The Honourable Justice Christa M. Brothers
Heard:	September 9, 2024, in Halifax, Nova Scotia
Final Written Submissions:	October 11, 2024
Decision:	October 21, 2024
Counsel:	Rob Jollimore and Jim Janson, for the Applicant Sorav Sogy, Self-Represented

By the Court:

[1] On May 13, 2024, the presiding Justice of the Peace (J.P.), Bruce V. McLaughlin, acquitted Sorav Sogy who was charged that he "did unlawfully commit the offence of using a hand-held cellular telephone or text messaging on a communications device while operating a motor vehicle" contrary to s. 100D(1) of the *Motor Vehicle Act* ("*MVA*") R.S.N.S. 1989, c. 293.

[2] The Crown appeals on the ground that the presiding J.P. erred in law by incorrectly interpreting s. 100D(1) of the *MVA*, The Crown requests that this Summary Conviction Appeal Court allow the appeal, set aside the acquittal and enter a conviction.

Evidence

[3] Mr. Sogy was self-represented. There were only two witnesses, Constable Katrinardottir and Mr. Sogy. Cst. Katrinardottir testified that on August 17, 2020, she was patrolling Spring Garden Road when she noticed Mr. Sogy's vehicle travelling in the oncoming lane with only its fog lights on. Cst. Katrinardottir said that when the light turned green, Mr. Sogy's car did not move, which raised questions in her mind. About five seconds later, when the vehicle finally moved, Cst. Katrinardottir noticed that the driver's face was lit up, like he was looking at a bright screen. The light was emanating up to his face. The vehicle proceeded very slowly and when Cst. Katrinardottir's vehicle passed it, she was able to see that the driver was holding a mobile phone in his hand. She observed Mr. Sogy's hand on the steering wheel and the phone was raised high enough that she could see it. When Cst. Katrinardottir pulled Mr. Sogy over, she noticed a phone on his lap. It was a touchscreen phone.

[4] Mr. Sogy's statement to the police was subject to a *voir dire* and the court found that the Crown had established beyond a reasonable doubt that the statement was made voluntarily, with Mr. Sogy knowing that he was speaking to a police officer. Cst. Katrinardottir said Mr. Sogy advised that he was using the phone because "he was just looking for a delivery." This could have been interpreted to mean that he was looking at his phone to obtain directions for his route.

[5] Mr. Sogy testified that he was delivering for Skip The Dishes. He was on his way to do his last delivery. He said his phone was in a magnetic holder attached to the inside of his car when it slipped from that magnetic attachment and fell down at

his feet, close to the gas pedal. Cst. Katrinardottir did not witness this. Mr. Sogy felt that the phone being at his feet was a safety hazard so he leaned down to retrieve the phone. It took him a while as it was difficult to reach the phone. Mr. Sogy testified that this was why his face was lit up by the phone screen. Mr. Sogy also gave an alternative explanation and said the constable was confused and that it was not the phone that had lit up his face, but the light from the digital instrument panel. He also testified that he never told the constable that he was "looking for a delivery" but that he was "looking to do a delivery." On cross-examination, Mr. Sogy admitted that the last delivery he was making was on Wellington Street and while it was close to where he lived, he had never made a delivery to that address. Mr. Sogy testified that the Skip The Dishes Application (App) was activated on his phone which connects to the mapping software. The App shows the position of his vehicle and a route for his delivery. Mr. Sogy testified as follows:

Q: And so when you told the officer, when she asked you why are you using a cell phone …

A: Mm-hmm.

Q: … and you told the officer I'm looking for a delivery …

A: Mm-hmm.

Q: … that was because you were looking for this address on Wellington you hadn't been to before, correct?

A: Yes.

Q: Okay.

A: I … I don't understand your statement there.

Q: Okay. Well, you heard the officer testify …

A: Mm-hmm.

Q: … that during the traffic stop …

A: Yeah.

Q: … she noted when she asked you about your cell phone you said that you were looking for a delivery and I suggested to you …

A: Mm-hmm.

Q: … that's consistent with you using the Skip the Dishes app…

A: Mm-hmm

Q: … and going to a place on Wellington street that you'd never been before.

A: If I were trying to find the address I would say I was looking for an address, I would not say a delivery, and from my recollection I said I was looking to do a delivery so I was …

Q: You were looking to do a delivery?

A: Yeah, on that particular address. I had the food in the back and plus the sweat thing, when you're handling hot food you do get the sweat and about the address thing if you're saying that I might not have put the … like I lost the track of the location so my car, it has a wireless car play featured so you don't even need to, you know, like basically connect your wire to the phone so it just basically wirelessly puts all of that information on the multimedia screen that you have so I wouldn't need to the phone to kind of look at the map. If I needed to do anything which is basically meaning to make a call, to send a text, I can just press a button, speak, and it does it.

Q: So earlier …

A: Mm-hmm.

Q: … you said you were doing a delivery?

A: Yeah.

Q: When you spoke to the officer you told her I'm doing a delivery?

A: I'm looking to do a delivery.

Q: And now it's I'm looking to do a delivery not I'm looking for a delivery.

A: It was always looking to do delivery. If you, like, if you like heard my cross questioning when I was (inaudible) to her, I asked her is it possible that I said …

Q: Okay.

A: … like, you know, I was looking to do a delivery.

The Decision

[6] The lower court's decision is 16 lines. The court's entire decision is as follows:

> THE COURT: Look, not that I agree with the outcome here but the Defendant in this case was clearly, at best, looking at the phone. There's no evidence, and let me just start by saying this is now an impossible field for police officers to try and deal with. I mean, it was tough enough before we began to embrace what **Anand** says in that they were trying to establish certain facts by visually, sometimes from 50 feet away, a car that they could only observe for, you know, a couple of seconds. It's a virtual impossibility but without the legislation being changed, I feel that I'm bound by what the Court of Appeal has said in Anand and it has simply said that

> you're looking at a cell phone, even if that is distracted, simply looking at the phone doesn't get you there.
>
> So Mr. Sogy, I don't agree with the use of cell phones in cars but I find that under the legislation and the case law and the way it stands, you're not guilty. Thank you.

