

Ontario Court of Justice

Her Majesty The Queen

Against

Laura Saelhof

Reasons for Judgment

Before the Honourable Justice R. Shamai
At Toronto, Ontario, on February 5, 2009

Appearances:

B. Warcop
M. Rombis

Counsel for the Crown
Counsel for the Accused

Reasons for Judgment

THE COURT: I have reviewed some of the evidence on this trial in the course of the Section 8 Application and although the evidence is subject to different tests and subject to different issues by way of the conclusion I am to draw, I am going to not review all of the evidence that I have just reviewed.

There are some aspects of the evidence which I will consider at this point on the trial as they inform more than the issues of grounds which Sergeant Lisker had at the time that he made a demand and, in particular, I refer to the testimony of Constable Tauro. He had no involvement with the defendant, Ms. Saelhof, until he was asked to assist in transporting her from the RIDE set up on Adelaide Street.

He said that he ignored whatever happened with the silver Cherokee he summonsed over at Sergeant Lisker's direction until he was asked to assist in removing Ms. Saelhof from the scene. At that point he was asked to assist the sergeant for administrative purposes helping with the paper work.

He noted that Ms. Saelhof was in custody but she was not handcuffed. During the course of his conversation with her to obtain information from 12:27 in the morning he noted that Ms. Saelhof's eyes were glassy; that she made stiff and concentrated movements and gave the example that while he was talking with her Ms. Saelhof would turn her whole body towards him in order to speak with him. He said it was concentrated movement and look and stare. He was that she gazed straight ahead as she answered. He didn't draw any conclusions, he says, but wondered about it.

The observation which Constable Tauro made was that there was a really strong odour of alcohol. He said that he, himself, is particularly sensitive to the odour of alcohol and described the reasons that that is the case. He said that he thought she was impaired based on how she acted and the smell of alcohol which increased

every time he dealt with her. He said that he didn't know what had happened to her vehicle.

Again he describes the way she walked when they were in the Traffic Services Division saying that when Ms. Saelhof proceeded from the booking area to the breath room he noticed a very stiff walk which was very pronounced. It was a rigid, not a fluid walk.

She wasn't swaying from side to side although she didn't require assistance, but he felt that this was different and again he noted how she would gaze beyond the person speaking with her when she gave her answers.

However, he says that there was nothing he noted as, for example, a slow response rate. There was nothing that was unusual in terms of her responses. He felt that her answers were appropriate and complaint. It was the manner that she spoke to the person addressing her that he felt was unusual although he agreed, as Sergeant Lisker did, that he had never spoken with her in other circumstances and couldn't say what her ordinary response style is.

As well, in addition to the testimony of Sergeant Lisker and the observations I have just reviewed from the evidence of Tauro, I have agreed evidence...an agreement as to what the observations of the breath technician, Constable Andrews, would have been.

His observations were that there was the odour of an alcoholic beverage present, that Ms. Saelhof's eyes were glassy, bloodshot and that she wore contacts, and if I am interpreting the handwriting here properly, he says they were blue contacts.

He says her speech was fair but none of the other possibilities and less than good are ticked off. For example, there is no check mark for 'slurred', 'incoherent',

'stuttered' or 'confused'. Ms. Saelhof, according to the breath tech, was cooperative and he says that the effect of alcohol was slight.

I am asked to dismiss this charge even though in the Crown's contention the evidence of even a sign of slight impairment is sufficient to found a conviction because, in this case, on the Defence position all of the observations of Ms. Saelhof which may have departed from what the officers believed to be normal behaviour, are not linked to her ability to operate a motor vehicle, so although the evidence may be uncontroverted that Ms. Saelhof had consumed alcohol, that there was a significant odour of alcohol anywhere she went and that her movement was stiff, she didn't meet the eyes of the person speaking with her, rather she looked beyond the person and a number of other observations of her physical comportment, including her wobbling notably at the scene when she was removed from the vehicle, all of this is interesting but it doesn't answer the ultimate question in the criminal case here- was her ability to operate a motor vehicle impaired by reason of the consumption of alcohol.

The observation of the operation of the motor vehicle was absolutely unremarkable. She was pulled over in a RIDE set up, no suggestion that she was non complaint or unable to manage her motor vehicle; no suggestion that she fumbled with her documents or couldn't find a way to open the car window or anything of this sort.

I think I have recited the totality of observations of Ms. Saelhof's physical demeanour on the night in question. I am not prepared to find beyond a reasonable doubt that her ability to operate a motor vehicle was impaired by the consumption of alcohol. There were some significant observations made of Ms. Saelhof. However, those are not conclusive in and of themselves of the impairment of her ability to operate a motor vehicle.

Indeed I have observed Ms. Saelhof for a few hours this afternoon and I note that according to her lawyer, she was experiencing considerable stress just on the issue

of what plea to enter while represented by Counsel and certainly was physically affected by that, to the point that her hands were shaking notably and even through the course of her own lawyer's submissions her hands were notable shaking so, it's hard for this Court to draw a conclusion beyond reasonable doubt.

I don't know why her hands were shaking. I am told that it's because of the nervousness. At the same time while it's plan that there was an impact noticeable upon her which can be linked to the consumption of alcohol on that night, there is nothing that directly links it to her ability to operate a motor vehicle and that's the inference that the Court has to find beyond reasonable doubt.

As an inference there are other ones available to me and Ms. Saelhof is entitled to the benefit of the doubt with respect to those inferences.

The primary contention on behalf of Ms. Saelhof with respect to the Over 80 offence relates to the period of time which elapsed between Ms. Saelhof being advised of her Rights to Counsel and cautioned and I am told that all of that advice was provided to her within five minutes of her arrest. She was arrested at 11:59 and I am told that it was at 12:01 that Sergeant Lisker began to tell her about her Rights and to make the demand of her.

The next information that I have about Ms. Saelhof is at 12:27 when she was transported from the scene. In fact, I have the testimony of Constable Tauro saying that it was at 12:27 that he began the assist at Sergeant Lisker's request to get information from Ms. Saelhof for administrative purposes and I have referred to the interaction he had with her t the time. So, as I understand it, there was about twenty-five minutes unaccounted for in this chain of events which lead to Ms. Saelhof providing breath samples showing a high reading of alcohol in her person.

The Crown is obliged to prove the samples were taken in accordance with the requirements of Section 258 and in this case, in particular, subsection 258(1)(c)

paragraph 2 that each sample was taken as soon as practicable after the time when the offence was alleged to have been committed and in the case of the first sample not later than two hours after that time with an interval of at least fifteen minutes between the times when the samples were taken.

Clearly there is a fairly tight timeline provided for the taking of samples. Close to one quarter of that time is not accounted for. In fact, I have absolutely no evidence as to what was going on during that time. I can't even imagine or suppose that it was a matter of getting routine information from Ms. Saelhof. I know from the evidence of Constable Tauro that he was instructed at 12:27 to start getting that information from Ms. Saelhof and I also have information that she was transported at that time from the scene.

There was no issue of her being uncooperative. There was no adverse weather conditions that I am told about. It was a RIDE set up. I am not told about the unavailability of a transporting officer or something like that. Again I can't infer from the evidence that I have any reason that it took close to half an hour to take Ms. Saelhof from the scene where she was investigated and arrested and required to provide a sample of her breath to Traffic Services where the sample was taken in due course.

As Counsel points out the Crown is not entitled to rely on the presumptions in the section without proof of every constitute element and I think it's commonplace to say or trire to say that where it's a technical provision on the Crown is put to strict proof of requirements.

In this case the lapse of time is sufficient that I am of the view it does not amount to "as soon as practicable" and I am dismissing the charge.