Case Name:

R. v. Singh

Between
Regina, and
Joga Singh Sahota

[2011] B.C.J. No. 305

2011 BCPC 42

92 W.C.B. (2d) 780

2011 CarswellBC 362

File No. 54579

Registry: North Vancouver

British Columbia Provincial Court
North Vancouver, British Columbia

C. Baird Ellan Prov. Ct. J.

Heard: January 20, 2011.
Judgment: January 21, 2011.

(29 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Dangerous operation of motor vehicle -- Impaired driving or driving over the legal limit -- Trial of Singh, charged with impaired driving, dangerous driving and driving with a blood alcohol level over .08 -- Singh was seen emerging from the driver's side of a vehicle involved in an accident -- Singh and his brother-in-law both testified that they had switched seats following the accident due to insurance and other concerns -- If Singh had been the driver, it was unlikely that he would have chosen to blame his younger brother-in-law partway through the investigation -- While the circumstances were suspicious, the requisite standard of proof was not met -- Singh found not guilty.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B,

Counsel:

Counsel for the Crown: J. Krupa.

Counsel for the Defendant: B. Mohan.

REASONS FOR JUDGMENT

1 **C. BAIRD ELLAN PROV. CT. J.**:-- The defendant, Joga Singh Sahota, is charged with impaired driving, driving over .08 and dangerous driving on January 24, 2010.

2 The sole issue in the case is whether the defendant was the person who drove a vehicle involved in a motor vehicle accident at the intersection of Cleveland Avenue and Hunter Place in Squamish, in the late afternoon of that date.

3 Mr. Sahota was observed to emerge from the driver's side of the vehicle by a witness who attended the accident scene after it occurred, a Mr. Jensen who was an off duty firefighter. Apart from that, it is the subject of admissions that the driver of the other vehicle, a Ms. Dumas, told the police that Mr. Sahota "presented himself" as the driver, and "acted as if" he was the driver, at the scene. She did not actually see him driving. Ms. Dumas was unable to attend due to a Sea to Sky Highway closure, and was therefore not examined as to what she meant by those remarks. They are consistent only with the evidence of Mr. Jensen to the effect that Mr. Sahota exchanged information with the driver of the other car.

4 Mr. Sahota concedes that he got out of the driver's side of the vehicle. He asserts, however, that he and his brother in law Hardeep Kandola switched seats after the impact. Both Sahota and Kandola testified to this effect.

5 Because the vehicle was not operable after the accident, the Crown, Mr. Krupa, in his usual fair fashion, does not seek a finding of care and control. He concedes that if I have a doubt as to who was the driver, acquittals must be entered on all counts.

6 Once Mr. Jensen's evidence is distilled, it is clear he was not in a position to see whether there was a seat switch, and as well, that there was time for that to occur. As pointed out by Mr. Mohan in his most able submissions, the issue is therefore purely one of credibility and the applicable case law is that of ***R. v. W.D.***, [1991] 1 S.C.R. 742. The question is whether I am in a position to find that

the evidence of both Mr. Sahota and Mr. Kandola is concocted.

7 Mr. Krupa, either through submissions or by inference from his cross examination, advances a number of reasons why he says the defence evidence should be rejected. The strongest of these and the one he relies most heavily upon is Mr. Sahota's evidence about when he first told the police he was not driving. I will deal with that particular point in a moment. I prefer to first go chronologically through what I view as the potential frailties in the defence evidence.

8 I note firstly that Mr. Sahota testified that he switched seats with Mr. Kandola because Mr. Kandola had a learner's permit, because Mr. Kandola was shocked or scared right after the accident and unable to speak, and Mr. Sahota was fearful that Mr. Kandola might be deported if he was found at fault in the accident. That was the gist of his evidence. Later, in cross-examination, however, he stated that he was confident his own insurance would cover the accident if he was driving, but not if it had been Kandola who was driving.

9 There appears therefore to have been an element of self interest that Mr. Sahota was reluctant at first to disclose. One might wonder as well why Mr. Sahota would believe there were possible immigration consequences from fault in a motor vehicle accident, but he wasn't asked about that, and as Mr. Mohan has pointed out, Mr. Sahota is not a sophisticated person.

10 It may also be that he was really more concerned about the insurance. However, far from detracting from his assertion about who was driving, I find the late admission of insurance concerns actually supports his evidence. That is, if he had those concerns, whether or not he admitted them to the police, it provides something more of an explanation for switching seats. The reluctance to admit that was the reason, while itself not particularly honest, tends to confirm that he had a stronger underlying motive to lie at the scene about who was driving. At least, in any event, it does not refute what he says occurred or lead me to reject his evidence.

