

Ontario Court of Justice

Her Majesty The Queen

Against

Meir Shema

Reasons for Judgment

Before the Honourable Justice C. Brewer  
At Toronto, Ontario, on June 26, 2013

Appearances:

B. Stagg  
M. Rombis

Counsel for the Crown  
Counsel for the Accused

## Reasons for Judgment

THE COURT: Meir Shema is charged with operating a motor vehicle with a blood alcohol level above the legal limit on April 28<sup>th</sup> on 2012.

Mr. Shema was pulled over for speeding. The arresting officer noticed that there was an odour of alcohol coming from the vehicle. Moreover, while Mr. Shema initially denied having had anything to drink, he then acknowledged having consumed one beer.

The issue in this case is whether the breath tests were taken as soon as practicable so as to satisfy the pre-conditions for the use of the presumption of identity in S. 258(1)c(2).

In this case, Mr. Shema is presumed to be innocent unless and until the Crown has proved each essential element of this offence beyond a reasonable doubt.

Reasonable doubt is based on reason and common sense. It is logically connected to the evidence or the lack of evidence. It's not enough for me to believe that Mr. Shema is possibly or even probably guilty. Reasonable doubt requires more.

As a standard, reasonable doubt lies far closer to certainty than it does to a balance of probabilities. At the same time, reasonable doubt does not require proof beyond all doubt nor is it proof to an absolute certainty.

S. 258 1c(2) of the Criminal Code is part of the scheme to ease proof of the concentration of alcohol in the accused's blood for proving the over 80 offence in S. 253(b). This provision states that where the breath samples were 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, no later than two hours after that time, with an interval of at least fifteen minutes between the times when the

samples were taken,” and provided certain other conditions are fulfilled, the Prosecution may rely on the presumption of identity.

This presumption simply deems the results of the breath tests to be proved by the accused’s blood alcohol level at the time of the offence in the absence of evidence tending to show that the over 80 result was caused by a malfunction of the approved instrument or operator error.

The phrase, “as soon as practicable”, does not mean as soon as possible, nor does it require the Crown to provide a minute by minute explanation for the delay between the time of the offence and the completion of the breath tests. In order to satisfy this “as soon as practicable” requirement the Crown must demonstrate that the police acted reasonably, in the sense that the tests were taken within a reasonably prompt time under the circumstances. The entire chain of events must be considered, bearing in mind that the Criminal Code permits an outside limit of two hours from the time of the events to the taking of the first test.

In this case, the traffic stop occurred at 3:43 a.m.; the car was pulled over at 3:45 and the in-car video commenced. At 3:48, the approved screening device demand was made. At 3:52, the result of the breath test led to a ‘fail’ reading and Mr. Shema was arrested. At 3:45, dispatch was advised of the arrest. At four o’clock an approved instrument demand was made.

The arresting officer testified that at 4:17, another officer arrived to deal with property and that his was one to two minutes after he had departed from the scene with Mr. Shema. The next time that is available is 5:05, when the qualified technician spoke to Mr. Shema about counsel of choice. At 5:08, Mr. Shema spoke with his counsel in the private booth. At 5:15, Mr. Shema was brought into the breath room having finished speaking with counsel. The first breath test was taken at 5:24. This is a total delay of approximately one hour and 44 minutes.

The issue in this case is the gap of approximately 45 minutes between 4:15, when it appears that there was a departure from the scene, to 5:05 when there was the first conversation at the station about contacting counsel. It is clear that within that time frame, Mr. Shema was transported to the police station and that he was paraded before the Officer In-Charge of the station.

However, no explanation was offered as to how long each of the parading and the transport took; and why there was no attempt to reach counsel before 5:05, when the Defendant had asked for counsel of choice at the scene and when the contact information for counsel of choice was in Mr. Shema's cellphone, which was in his possession.

In the case of *R. V. Walker*, which was adopted in *R. V. Dean*, Justice Hill said that that compliance with the statutory scheme must be strictly construed where the prosecution is relieved of the obligation of adducing expert evidence on the subject. While it's clear that the Crown does not have to provide a minute by minute accounting of events, it seems to me that there must be some explanation for this gap in the passage of time.

I note that in cases such as *R. V. Dean* and *R. V. Wellet*, the gaps of 18 minutes have been found to violate the "as soon as practical" requirement where no explanation was offered for what occurred during that time frame. It appears to me that this situation is an analogous one, given that while we know two events occurred, but we do not know how long they lasted and we do not know why the first contact with respect to counsel of choice appears to have been 45-48 minutes after the departure from the scene. I'm not satisfied that the Crown has proven the charge beyond a reasonable doubt.

Accordingly, the charge against Mr. Shema is dismissed.

MR. ROMBIS: Thank you very much, Your Honour.

MR. STAGG: Thank you for accommodating us, Your Honour, in 303, 307 as well.

MR. ROMBIS: Thank you very much, Your Honour, if I could be excused, please?

THE COURT: Of course.