

Case Name:
R. v. Athwal

Between
Regina, and
Amarjit Singh Athwal

[2011] B.C.J. No. 2774

2011 BCPC 507

File No. 179860-1

Registry: Surrey

British Columbia Provincial Court
Surrey, British Columbia

A.E. Rounthwaite Prov. Ct. J.

Heard: June 17, 2011.
Judgment: July 7, 2011.

(24 paras.)

Counsel:

Counsel for the Crown: A. Starnow.

Counsel for the Defendant: B. Mohan.

REASONS FOR JUDGMENT

1 A.E. ROUNTHWAITE PROV. CT. J.:-- Amarjit Singh Athwal is charged with impaired driving and driving with a blood alcohol level exceeding the legal limit on November 29, 2009 in Surrey, B.C., contrary to ss. 253(1)(a) and (b) of the ***Criminal Code***. The main issue in his trial is whether the admissible evidence proves that Mr. Athwal was the driver of a minivan that swerved

off 152 Street at about 10:37 p.m. striking a light standard with sufficient force to shear it off at its base.

2 None of the witnesses testified that they saw Mr. Athwal driving but Crown counsel submits that a combination of direct and circumstantial evidence establishes the identity of the driver. Before basing a verdict of guilty on circumstantial evidence, I must be satisfied beyond a reasonable doubt that Mr. Athwal's guilt is the only reasonable inference to be drawn from the proven facts. Defence counsel, Mr. Mohan, argues that discrepancies in the Crown witnesses' descriptions of the man and woman they saw that night raise a doubt about the reliability of their description and identification of the driver. He says there might have been other occupants of the minivan, one of whom was driving.

3 I will begin by outlining the proven facts relevant to the issue of identification of the driver. I will then explain the inferences I draw from the facts. Next I will consider whether discrepancies in the evidence give rise to doubt. Although the defence called no evidence, the Crown led some evidence supporting the defence, so I will then assess that evidence and consider whether it raises a doubt. Finally, I will assess whether the evidence I do accept proves Mr. Athwal guilty of each charge beyond a reasonable doubt.

Facts Relevant to Identification

4 The following facts were proven by the evidence in the trial. Layla Dusseault saw the 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 152 Street. They turned around and came back to the scene of the collision where the man talked to a police officer, was handcuffed and put in a police car.

5 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.

6 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 152 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 that 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.

7 Cst. Barrett identified Mr. Athwal as the man he found with ambulance attendants at the scene of the collision, arrested, and witnessed providing breathalyzer 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.

Inferences Drawn

8 The only reasonable inference from all the facts is that Mr. Athwal was driving the minivan when it collided with the pole. First, there is no doubt that the accused person in the courtroom, Mr. Athwal, is the person Cst. Barrett arrested. The officer obtained a BC driver's licence bearing Mr. Athwal's name and photograph from the man he dealt with, in addition to identifying him in court.

9 Second, Ms. Dusseault saw a man get out of the driver's side door of the minivan within seconds of its tires ceasing to spin and its reverse lights extinguishing. He was followed a short time later by a woman. Someone must have been operating the minivan when its tires were spinning and lights flashing. There is no evidence that anyone other than the man and the woman was in the minivan or in its vicinity. Mr. Mohan's submission that others might have been present is speculation unsupported by any evidence. There was no time for a passenger to climb over the driver in order to leave the minivan first. The only reasonable inference from the proven facts is that the first person to leave the minivan by the driver's side door was the driver.

10 Third, the evidence of Daniel Lowndes identifies Mr. Athwal as the man he saw stumbling up the hill and being dealt with by police after he was returned to the scene of the collision. Since he saw no one else walking up the hill, I am satisfied that the man and woman he saw on the hill were the same people Ms. Dusseault saw getting out of the minivan, walking up the hill, returning and being dealt with by police. Both witnesses gave similar descriptions of the couple, and both described them as stumbling. Thus the man Ms. Dusseault saw getting out of the minivan, who must have been the driver, was the same man Mr. Lowndes identified in court as Mr. Athwal. Both witnesses saw this man talking to a police officer; Ms. Dusseault saw him arrested; and the man Cst. Barrett arrested was Mr. Athwal. Thus, the combination of direct and indirect evidence establishes the identity of the driver.

