

CANADA / JUDGMENT

## R. v. Thiara

2020 BCSC 482

### COURT

Supreme Court of British Columbia

### DECIDED

31 March 2020

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2020 BCSC 482 R. v. Thiara

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Thiara,

2020 BCSC 482

Date: 20200331

Docket: X082006

Registry: New Westminster

Regina

v.

Gurmukh Singh Thiara

**Before: The Honourable Mr. Justice Blok**

On appeal from: A decision of the Provincial Court of British Columbia, dated July 11, 2019 (R. v. Thiara, Port Coquitlam File No. AJ12560646)

Reasons for Judgment

Counsel for the Crown:

N. Reithmeier

Counsel for the Appellant:

P. Sahota

Place and Dates of Hearing:

New Westminster, B.C.

November 1 and

December 17, 2019

Place and Date of Judgment:

New Westminster, B.C.

March 31, 2020

## I. Introduction

- [1] This is a summary conviction appeal in a traffic ticket case.
- [2] On July 28, 2018, Mr. Thiara, a taxi driver who was operating his taxi, was issued a violation ticket for using an electronic device while operating a motor vehicle on a highway, contrary to s. 214.2(1) of the Motor Vehicle Act, R.S.B.C. 1996, c. 318 [the Act]. He challenged that ticket, and a trial was held in Provincial Court in Port Coquitlam on July 11, 2019. In reasons given that day, Mr. Thiara was convicted of the offence. Mr. Thiara now brings an appeal of that conviction.
- [3] This appeal was heard over two hearing days, November 1 and December 17, 2019.

## II. Evidence at Trial

- [4] There were two witnesses who testified at trial, RCMP Constable Jennifer Barker and Mr. Thiara.
- [5] Constable Barker testified that the incident occurred in Port Coquitlam on July 28, 2018. The RCMP had set up an impaired driving roadblock on the Coast Meridian overpass, which goes between Kingsway Avenue and Lougheed Highway. At 1:05 a.m., she stopped a taxi. She testified that on her first observation inside the taxi she saw, positioned between the driver and the front passenger seat, a lit GPS or lit electronic device with a GPS screen displayed on it.
- [6] The appellant's evidence was that he had two GPS devices and the one seen by the officer was merely a backup device. He testified that when the officer pointed towards the device in question, his customer, who was sitting in the front passenger seat, grabbed the GPS, the power button got pressed and it turned on.
- [7] In cross-examination, the appellant said the GPS in question is a working device but it was not turned on. He admitted that the screen does not light up when it is not turned on. The appellant agreed that the passenger did not touch that unit prior to the taxi arriving in front of the officer.

- [8] During Mr. Thiara's cross-examination of Cst. Barker there were a number of occasions when the judicial justice intervened to focus Mr. Thiara on the task of putting questions to Cst. Barker. These interventions form the basis of Mr. Thiara's complaint that he was not given a proper opportunity to cross-examine the officer.

### III. Reasons for Judgment

- [9] The judicial justice began her reasons by noting there were several issues to deal with. These were: (1) the consequences, if any, of the police having issued a replacement ticket changing the location from "Coquitlam" to "Port Coquitlam"; (2) Mr. Thiara's request, made during the cross-examination of Cst. Barker, that the trial be adjourned pending the outcome of his police conduct complaint; and (3) a discrepancy between a summary of the officer's notes, evidently made by an investigator responding to Mr. Thiara's complaint, and the officer's actual notes.
- [10] After addressing these other issues, the judicial justice embarked on a summary of the evidence. She noted the officer's evidence that when she first looked into Mr. Thiara's vehicle she saw an unsecured electronic device with a screen that was lit, showing a map, which device was located in the parking brake area between the driver's seat and passenger seat. She then noted the defence position that the device was not lit and had only been activated later through the intervention of the passenger. She also noted Mr. Thiara agreed that the device will not light up unless it is turned on, and will not show a map screen unless an address is put into it. The judicial justice acknowledged Mr. Thiara's position that he had another GPS, his primary GPS, and the subject device was only a backup, but she said this did not explain why the backup device was lit and showing a map when the officer first saw it. The judicial justice also noted Mr. Thiara's complaint that the officer did not look at the other device, the device he said was his primary device, when he pointed it out to her, but concluded that ultimately this was not relevant to the issue in question.
- [11] The judicial justice then quoted from the provisions of the Act and the Electronic Devices while Driving Regulation, B.C. Reg. 308/2009 [the Regulation], and noted that a GPS must be secured to the vehicle if it is being used. She then considered the definition of "use" as set out in the Act and as discussed in some authorities from the Supreme Court of British Columbia.
- [12] The essential reasoning and conclusions of the judicial justice can be distilled from the following passages:
- [26] In this case, what we have is a GPS. It was not held in Mr. Thiara's hands, but it was laying loose. It is the evidence that it was turned on[,] and on Mr. Thiara's own evidence, it would not be lit and would not show a map if it is not turned on. The officer's evidence with regard to her first observation of that device, as they came to her, with a screen showing a map, is a very significant fact, in my decision. Clearly, as they were coming up and the officer had seen it in her first visual of the interior. That would have been prior to any interference from

