Case Name:

R. v. Athwal

Between
Regina, and
Amarjit Singh Athwal

[2012] B.C.J. No. 463

2012 BCSC 337

100 W.C.B. (2d) 308

2012 CarswellBC 693

Docket: X075059

Registry: New Westminster

British Columbia Supreme Court
New Westminster, British Columbia

J.W. Williams J.

Heard: January 4, 2012.
Judgment: March 7, 2012.

(41 paras.)

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Motor vehicles -- Impaired driving or driving over the legal limit -- Appeal by Athwal from conviction for driving with blood alcohol level over .08 on basis of misapprehension of evidence dismissed -- Central issue was identity of driver in motor vehicle accident -- No witness was able to positively identify Athwal as driver -- Based on testimony of persons at scene, trial judge held circumstantial evidence constituted proof beyond reasonable doubt that Athwal was driving -- There was no basis to conclude that trial judge misapprehended evidence, or drew improper inferences -- Contention that verdict was unreasonable and not supported by evidence was not established.

Criminal law -- Evidence -- Hearsay rule -- Exceptions -- Methods of proof -- Circumstantial

evidence -- Inferences -- Of fact -- Appeal by Athwal from conviction for driving with blood alcohol level over .08 on basis of misapprehension of evidence dismissed -- Central issue was identity of driver in motor vehicle accident -- No witness was able to positively identify Athwal as driver -- Based on testimony of persons at scene, trial judge held circumstantial evidence constituted proof beyond reasonable doubt that Athwal was driving -- There was no basis to conclude that trial judge misapprehended evidence, or drew improper inferences -- Contention that verdict was unreasonable and not supported by evidence was not established.

Criminal law -- Appeals -- Grounds -- Misapprehension of or failure to consider evidence -- Appeal by Athwal from conviction for driving with blood alcohol level over .08 on basis of misapprehension of evidence dismissed -- Central issue was identity of driver in motor vehicle accident -- No witness was able to positively identify Athwal as driver -- Based on testimony of persons at scene, trial judge held circumstantial evidence constituted proof beyond reasonable doubt that Athwal was driving -- There was no basis to conclude that trial judge misapprehended evidence, or drew improper inferences -- Contention that verdict was unreasonable and not supported by evidence was not established.

Appeal by Athwal from a conviction for driving with a blood alcohol level over .08. The central issue was whether Athwal was the driver of the vehicle. Athwal was involved in a motor vehicle accident. No witness was able to positively identify Athwal as the driver. However, based on testimony of persons who were at the scene and the investigating police officer, the trial judge held that the circumstantial evidence constituted proof beyond a reasonable doubt that Athwal was driving the vehicle. Dusseault testified that she had seen a man emerge from the driver's side of the crashed car "within seconds" of the vehicle's back-up lights going off and the wheels stopping and some time later saw a woman get out of the driver's side of the door with some difficulty. Pandher thought the driver was a man. The officer identified Athwal as the man he arrested at the scene. Lowndes testified that he had spoken to the man at the scene, who indicated the woman had been driving, that the woman also made a statement, and that the driver's side airbag of the vehicle was deployed. On appeal, Athwal submitted that: the trial judge erred in her finding of facts and inferences so as to conclude beyond a reasonable doubt he was the driver; failed to properly apply the rule in Hodge's Case (1838); that the verdict was unreasonable and not supported by the evidence; and that the trial judge had erred by ruling the statement made to Lowndes by the woman was inadmissible.

HELD: Appeal dismissed. The trial judge had not misconstrued the evidence of Dusseault. The evidence supported that the man emerged from the car within seconds of the events described. That conclusion, together with the fact that the woman emerged with difficulty some time after the man and that the driver's side airbag was deployed, all supported the reasonableness of the inference that the man was the driver. It was clear that the trial judge had not overvalued Pandher's evidence. The trial judge had also not based her decision to convict Athwal on the mere fact that he had been arrested, but had simply used the officer's evidence as an element of continuity. There was no need

to employ the exact words used in Hodge's Case and it was sufficient to make clear that the guilt of the accused was the only reasonable inference. The statement given to Lowndes by the woman was properly excluded and could not be received as an exception to the hearsay rule. An appellate court was reluctant to allow an argument not advanced at trial to provide a basis for a successful appeal. Also, the woman was present during the trial and therefore the element of necessity was lacking. There was no proper basis to conclude that the trial judge erred in her assessment of the evidence, nor was any reason shown to enable a finding that the inferences drawn were improper. The contention that the verdict was unreasonable and unsupported by the evidence was not established.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 253(1)(a), s. 253(1)(b)

Appeal From:

On appeal from Provincial Court of British Columbia, Surrey Registry, No. X075059, Order made July 7, 2011

Counsel:

Counsel for the Crown/Respondent: J.R.W. Caldwell.