11 In addition, Mr. Athwal took keys from his pocket and gave them to the tow truck driver, and while there is no evidence that the tow truck driver used these keys to start the minivan, this adds to the web of inculpatory facts that combine to prove beyond a reasonable doubt that he was driving.

Discrepancies

12 Mr. Mohan argues that discrepancies in the witnesses' descriptions of the man and woman undermine the identification. While Ms. Pandher told the 911 operator she thought the driver was a

male and thought he might be Caucasian or Asian, when asked about his race she said she couldn't see. She thought the female passenger was Caucasian and blonde. Given her uncertainty and limited opportunity to observe, I give little weight to Ms. Pandher's identification evidence. I simply note that her impressions that the driver was male and the passenger female are consistent with the circumstantial evidence.

13 I reject Mr. Mohan's submission with regard to discrepancies in the evidence of the other witnesses for the following reasons. First, he presented a woman to two of the witnesses during cross-examination, but there is no evidence that woman was at the collision scene that night. The name she gave when called into the courtroom was not evidence and she did not testify. There is therefore no evidence as to the actual appearance of the woman present at the collision.

14 In addition, Ms. Dusseault's, Mr. Lowndes', and Cst. Barrett's descriptions of the people they observed were generally consistent. All witnesses were able to provide some details of the clothing worn by the man and woman. Ms. Dusseault said the man was dark haired, brown skinned, wore dress clothes and looked 25 to 35 years old; Mr. Lowndes said the man was East Indian, about 5'10", with dark hair, perhaps a little less grey than Mr. Athwal's on the day of trial; and Cst. Barrett described the man as East Indian, 5'8" to 5'9", with short hair, greying around the ears, and wearing dress clothes. All three of these witnesses' descriptions of Mr. Athwal were consistent with his appearance in the courtroom. Moreover, the in-court identifications of Cst. Barrett and Mr. Lowndes were not challenged or shaken on cross examination. Cst. Barrett had also compared Mr. Athwal with his photo driver's licence at the scene and found he matched the photograph on his licence.

15 With regard to the woman, Ms. Dusseault said she was heavier set and wore dress clothes; Mr. Lowndes said she was heavier set with dark black hair, Caucasian, in her late 30s or early 40s, and wore dress clothes. Cst. Barrett described the woman as East Indian, about 40, with long hair and a large purse. The only discrepancy in their descriptions of the woman was whether she was Caucasian with dark hair or East Indian. All three witnesses spoke to the man, but only Mr. Lowndes spoke with the woman. Since the witnesses had less opportunity to observe the woman than the man, I do not find the slight discrepancy concerning the woman's ethnic background to undermine the reliability of their other evidence.

16 Defence counsel also pointed to possible discrepancies in the evidence on two other details, but I do not consider them to be significant. The difference in the evidence of Mr. Lowndes and Ms. Dusseault about how far up the hill the couple walked is semantic rather than substantive. While Mr. Lowndes referred to the distance as a block, he said it was just before 82nd. Ms. Dusseault said they may have walked to 82nd but that distance is not a full block's length. Ms. Dusseault's use of the word "block" was simply more precise than Mr. Lowndes': they agreed that the couple walked almost to the next intersection, being 82nd Avenue. In cross-examination, Ms. Dusseault said she didn't see the couple talking to a motorist, but the distance from which she was watching may have prevented her from seeing them speak to Mr. Lowndes as they walked north and he sat in his

vehicle on the road. Mr. Lowndes testified that after an initial brief conversation he turned off 152nd, parked his vehicle, and went to speak to the couple and walk them back to the collision site. Ms. Dusseault wasn't asked if she'd seen this.