the customer.

- [28] In the case before me the screen is lit. The device is both lit and showing a map, that is, being used. Why else would the device be turned on and showing a map if it is not being used? The device was not secured as required by the Motor Vehicle Act Regulations.
- [35] Considering all of the evidence before me, I cannot find that a defence applies to Mr. Thiara, or that Mr. Thiara raised a reasonable doubt to the allegation simply by his assertion that it was not turned on and it was the customer's interference that resulted in the situation.
- [36] I find that, applying *R. v. W.(D.)*, that no defence applies, nothing that you say has raised with a reasonable doubt, and I find that Crown has proven its case beyond a reasonable doubt. I find Mr. Thiara guilty.

#### IV. Grounds of Appeal

- [13] The grounds of appeal shifted somewhat during the course of the appeal. In his submissions on the first day of the appeal, appellant's counsel confirmed five grounds of appeal:
- a) the appellant was denied the opportunity to effectively cross-examine the officer;
  - b) there was no evidence that the item in question was actually a GPS device, since the officer used three different terms to describe it (a "lit GPS", a "lit electronic device" and a "cell phone");
  - c) the judicial justice committed an error in stating that the GPS was being used "by his own admission", meaning the appellant's own admission;
  - d) the officer never provided a copy of her notes to the appellant; and
  - e) the appellant was not permitted to refer to the complaint that he made concerning police conduct during the event.

#### V. Positions of the Parties

##### A. Appellant

- [14] The appellant expanded on each of his grounds of appeal as follows:

##### Ground #1 - Interference in Cross-Examination

- [15] The appellant referred to the transcript of the proceedings, arguing that it discloses that almost all of the dialogue was between the court and the appellant, such that the appellant posed few questions to the officer in cross-examination.

**Ground #2 - Varying Descriptions of Device**

- [16] Appellant's counsel argued that the varying descriptions used by the officer should have resulted in a reasonable doubt as to whether the item in question was an electronic device or whether it was shown to be an electronic device.

**Ground #3 - Error in Stating Appellant Admitted Using GPS Device**

- [17] During the course of a dialogue with the Court, when the Court asked counsel to identify those portions of the reasons where the judicial justice said these words, counsel was unable to do so.

**Ground #4 - Failure to Disclose Officer's Notes**

- [18] Appellant's counsel said the officer was permitted by the judicial justice to look at her notes, but these notes were never provided to Mr. Thiara in advance of the hearing. Appellant's counsel was unable to point to any authority that indicated there was a duty to disclose these notes in advance of the hearing, stating only that "it is the same in all criminal cases". Counsel added that this was "not a big issue". At about this point, appellant's counsel also said that the officer was biased against Mr. Thiara at the trial because the appellant had brought his complaint about her conduct by this point. He did not, however, develop this argument further and did not list that as one of the grounds of appeal.