Counsel for the Defence/Appellant: B. Mohan.

Reasons for Judgment

1 **J.W. WILLIAMS J.**:-- The appellant was charged with two *Criminal Code* offences: first, operating a motor vehicle with a blood alcohol that exceeds 80 milligrams of alcohol in 100 millilitres of blood, pursuant to s. 253(1)(b); and, second, the offence of impaired driving under s. 253(1)(a). At the conclusion of the trial, the learned Provincial Court judge reserved judgment. Approximately three weeks later, she handed down her decision. She found the Crown had proven the appellant's guilt and entered a conviction for the first count, under s. 253(1)(b); she conditionally stayed the other count.

2 Mr. Athwal appeals from that conviction.

3 A central issue at trial was whether it was proven that the appellant was the driver of the vehicle at the relevant time. That same issue is the focus of the appeal.

4 The circumstances giving rise to the charges were a motor vehicle accident. An automobile

travelling northbound on 152nd Street in Surrey went off the road and struck a pole. No witness was able to positively identify the appellant as the driver. However, based on the testimony of three persons who were at the scene, plus the evidence of the investigating police officer, the trial judge held that the circumstantial evidence constituted proof beyond a reasonable doubt that the appellant was driving the vehicle and, accordingly, she found his guilt had been established.

5 In the course of this appeal, the appellant submits that:

(a) The trial judge erred in her finding of facts and inferences so as to conclude beyond a reasonable doubt that the appellant was the driver;
(b) The trial judge failed to properly apply the rule in *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136; and
(c) The verdict of the trial judge was unreasonable and not supported by the evidence.

6 The appellant asks that the conviction be set aside and an acquittal entered or, alternatively, that the conviction be set aside and a new trial ordered.

7 The Crown respondent submits that there was no error made by the trial judge and the appeal should be dismissed.

The Trial

8 The body of evidence before the trial judge on the issue of identification arose from the testimony of four witnesses. It is summarized as follows:

(a) Layla Dusseault was a pedestrian at the scene. She saw the appellant's minivan on the sidewalk, within two seconds of hearing a loud crash. As she ran across the road towards it, she saw its tires spinning and its reverse lights flashing. Within seconds of the spinning and flashing stopping, she saw a man get out of the driver's side door of the minivan. She had a short conversation with him and was calling 911 when she saw a woman get out of the open driver's side door. The man assisted the woman who was stumbling. Both appeared intoxicated. The couple walked north on 152nd Street. They subsequently turned around and came back to the scene of the collision where the man had a conversation with a police officer and was then handcuffed and put into a police car.
(b) Karanshivjot Pandher was driving north behind the minivan when it drove onto the sidewalk and hit the pole. She stopped within two seconds of the collision and looked back at the minivan. She thought the driver was a man although she couldn't see clearly enough to discern his ethnicity; she thought he was Caucasian or Asian. She believed the passenger was a woman. Ms. Pandher called 911 and left immediately. She didn't see

anyone else at the scene.

(c) Daniel Lowndes was also driving north when he saw an empty minivan with its driver's door open and driver's airbag deployed and a fallen light standard beside the road. He noticed a man and a woman stumbling away from the minivan and up the hill on 152nd Street. When he spoke to them from his vehicle they indicated they'd been in the accident at the bottom of the hill. He parked off the road and got out to persuade them they had to return to the scene of the collision. When he asked the couple "Was she driving?" the man said "yes". The woman was hysterical. He eventually led them back to the scene and saw police deal with them. Mr. Lowndes identified Mr. Athwal as the man he dealt with that evening. He saw no one but the couple walking up the hill, and saw no one else he thought was involved in the collision.

(d) Cst. Barrett was the investigating police officer. He identified Mr. Athwal as the man he found with ambulance attendants at the scene of the collision, that he arrested, and the person he witnessed providing breathalyser samples. He saw Mr. Athwal take keys from the inside pocket of his jacket and give them to the tow truck driver who attended to tow the minivan.

9 The defence did not call evidence at trial.

10 In her Reasons for Judgment, the trial judge concluded that the only reasonable inference from all the facts was that Mr. Athwal was driving the minivan when it collided with the pole. It was on that basis that she entered the conviction.

Discussion and Analysis

11 A useful starting point is to reiterate the principles which must govern this Court's approach to the task of reviewing the trial judge's finding of facts and the inferences drawn, and the reasonableness of the verdict. Those principles were set out by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras. 22 and 23:

> [22] ... Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to

the pieces of evidence.

> [23] We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts.

12 An appellate court should not interfere with findings of fact made by a trial judge or with factual inferences drawn unless they are plainly wrong, they are not supported by the evidence, or they are otherwise unreasonable. Actionable error must be plainly identified, and it must be shown to have affected the result: *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6 at para. 9.