Exculpatory Evidence

17 If I believe evidence supporting a defence or if it leaves me with a reasonable doubt, I must acquit. It is only where I reject defence evidence and am not left in doubt by it, that I must then consider whether the evidence I do accept satisfies me beyond a reasonable doubt of Mr. Athwal's guilt.

18 The Crown led evidence that Mr. Athwal said "yes" when Mr. Lowndes asked if the woman was driving. The statement by Mr. Athwal, an accused person, is admissible evidence in his trial. The hearsay statement of another person is not. Thus, anything the woman might have said to Mr. Lowndes is not admissible.

19 Does Mr. Athwal's statement raise a doubt about his guilt? I find it does not. It is an unsworn, uncorroborated statement and it is inconsistent with other evidence in the trial. It is contradicted by the facts that Mr. Athwal got out of the driver's side door within seconds of the minivan's tires ceasing to spin while the woman followed him out shortly after; and that he took keys from his pocket to give to the tow truck driver. There was simply not time for Mr. Athwal to climb over a woman seated in the driver's seat and described as "heavier set" by the witnesses, in order to leave the minivan by the driver's door before she did. I therefore reject Mr. Athwal's brief statement to Mr. Lowndes as untrue. Because of the strength of the web of evidence implicating him I find his statement does not raise a doubt about the identity of the driver.

20 I conclude that the direct evidence of Cst. Barrett and Mr. Lowndes proves that Mr. Athwal is the man who was arrested and "blew over .08" on the breathalyzer. The direct evidence of Mr. Lowndes and Ms. Dusseault proves that Mr. Athwal was arrested after he was the first of two people to exit the minivan by the driver's door, walk up the hill, and return. The circumstantial evidence of the order in which the two people left the minivan, the door by which they left, the timing, and possession of keys that were given to the tow truck driver establishes that Mr. Athwal was the driver.

Count 2: "The Breathalyzer Charge"

21 For the reasons explained above, I find that the combination of direct and circumstantial evidence proves beyond a reasonable doubt that Mr. Athwal drove the minivan just before 10:37 p.m. on November 29, 2009. The Crown has also proven that Cst. Barrett made a proper demand for breath samples, and Mr. Athwal provided suitable samples that were analyzed as having a blood alcohol concentration of 150 and 140 milligrams percent. Under s. 258(1)(c) of the **Criminal Code** he is presumed to have had a blood alcohol content of .14, being 140 milligrams percent, at the time he drove. I therefore find him guilty of count 2, the breathalyzer charge.

Count 1: Impaired Driving

22 I must consider the totality of the evidence. The evidence of Ms. Dusseault, Mr. Lowndes, and Cst. Barrett establishes that Mr. Athwal exhibited significant symptoms of impairment by alcohol:

- * slurred, disjointed speech;
- * bloodshot eyes;
- * swaying and staggering while standing and walking;
- * an inappropriate emotional reaction to the collision, one that was like a chuckle, with a smile;
- * the smell of liquor on his breath; and
- * slowness in retrieving his driver's licence.

The smell of liquor, slurred speech, and balance problems continued at the police detachment. In contrast, outside the courtroom at his trial, Mr. Athwal was steady on his feet, with no balance problems and nothing noticeable about his speech.

23 The only logical inference from the combination of his unexplained single vehicle collision and his symptoms of impairment is that Mr. Athwal's ability to operate a motor vehicle was impaired by alcohol when he drove the minivan and collided with a street lamp on November 29, 2009. I therefore find the totality of the evidence proves beyond a reasonable doubt that he is guilty of Count 1, impaired driving.

24 Because of the rule against multiple convictions for the same transaction, a conditional stay will have to be entered on one count.

A.E. ROUNTHWAITE PROV. CT. J.