Standard of Review

[7] In *R. v. Nickerson*, 1999 NSCA 168, Justice Cromwell described the applicable standard of review on a summary conviction appeal at para. 6:

> The scope of review of the trial court's findings of fact by the Summary Conviction Appeal Court is the same as on appeal against conviction to the Court of Appeal in indictable offences: see sections 822(1) and 686(1)(a)(i) and *R. v. Gillis* (1981), 60 C.C.C. (2d) 169 (N.S.S.C.A.D.) per Jones, J.A. at p. 176. Absent an error of law or a miscarriage of justice, the test to be applied by the Summary Conviction Appeal Court is whether the findings of the trial judge are unreasonable or cannot be supported by the evidence. As stated by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656 at 657, the appeal court is entitled to review the evidence at trial, re-examine and reweigh it, but only for the purpose of determining whether it is reasonably capable of supporting the trial judge's conclusions. If it is, the Summary Conviction Appeal Court is not entitled to substitute its view of the evidence for that of the trial judge. In short, a summary conviction appeal on the record is an appeal; it is neither a simple review to determine whether there was some evidence to support the trial judge's conclusions nor a new trial on the transcript.

[8] Sitting as a Summary Conviction Appeal Court, I can review the evidence to determine if it is reasonably capable of supporting the J.P.'s conclusion.

[9] The difficulty in this case is the J.P. did not make any explicit findings of fact in acquitting Mr. Sogy.

Lack of Participation in the Appeal

[10] While Mr. Sogy was in attendance for an appeal engaging similar issues being heard one hour prior to his own appeal, that is *His Majesty the King v. Lisa Marie Rankin*, Hfx No. 533833, and despite the court acknowledging him and advising that his appeal was taking place next after a brief break, he did not return and did not make any oral submissions. The court did receive and consider a factum filed by Mr. Sogy. The court attempted to contact him by way of email and phone, information which was provided to the court when he filled out the Personal Representation Form on June 20, 2024. Despite several calls and emails, he did not attend for the hearing,

which ultimately went ahead in his absence. After the hearing, the court wrote to him as follows on September 16, 2024:

> Your appeal which took place on September 9, 2024, proceeded without your attendance, at the request of the Crown as you left before you matter was called. You were in the courtroom for the matter which proceeded before yours and had similar legal issues. Despite the court advising we would return after a 10-minute break to hear your appeal; you did not reappear. Efforts were made by court staff to contact you. The Sheriffs went through the building and the court clerk called your phone number, however, these efforts were unsuccessful.
>
> After submissions by the Municipal Crown, the Court determined further information from the parties would be required in relation to what, on a summary conviction appeal, the court should do when the lower court did not make any findings nor address what evidence was accepted or not accepted at your trial.
>
> The Municipal Crown will be providing further written submissions to the Court on or before October 11, 2024. You are invited to provide your written submissions as well on the same date.
>
> If you have any questions, comments, or concerns, please feel free to contact my Judicial Assistant at (902) 424-6940.
>
> Yours very truly,
>
> Justice Christa M. Brothers

[11] The Attorney General filed additional submissions on October 9, 2024, which were provided to Mr. Sogy. On October 10, 2024, a further email was sent by the court to Mr. Sogy, seeking information as to whether or not he intended to provide any additional written submissions. Having not received any response, the court concluded that it would provide this written decision.

Sufficiency of Reasons

[12] Initially, I had concerns about the sufficiency of the J.P.'s reasons, given his failure to review the evidence and make specific factual findings. However, after receiving additional submissions on this issue, I am satisfied that the J.P.'s reasons are sufficient to allow for meaningful appellate review.

[13] The Crown's witness and Mr. Sogy gave two competing versions of what Mr. Sogy was doing with his phone prior to being stopped by Constable Katrinardottir. In deciding to acquit Mr. Sogy, the J.P. remarked that Mr. Sogy was, "at best", looking at his phone, and that, according to *Anand*, *supra*, simply looking at a phone while driving, even if distracting, does not establish liability under s. 100D(1). In

other words, the J.P. concluded that it was unnecessary to assess credibility and make specific findings of fact because the Crown's evidence, taken at its highest, proved nothing more than that Mr. Sogy was looking at his cellphone while driving – conduct which is not prohibited by s. 100D(1). I see no error in his conclusion. Constable Katrinardottir testified that she observed Mr. Sogy's hand on the steering wheel and the phone was raised high enough that she could see it. She did not testify to seeing Mr. Sogy entering address information into the phone, texting with it, or otherwise manually accessing its features.

[14] In *R. v. Rankin*, 2024 NSSC 309, released concurrently with this decision, I rejected the Crown's argument that the Court of Appeal's comments in *Anand*, *supra*, ought not to be relied on in interpreting s. 100D(1). Given my analysis in *Rankin*, *supra*, I find no error in the J.P.'s interpretation of s. 100D(1) and his decision to acquit Mr. Sogy. Merely looking at a cellphone while driving is not prohibited by the language of s. 100D(1). As Beveridge J.A. noted at para. 65 of *Anand*, *supra*:

> …It is decidedly not the role of the courts to fill in the blanks and convict members of the public based on our views of whether the impugned conduct is just as bad as what the Legislature in fact had banned.

Conclusion

[15] I dismiss the appeal and uphold Mr. Sogy's acquittal.

Brothers, J.