Ontario Court of Justice

Her Majesty The Queen

Against

Vihayanti Tahlan

Reasons for Judgment

Before the Honourable Justice R. Schwarzl
At Brampton, Ontario, on June 14, 2011

Appearances:

T. Holmes	Counsel for the Crown
M. Rombis	Counsel for the Accused

Reasons for Judgment

THE COURT: Vijayanti Tahlan is charged that on or about the 23rd of May, 2010, at the City of Brampton, she did, without reasonable excuse, fail to comply with a demand made to her by Darren Peel to provide samples of her breath that were suitable to enable a proper analysis thereof.

She has pled not guilty. I start my reasons by reminding myself and those here of several important principles of our criminal justice system. One is that the defendant is presumed innocent until proven guilty by the prosecution. The burden of proof remains on the prosecution throughout the trial and never shifts to the accused.

The burden of proof is that of proof beyond a reasonable doubt. This is substantially more onerous that a civil standard of proof which is one the balance of probabilities. It is not enough that I think that the defendant is probably guilty, I must be satisfied on the totality of all the evidence that the Crown has proven her guilt beyond a reasonable doubt.

In addition, where an accused such as Ms. Tahlan has testified I am obliged to go through an analysis of the evidence which includes the following. If I believe the accused, I must acquit her. If I don't believe her but her evidence raises a reasonable doubt, I must acquit her. If I don't believe her and her evidence does not raise a reasonable doubt, I must then analyze the remainder of the evidence and it is only if the remainder of the evidence in that circumstance is trustworthy that I might be able to find her guilty. Even if it is trustworthy, the remaining evidence that I do accept or that remains after I have rejected hers, must prove each element of the offence beyond a reasonable doubt. So the burden is on the Crown and it is a very high burden.

The facts in this case are very simple. The accused was operating a motor vehicle late at night in the City of Brampton. She was pulled over by an exceedingly experienced and careful officer, Officer Morash. He pulled her over for two reasons. One, a faulty taillight and secondly, to check her sobriety, given what he viewed as faulty driving that included rolling through a red light and some modest weaving within her lane or as he described it, corrective measures before she was aiming straight down Airport Road.

He pulled her over, spoke to her, both in and outside of the car and once outside of the car, confirmed that he had grounds to make a screening demand which he did. It was a proper demand and there was a proper foundation to do so. He had with him a properly functioning screening device and after nine opportunities, the defendant provided a suitable sample of her breath into the screening device and registered a fail indicating to the officer that she was driving a motor vehicle with more than the legal limit of alcohol in her system. Accordingly, she as arrested for driving with excess alcohol, and a lawful demand was made. That was within minutes of the driving.

She was brought to the station and dealt with according to law, by Constable Peel, a qualified technician who operated an approved instrument, being an Intoxilyzer 800C. After giving her approximately 20 plus opportunities and with many, many, many short blows that often activated the tone of the approved instrument intermittently, none of the opportunities yielded a suitable sample for analysis, although it came awfully close.

I watched the breath room very carefully and the number of times that she activated the tone were almost too many to count within those 20 plus opportunities but I was measuring by counting steamboats or seconds and the times that she activated the tones was anywhere between one and five seconds, depending on the situation.

Officer Peel had said to her, on at least one occasion, that she was so close to providing a suitable sample, that she just needed to keep going a little bit.

The defence raises a number of arguments. One is with respect to the evidence with respect to the quality of the mouthpiece, that is to say, that I ought to be in some reasonable doubt because it wasn't proven that the mouthpiece was unobstructed or broken. I reject that particular argument, although earnestly and well made. On the basis of the evidence in this case, the defendant opened two sealed packages, each one containing a single mouthpiece. Each time she was asked to open it, she was asked to put it in her mouth and blow through it. The mouthpiece then emitted a whistle which sound indicated that air was flowing unobstructedly through each mouthpiece. I am satisfied beyond a reasonable doubt that there was no obstruction or defect in the mouthpieces.

There was also an argument made that the tube connecting the mouthpiece to the approved instrument was not tested. Again, with respect, I do not accept that particular argument for the following reason: that when she blew into the mouthpiece which was connected to the instrument, on many occasions the instrument started emitting a tone. The evidence is, therefore, that air was getting into the instrument and doing what it was supposed to do, that is to say, being accepting by the instrument and thereby emitting an audible tone.

Penultimately, or next to last, it is argued that the information particularized a failure to comply with Officer Peel's breath demand which was argued was not made as soon as practical because it was made so long after the stop at the side of the road. The stop at the side of the road was approximately 2:30, 2:26 in the morning. Peel's demand wasn't made until 3:51, a considerable period of time later.