**Ground #5 - Appellant Not Permitted to Refer to Police Complaint / Unequal Treatment Relating to Police Complaint**

- [19] In his factum, the appellant stated that he had made a post-incident complaint about the investigating officer and in that complaint he had "categorically stated that he had not touched a second GPS to see the map and it was not working". During the course of the trial, the judicial justice ruled the complaint inadmissible (Page 14, Line 15 of the transcript) whereas the subsequent response to the complaint was admitted (Page 16 of the transcript). Appellant's counsel submitted that this showed Mr. Thiara was treated unfairly.

**B. The Crown**

- [20] Crown counsel began his submissions by noting the appellant's statement of facts did not comply with the Criminal Rules because it included various statements for which no sources are given in the transcript. The Crown also noted other deficiencies in the appellant's materials. These were valid criticisms.
- [21] The Crown further observed that two of the grounds for appeal (#2 and #5) were not raised in the appellant's statement of argument. This too is a valid criticism.
- [22] The Crown's responses to the grounds raised were as follows:

### Ground #1 - Interference in Cross-Examination

[23] The Crown agreed it was a disjointed cross-examination, but said this was because it was focused on a collateral issue, the complaint that Mr. Thiara made about police conduct. The Crown noted that, at the outset, the judicial justice fully explained the procedure that would be adopted, informing Mr. Thiara that he would have an opportunity to question the officer, and towards the end of the cross-examination, the appellant was twice asked by the judicial justice if he had any further questions and he said he did not.

### Ground #2 - Varying Descriptions of Device

[24] The Crown submits the differing descriptions are immaterial and the precise nature of the device is irrelevant. Between the Act and the Regulation, all of the descriptions used are captured by the legislation. The officer's evidence that she saw a device with an illuminated map on its screen indicates that it was a device functioning as a GPS, and whether this was a cell phone or a GPS-specific device is neither here nor there as both items would fall within the Regulation and would have to be affixed in order for their use while driving to be lawful.

[25] The Crown also addressed an earlier iteration of this ground of appeal, where the appellant alleged the judicial justice erred in stating that the officer gave evidence that a map was being displayed on the device. The Crown noted that the officer did indeed give this evidence, noting that her evidence in this regard was shown in the transcript (at page 6, lines 18-29).

### Ground #3 - Error in Stating Appellant Admitted Using GPS Device

[26] Although the appellant was unable to point to anything in the reasons for judgment that supported this ground of appeal, the Crown nonetheless dealt with this as possibly amounting to an allegation by the appellant that the judicial justice misapprehended the evidence. The Crown provided submissions on that basis.

### Ground #4 - Failure to Disclose Officer's Notes

[27] The Crown said the officer used her notes to refresh her memory, and later used one portion of her notes to clarify a particular word that had been incorrectly summarized by a complaint investigator. The complaint investigator had interpreted a handwritten word as being the word "solid" instead of the correct word "said".

[28] The Crown referred to *R v. Wong*, 2016 BCPC 189 [Wong], a decision of Judicial Justice Adair, who summarized at length the Crown's duty to disclose in traffic court cases. He concluded that judicial justices have full jurisdiction to order disclosure, but disclosure obligations only arise if the defendant asks for disclosure in a timely way prior to the start of trial. Based on that authority, the Crown submits that since the appellant made no request for disclosure, no duty was breached.

## Ground #5 - Appellant Not Permitted to Refer to Police Complaint / Unequal Treatment Relating to Evidence of Police Complaint

- [29] The Crown noted that the court below gave wide latitude to the appellant on this issue, with much of the proceedings being taken up by the issue, including the court's own efforts at trying to understand the point being made by the appellant. Ultimately, the RCMP response to the complaint (which exonerated the officer), as well as the appellant's letter asking for a review of that decision, were marked as exhibits.
- [30] The Crown submits that none of this evidence was relevant.

## VI. Evidentiary Issue

- [31] In his materials filed on this appeal, the appellant included an affidavit he swore, which included his version about what happened that night, his complaint about the officer's conduct, the proceedings at trial, and why he should have been acquitted. The Crown objected to the admission of this affidavit on the ground that this appeal is an appeal on the record only and that the Court cannot consider additional evidence unless there is a successful application to adduce new evidence. The appellant did not respond to that objection.
- [32] The Crown's objection was well-taken. Although the affidavit has found its way into the court file because it was part of the appellant's filed appeal book, it is not admissible, and I have not taken any of its contents into account.