11 I note secondly that Mr. Sahota was quite prepared to lie at the scene of the accident, by switching seats, and has admitted that his intention was to mislead people. Does this make him a dishonest person whose evidence should not be accepted? Mr. Krupa made the point that he was either lying at the scene or he is lying now. But I do not find it any more likely that a person would lie in court under oath, and bring his wife's brother to also do so, than that he might lie at the scene of an accident for the reasons given by Mr. Sahota. I do not find that Mr. Sahota's admission of intent to mislead people at the scene in and of itself makes him inherently unreliable as a witness.

12 Thirdly, was it unreasonable that Mr. Sahota would accept responsibility for the accident when he was aware that he ought not to have been driving? He has explained that he didn't know it would go as far as it did. As I understand his evidence, at the scene, he did not believe he was very drunk, in terms of symptoms. It is clear from the fact that he asked Mr. Kandola to drive that he knew he should not be driving. But he made the decision to switch before the police arrived. By the time they did, of course, he was stuck with the impression he created and presumably believed or hoped that they did not perceive him to be impaired. Was his decision, made at the time it was

made, so unreasonable as to be unbelievable? It was clearly rash and stupid. It backfired considerably. But I do not find Mr. Sahota's decision to be so ludicrous or preposterous as to be inherently unbelievable.

13 A fourth aspect I have considered is whether it made sense for Mr. Sahota to switch seats at the time when he says he did so. It is not clear to me who it was that he expected or intended to mislead. He was not challenged as to where the occupants of the other car were or whether he was aware of Mr. Jensen's presence. Since he has not been tested on that point, I can only assume that he was satisfied for some reason that no one was in a position at that point to see the switch.

14 So, one might have asked whether, if he believed that, would it not have made more sense for him to just get out of the vehicle than to switch seats. But the evidence discloses that the rear windows in the van were tinted, and that the Dumas vehicle had stopped to the rear of the van. Mr. Sahota could reasonably have believed that he might be seen getting out of the passenger side, but not switching seats within the vehicle. At least, I find there no basis on the evidence of timing or the location of the vehicles to conclude that switching seats itself was unreasonable or did not make sense at that point.

15 As I stated, perhaps the most troublesome aspect of Mr. Sahota's evidence is the question of when he first told the police he was not the driver. As noted by Mr. Mohan this is not a case where the first one hears of the story is at the trial. Mr. Sahota actually did tell the police he was not the driver, and in fact he said that on the first occasion when he was asked the question. He then told the police a version of the events which was largely consistent with his evidence at trial.

16 Cst. Tiwarn acted as a Punjabi translator for Mr. Sahota and Cst. Sokerov who investigated the offence. He translated the ***Charter*** rights at the scene, and Mr. Krupa points out that the officers' evidence is to the effect that after being told he was arrested for impaired driving, Mr. Sahota did not at that point tell them that he was not the driver, nor at any point before the statement at the station.

17 Mr. Sahota testified at first that he told the police at the station after he was asked and had an interpreter. He said later that he tried to say something to Cst. Sokerov at the scene and may not have been understood. Mr. Krupa pressed whether he had told Cst. Tiwarn, in Punjabi, at roadside, that he was not the driver, and ultimately Mr. Sahota said he had.

18 I am not entirely satisfied that he understood the term "roadside" in that question, but assuming he did, and that he is asserting that he said something at that point, why was it not related or noted by Tiwarn?

19 Tiwarn was asked if Sahota had said anything about not being the driver before his statement at the station. He said he did not recall him saying anything. He said he was taking notes as he went through the ***Charter*** rights, and if Sahota had mentioned that he was not the driver before that, Tiwarn would have put it in his notes. He had no note to that effect. When he told Sahota he was

being arrested for impaired driving and an alcohol level over .08, Sahota responded, "that's right or that's correct". He had corrected an earlier translation of that response as "OK". I noted however that Cst. Sokerov had this answer recorded as "Yes, okay." In any event, of course, he does not know what the defendant said, because it was in Punjabi.

20 I note as well the following. There were other parts of Cst. Tiwarn's evidence where he said he could not keep up with what Mr. Sahota was saying. From his testimony it is clear he is relying on his notes, not on his memory of what was said. One might think that a denial of responsibility at roadside would be something he would remember, but of course there was a full denial later, and the earlier protest could have gotten lost in the scheme of things or the confusion of translation, conceivably. I have to note as well that when Mr. Sahota did say he was not the driver at the station, no one took him seriously, so an earlier denial may well not have been something that Cst. Tiwarn recalled or noted. And finally, for some reason, Cst. Sokerov asked him, at the station, if he had been driving the car. What triggered that question if not an earlier suggestion, or at least a question in Cst. Sokerov's mind, that it was not him?