13 As for the allegation of unreasonable verdict, the test to be applied by an appellate court was set out in *R. v. Yebes*, [1987] 2 S.C.R. 168, 43 D.L.R. (4th) 424 at para. 25: the test is whether the verdict is one that "a properly instructed jury, acting judicially, could reasonably have rendered." In *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381 at para. 24, the Court made clear that, as a general rule, trial judges are entitled to consider and weigh the evidence as they see fit:

> [24] Triers of fact, whether juries or judges, have considerable leeway in their appreciation of the evidence and the proper inferences to be drawn therefrom, in their assessment of the credibility of witnesses, and in their ultimate assessment of whether the Crown's case is made out, overall, beyond a reasonable doubt. Any judicial system must tolerate reasonable differences of opinion on factual issues.

14 A further point made in *Biniaris* is that an appeal court must be able to articulate its reason for ruling that the trial judge's verdict was unreasonable. Specifically, the Court noted at para. 38 that it will be "insufficient for the court of appeal to refer to a vague unease, or a lingering or lurking doubt based on its own review of the evidence."

15 Turning to the case at bar, there was no single specific piece of evidence that proved, beyond a reasonable doubt, that the appellant was driving the vehicle. In assessing whether the Crown had met its burden on that issue, the trial judge took into account the evidence of the four witnesses described at para. 8 of these Reasons.

16 The essence of the appellant's submission is that the trial judge erred in her assessment of that evidence and that she drew inferences that were not supportable or reasonable. In the result, he contends that she reached a conclusion that was not reasonable or properly supported by the

evidence and that, in fact, proof beyond a reasonable doubt was not made out.

17 The appellant raises a number of specific issues.

18 With respect to the witness Ms. Dusseault, the appellant says that the trial judge erred in finding that she saw the male person emerge "within seconds" of the back-up lights going off and the wheels stopping. He says she misconstrued that evidence, resulting in a fundamental error: a conclusion that the male had been driving the vehicle because of the manner in which the occupants emerged from the vehicle.

19 In my view, the trial judge's conclusion that Ms. Dusseault saw the man emerge "within seconds" of the lights going off and the wheels stopping is quite soundly supported by an examination of the testimony of this witness. Ms. Dusseault testified that those two things (the lights going off and the wheels stopping) occurred after she stepped onto the median of the road. She also said that, within seconds of reaching the median, a man stepped out of the driver's side of the vehicle. Some time later, after Ms. Dusseault had had a conversation with the male and had made a call to 911 for emergency services, she observed a woman get out of the driver's side of the door, falling and stumbling and demonstrating difficulty in standing.

20 In my view, there can be no fault found with the conclusion of the trial judge that the evidence supported the conclusion that the male emerged within seconds. The sequence the witness described leads quite logically to the proposition that the man got out of the vehicle within seconds of the lights going off and the wheels stopping.

21 Furthermore, it seems to me that that conclusion, taken in conjunction with the fact that the female emerged some appreciable time after the male, the difficulty the female was having moving about, and the fact that the driver's side airbag of the vehicle was deployed, are all considerations which support the reasonableness of the inference drawn by the trial judge that the male who first exited the vehicle was the driver.

22 With respect to Ms. Pandher, the appellant says that it is important to appreciate that her evidence concerning the identity of the person driving the motor vehicle was far from certain.

23 It is clear from the Reasons for Judgment that the trial judge appreciated that this witness was not able to positively identify the defendant as the driver. The trial judge fully acknowledged this in her findings of fact. Specifically, she stated that she gave little weight to Ms. Pandher's identification evidence, although she did find her impressions were consistent with the other circumstantial evidence. Accordingly, there is no basis to find that the trial judge overvalued Ms. Pandher's evidence in her analysis. It was a minor factor, given modest weight.

24 The appellant also makes reference to the evidence of the investigating police officer. The officer identified Mr. Athwal as the man he arrested at the scene and subsequently took to the police detachment. In his factum, the appellant objects to the manner in which this evidence was applied in

the following terms: "The fact that the accused was arrested for the crime and identified by the police in court as the same person they arrested does not establish he committed the crime."

25 That submission seems to indicate a quite serious misunderstanding of the manner in which the trial judge dealt with the police officer's evidence. In fact, she simply (and properly) used that evidence as an element of continuity: it satisfied her that the accused person before her at trial was the same person who had been seen walking from the scene of the collision and later returning, and the same person that other witnesses had observed at the scene. There is no basis whatsoever to conclude that the trial judge based her decision to convict the appellant on the mere fact that he had been arrested.

26 Lastly, it is generally alleged that the trial judge failed to critically examine each of these elements of evidence with sufficient care.

