

Ontario Court of Justice

Her Majesty The Queen

Against

Farah Sheikh

Reasons for Judgment

Before the Honourable Justice A. Di Zio  
At Toronto, Ontario, on January 27, 2014

Appearances:

S. Arnold  
M. Rombis

Counsel for the Crown  
Counsel for the Accused

## Reasons for Judgment

THE COURT: In the very brief period of time I have had, I was able to review the evidence in my office and I have had time to reach a conclusion in the Farah Sheikh matter. And I want to say again, that the submissions here, in my review has had an impact on the way I was finally decided this. You may be curious about that but it has had an impact.

So the first issue is the s. 8 breach and whether or not there were reasonable and probable grounds to make the demand at the roadside. And by the way, these brief reasons follow the submissions made by both counsel and the questions I asked and the answers that I received.

The factors that the police officer recited in coming to his conclusion that he has the suspicion that Ms. Sheikh had alcohol in her body does not include evidence that he smelled alcohol coming from her body. It indicates evidence of alcohol in the car where there were two people, Ms. Sheikh and the passenger. And then of course, there is the other driving information that he gave.

He asked her to step outside and then he made a demand on her to provide a roadside sample. This was done outside and I wanted to check my notes on that. At no time did he say that he smelled alcohol on her breath when he was outside making the demand. And I suggested this was a great opportunity for him to know if she had an odour of alcohol coming from her breath. And he did not say anything about it. Now I do not know if he just forgot to mention it or what, but there is no evidence to indicate whether or not she had alcohol coming from her breath. Plenty of evidence that there is alcohol odour in the car but I am talking about her breath.

And then he made the demand. So he is outside with her while he was making the demand and reading the demand, etcetera and obviously she's breathing. I am sure there were probably a few words. So there is no evidence of odour of alcohol.

So that would make the demand, in my view, unreasonable because she had denied alcohol consumption which I guess he did not believe because of the odour coming from the car. But he could not have known whether it was coming from her or from the other passenger or from maybe spilled alcohol inside the car. But he had the perfect opportunity to investigate this to see if there was an odour of alcohol coming from her breath. And he said nothing. My conclusion is that he did not have that evidence. And, that is a requirement before demanding a breath sample at the roadside. So, in my view there has been a breach. He did not have reasonable grounds to demand it.

The question now is whether or not under s. 24(2) I should admit it in just the same. My initial reaction was, 'Oh what is the big deal.' You know, it is not too intrusive, what happened. The breath test is a simple matter. Road safety and all that. But I thought about it more as I was reviewing my notes, it seems to me that the officer and perhaps, though inexperience, I'm not sure, the fact that he did not give any evidence about what was in her breath shows a lack of investigation. It shows a lack of investigation also in the sense that he did not ask the passenger whether she had been drinking. That might have cleared things up because this driver here denied drinking.

And as I said, going back to the time the demand was made outside and he had her in his presence and he did not properly investigate whether or not she had an odour of alcohol coming from her breath.

So, I think if I allow this in, I am really sending the wrong message that an improperly investigated procedure which interferes with a citizen's right of freedom from unreasonable search and seizure would be the wrong message, absolutely. And that in my view would be contrary to justice and it would not be the message that should be sent out. So I am not going to allow it under s. 24(2).

And the only reason why the arrest was made and the further investigation was done was because she failed the roadside breath test. Without that failure, there are no other grounds really for demanding the breath sample into the intoxylizer at 22 Division.

On the question of as soon as practicable, we are dealing here with 39 minutes between the time that the officer saw Ms. Sheikh driving and the time when he paraded her at 22 Division. Thirty-nine minutes, that does not seem to be an inordinate amount of time but nevertheless, an explanation is required. Some evidence should indicate that this time is reasonable.

I understand the Crown's submission about all the steps that were taken and that they were continuously taken and maybe they were. I do not know. But in looking over my notes, there is really not much evidence about what he did. I mean, he arrested her. He gave her rights and the demand. No time is specified. And then the next thing is going to 22 Division and parading her, that is 39 minutes later. Well, it would not be 39 minutes. It would be 39 minutes from the first time he saw her driving.

But my point is that and I think this is what Mr. Rombis was saying is that we do not really know what the gaps were. I mean, I would really be just making up that or speculating that the times are reasonable without knowing what they are. So I do not know if it took five minutes to arrest and give her rights and make the demand and then, about 30 minutes or so to go to 22 Division. I do not know how far away 22 Division is. I do not know if he took the most direct route to 22 Division. And I think it is just the lack of sign posts along the way as far as time is concerned to allow me to analyze this and to say it is reasonable or not reasonable.

So, lacking those time markers leads me to conclude that I really cannot conclude if it was reasonable or not. And if it was not reasonable and if I cannot conclude that then my conclusion is that it had not been proven that it is reasonable, that it is done

as soon as practicable then, the presumptions apply. So, I am not satisfied because of the lack of evidence that it was done as soon as practicable so the presumption does not apply an the charges have not been proven.