21 Let's assume however that Mr. Sahota did not say anything to Cst. Tiwarn at roadside, and that his evidence to that effect is wrong. Does that make him a liar, or so unreliable as to be incapable of belief? It is clear that at some point he did make the decision to say he was not the driver, when he had maintained to those present at the scene that he was. At some point, as he states it, he thought better of that, when it became apparent that the outcome was becoming worse for him than what he was hoping to avoid.

22 Am I to find his statement a lie based on his assertion that he said the same thing at the scene, when he did not? Or to conclude that because he did not deny at the scene, his later statement is not to be believed? Mr. Krupa says he could have gestured or demonstrated frustration at the scene, and that by his acquiescence he has belied his later denial and that by adding later that he did say something, he is trying to bolster his credibility. These are issues as to timing as much as anything else. As Mr. Mohan says, "there is some debate" about when Mr. Sahota first told the police he was not the driver, but it is not a situation where he never told them before the trial. Moreover, Mr. Sahota was admittedly impaired, and that may explain some later imprecision as to when he first "came clean", so to speak.

23 Again, as Mr. Mohan has observed, these are uneducated people with a language barrier. Mr. Sahota stated, when he was asked, that it was his brother in law who drove. Clearly that statement, at that point, served to exculpate him, but I do not find the timing to be suspicious enough to demand rejection of his evidence. In fact, in my view it would be more likely that he would proclaim his innocence from the outset at the scene, and throughout, if he was *fabricating* a defence.

24 I also note as pointed out by Mr. Mohan that Cst. Gregory who attended the scene off duty confirmed that Mr. Kandola in fact had a learner's licence, which is supportive of the defence version of events, and is something that if Mr. Sahota had in fact been driving, one might not even

necessarily expect Mr. Sahota to have noted. By the same token, his description of the way in which the seat switch occurred, elicited perhaps unexpectedly in cross-examination, was the same precisely as that given by Mr. Kandola, though he took the stand with no break between, and arguably may not have been prepared on that point.

25 I would add the following. Mr. Kandola has testified, at risk of perjury, that it was he who was driving. I do not know that he is immune from incrimination based on his testimony. Is it more likely that he would lie in court than that he would switch seats at the behest of his older brother in law? Mr. Krupa made the point that Mr. Kandola waited a year to come forward, but as Mr. Kandola observed, Mr. Sahota had told the police it was Mr. Kandola who was driving. They did not pursue it with him. Was it up to him to go to them? He knew they knew about him. He was new to the country. He says he told ICBC. I do not find that his failure to go and make a statement to the police detracts from his credibility.

26 It may be that family lies for family, on occasion, as suggested by the Crown. Does that make one version more likely than the other? Not to my mind. On the other hand, I find it unlikely that, if Mr. Sahota was the driver, he would have chosen part way through the investigation to blame his young brother in law, his wife's brother, if indeed Mr. Kandola was not the driver. I shudder to consider the family ramifications of that kind of decision, let alone requiring him to come and corroborate false evidence in a court of law. It has not been established to my satisfaction that the penalty of a conviction and driving prohibition for Mr. Sahota is a powerful enough incentive to risk criminal consequences to Mr. Kandola and the effects that might have on life at the Sahota residence.

27 One might be suspicious, but that does not afford proof beyond a reasonable doubt. In dealing with a similar case, Judge Gorman of the NFLD and Labrador Provincial Court stated in ***R. v. Jenniex***, [2010] N.J. No. 6:

> **17** I found certain portions of Mr. Jenniex's evidence to be problematic. For instance, he knew Mr. Bugden, but they are not particularly close friends. Mr. Jenniex had been drinking and he was accepting responsibility for a very serious matter in which a police vehicle had been driven off of the road. Why would he do so? Mr. Jenniex was unable to provide a rational explanation for his purported actions, though he did appear to recognize the stupidity of what he did.
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> **18** Overall, though I have difficulties with some of Mr. Jenniex's evidence, I am unable to reject it or conclude that it was fabricated. Mr. Jenniex's evidence is sufficient to raise a reasonable doubt as to whether or not he was the person that was driving the van on March 20, 2009.

28 Those remarks illustrate the application of the ***W.D.*** standard in a case much weaker in terms of defence evidence than the one before me. I do not find there is a basis on the evidence in this

case on which to find that Mr. Sahota and Mr. Kandola have concocted a defence. The circumstances may be suspicious, but that is not enough to meet the criminal standard.

29 The charges are dismissed.

C. BAIRD ELLAN PROV. CT. J.