## VII. Discussion

### A. The Grounds of Appeal

- [33] The elusive nature of the appellant's arguments made this matter much more complicated than it should have been. The appellant's statement of argument was rambling and confusing, and the appellant departed so substantially from those points in oral submissions that a fair amount of time was spent simply trying to identify the grounds of appeal. The results of that process are the grounds of appeal as set out earlier in these reasons which, during submissions, appellant's counsel agreed were the appeal grounds. Despite that, in reply submissions the appellant raised yet further points.
- [34] I deal with the identified grounds of appeal as follows:

### Ground #1 - Interference in Cross-Examination

- [35] I agree with the Crown's submissions on this issue. While the transcript reveals that the cross-examination consisted primarily of a dialogue between the appellant and the bench, this dialogue was made necessary by the appellant's repeated references to his police complaint and to his response to the dismissal of his complaint, all of which were essentially irrelevant in terms of the cross-examination of the investigating officer.

[36] The judicial justice provided what was really quite a thorough explanation of procedure at the outset of the hearing. This explanation included telling the appellant that he would be given the opportunity to ask the officer questions, and that those questions should include questioning the officer about things she said that he disagreed with and putting to her his version of the events. On two occasions near the end of the cross-examination, the judicial justice asked the appellant whether he had any further questions for the officer, and the appellant confirmed he did not.

[37] There is no basis or substance to this ground of appeal.

## **Ground #2 - Varying Descriptions of Device**

[38] I agree with the Crown's submissions on this issue. By whatever description, the device in question fell within the definitions set out in the Regulation.

## **Ground #3 - Error in Stating Appellant Admitted Using GPS Device**

[39] Counsel for the appellant abandoned this ground of appeal when it became apparent during submissions that he could not identify any part of the transcript where this took place.

## **Ground #4 - Failure to Disclose Officer's Notes**

[40] The essential complaint here is that the investigating officer did not disclose her notes to the appellant in advance of the hearing.

[41] On appeal, the appellant did not provide any authority for the proposition that disclosure was mandatory in cases such as this. The Crown provided an authority to the contrary (Wong). The appellant did not argue that Wong was incorrect or otherwise inapplicable, but instead essentially abandoned the issue.

[42] The appellant has failed to establish there is any substance to this ground of appeal.

## **Ground #5 - Appellant Not Permitted to Refer to Police Complaint / Unequal Treatment Relating to Police Complaint**

[43] The appellant alleges unfair treatment because he was not allowed to refer to his complaint about the investigating officer's conduct.

[44] The judicial justice ruled the complaint inadmissible, and that ruling is not being challenged on this appeal. The response by the police to the appellant's complaint letter, and the appellant's responding letter seeking a review of that decision, were marked as exhibits.

[45] Given the ruling that the appellant's complaint was inadmissible, there is no reason why the complaint letter would have been marked as an exhibit. Since the appellant's complaint appears to have been nothing more than a past consistent statement, I would add that the ruling seems entirely correct.

[46] It is not entirely clear why the other documents were marked as exhibits, although it appears these documents evidenced in some way the misreading by the complaint investigator of one word in Cst. Barker's handwritten notes, which were the subject of a fairly long dialogue during the cross-examination of the officer. Certainly, there is nothing in these matters that demonstrates the appellant was treated unfairly in any way.

## B. The Appeal Generally

[47] The appellant referred to other issues during his submissions. These issues had a common theme: his argument - that he was using another GPS and not the one identified by the officer - was not properly considered by either the investigating officer or the judicial justice.

[48] What the appellant has failed to recognize is that his argument was only relevant insofar as it might have cast doubt on the officer's testimony that on her first observation inside the vehicle she saw an illuminated (thus being "used") unaffixed device between the two front seats, which was testimony the appellant never actually challenged.

[49] The conclusions of the judicial justice were well-founded on the evidence.

[50] The appeal is dismissed.

"Blok J."

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