27 To my mind, the appellant's submissions cannot succeed.

28 They fail to appreciate that the trier of fact is entitled to draw inferences and reach conclusions, so long as they are not unreasonable. The appellant's submissions also fail to recognize that the proper course of analysis requires a trier of fact to consider the evidence globally, not piecemeal. Even though no individual piece of evidence, considered on its own, may provide proof beyond a reasonable doubt of an essential element, the entire body of evidence, considered in its totality, may do so.

29 In the present case, the Reasons for Judgment demonstrate quite strikingly that the trial judge instructed herself properly with respect to the manner in which circumstantial evidence should be considered. Her approach was in compliance with the Supreme Court of Canada's decision in *R. v. Cooper*, [1978] 1 S.C.R. 860, 74 D.L.R. (3d) 731 [*Cooper* cited to S.C.R.]. The law is clear that there is no need to employ the exact words used in *Hodge's Case*. It is sufficient if the trial judge makes clear that, before basing a guilty verdict on circumstantial evidence, the court "must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts": *Cooper* at 881.

30 As the authorities previously cited make clear, an appellate court may examine the inferences drawn by the trier of fact to decide whether they are reasonable; however, if they meet that standard, then the reviewing court should not interfere.

31 It is my conclusion that there is no proper basis to conclude that the trial judge erred in her assessment of the evidence, nor has any reason been shown to enable a finding that the inferences drawn were improper.

32 As for the contention that the verdict was unreasonable and cannot be supported by the evidence, I am unable to find that this has been established, applying the test articulated earlier in these Reasons.

33 In the course of the appellant's submissions, another issue was raised, namely, whether the trial judge had erred in ruling that a particular statement, made by the woman who was in the company of the appellant shortly after the collision, was inadmissible.

34 The statement in question was elicited during Mr. Lowndes' examination in chief. While describing the events of the evening, Mr. Lowndes said this:

> So I approached them and I - - I stopped them and I had said we're going back down. By the way, was she driving? And the gentleman, who I recognize here, said to me, yes, she was, and that's when she went into a little bit of a hysterical reaction, crying, saying I'm gonna be in big trouble and they started to walk ..."

Counsel said nothing regarding this statement during Mr. Lowndes' examination in chief.

35 In cross-examination, the appellant's counsel sought to have that exchange received as evidence at trial, specifically the utterance of the woman suggesting that she had been the driver. He also sought to refer Mr. Lowndes to a statement he had given to the police, wherein he said that the woman "basically volunteered to me that she was the one, that she was driving." In short, counsel was attempting to enter into evidence the statement allegedly made by the woman, to the effect that she was the driver of the vehicle.

36 The trial judge intervened and advised counsel that the evidence was hearsay, the implication being that it was not admissible. At that point, counsel for the appellant simply said "That's fine. Thank you." and moved on with his cross-examination. There was no further discussion of the matter.

37 In his submissions before this Court, the appellant submits that the trial judge erred in her ruling respecting this evidence. He says that the evidence ought to have been received as a principled exception to the hearsay rule.

38 In my view, that argument cannot succeed. From a procedural perspective, the record seems clear that counsel for the appellant elected not to advance that argument before the trial judge; nothing was said in response to her observation that this was hearsay evidence. If counsel thought that the evidence should nevertheless have been received, he was obliged to make his position known to the trial judge. There is nothing in the record to suggest that she prevented him from advancing such an argument. This seems to have been a situation where counsel chose not to advance the submission. That was a strategic decision and, ordinarily, an appellate court will be reluctant to allow an argument not advanced at trial to provide a basis for a successful appeal.

39 Substantively, the appellant's position also seems wanting in merit. The principled exception to hearsay requires a finding that the evidence is both necessary and that there is some assurance of its reliability. In the present case, the woman who made the statement was present during the trial. In fact, appellant's trial counsel arranged for her to be paraded into the courtroom during the

cross-examination of the witness Mr. Lowndes so that he could identify her as the person who was there that night. Accordingly, it seems to me that any application to have her statement adduced thorough Mr. Lowndes was doomed because the element of necessity was quite conspicuously lacking. Furthermore, the circumstances of the statement, where the declarant was apparently drunk and hysterical, might also be expected to weigh against the statement's reliability, although this is simply a passing observation. These issues are not before me to be decided.

Conclusion

40 For the reasons set out above, the appeal is dismissed and the decision of the trial judge is affirmed.

41 By order of this Court, the driving prohibition imposed upon Mr. Athwal as a consequence of his conviction was stayed pending final determination of this appeal. In view of the disposition, that stay will end upon release of these Reasons for Judgment and Mr. Athwal will be required to surrender his licence forthwith and will be subject of the prohibition order. I am not aware of the status of the fine or Victim Fine Surcharge imposed by the Provincial Court. If those have not been paid, then the obligation to do so is also reinstated.

J.W. WILLIAMS J.