As I understand the law, any breath demand as to be made as soon as practicable after the officer has formed his grounds. In this particular case, Peel was given information by the arresting officer as to the details of the investigation at

approximately 3:15. For the next half hour between 3:15 and 3:46, the accused was unavailable to PC Peel because the accused was speaking in private to duty counsel. Within a few minutes of being introduced and going through rights to counsel and other introductory matters, at 3:51 a.m. Officer Peel made a breath demand of his own which, in my view, was made as soon as practicable after he received or had grounds to believe that an offence had been committed.

The ultimate and most central submission made was that the accused was actually trying. That is to say, she wasn't faking it. She was doing her best. That's the core issue in this particular case.

Where an individual provides some effort, actual or not, to blow into the approved instrument, as I understand the law, the defence only needs to raise a reasonable doubt that there was, in the absence of mens rea or a reasonable doubt as to mens rea.

Many years ago. Justice Duncan out of this court in a case called R v Sullivan, [2001] OJ No. 2799, stated the following:

> "Despite the weight of authority the other way, I am firmly of the view that the failure to provide proper samples due to the physical inability is a defence that operates to negate the volitional or intentional quality of the failure and this to rebut the element of the offence. It seems to be to be absolutely fundamental that criminal liability only attaches to conduct that is voluntary and intentional on the part of the accused and that a claim that such violation or intention was lacking is a defence aimed at the heart of what must be proven to establish guilt of any crime. Accordingly it is my view that the defence here is to be categorized as a claim that the accused's failure to comply was not volitional or intentional. This is not a case that raises the issue of "a reasonable excuse". As a matter of law the accused has the burden of raising sufficient evidence to lend an air of reality to that issue. Further, as a practical matter in this situation, that evidence will have to fairly cogent.

> Finally the burden visited on the Crown here is no more onerous than that which it is capably handled in other areas, such as proof of criminal intent or to use a closer analogy, disproving that the accused acted under duress, such as R v Rusik."

His case has been followed by many courts and really it boils down to an assessment of credibility.

Here the police witnesses are both witnesses of considerable experience in dealing with both screening tests and approved instrument tests. Officer Morash has dealt with hundreds of people with respect to approved screening device tests. There is no evidence as to how often PC Peel has done so. Both officers are qualified technicians and both have dealt with literally hundreds and hundreds of subjects on approved instrument tests.

Both officers were of the view that Ms. Tahlan was capable of providing a sample but essentially chose not to for the following reasons. One, she was able to provide an adequate sample into the approved screening device. One of the difficulties I have with that is that there is no evidence whether it is easier, the same or harder to provide a breath sample into the Intoxilyzer 800C approved instrument versus the approved screening device.

Secondly, the officers were of the view that she understood the instructions and was capable of following them. The instructions were very simple. Blow constantly and consistently until told to stop but she did not. The accused provided innumerable intermittent samples, none of which were suitable on their own.

The officers testified that her squirming and her puffing were signs that she was not giving an adequate effort. The evidence also suggests that sometimes when she put her lips to the mouthpiece and said she was blowing, she clearly was not because there was no tone being emitted from the instrument. It is a combination of all of

that, that the prosecution says is evidence that the defendant simple was playing games and was behaving in a manner that was tantamount to refusing to provide a sample.

The defence, on the other hand, is that she really was trying her best. She kept saying so on the video and she said so again in court. On the video the defendant coughed several times before even the initial test and throughout the test procedure which was about half an hour. She also said that she had been battling what she called as "walking pneumonia" and that she was still using a puffer. There was no evidence at the trial that she was incapable of providing a sample due to any medical problem. It was simply her evidence that she did the best she could with the lungs that she was given. Therein lies the heart of the matter.

I accept the evidence of the police officers that she was puffing her cheeks, she was not blowing at all, she was blowing for too short a time and she was able to provide a sample into the screening device. I also accept their evidence that she was otherwise generally co-operative with the police. She was not being cute or sassy or insolent with the police. She was generally respectful of them and did not give them a hard time but for her failure to provide a sample that was long enough in order to have the analysis of the breath sample.

Attitude and demeanor alone are not sufficient evidence to prove anything one way or the other but in my view it does go to demonstrate her bona fides to some degree. If this court were to find that she was being blatantly abstruse or obstructionist, that would go a long way to resolving the issue that I have to address. On the other hand, her general co-operation and compliance by actually putting her mouth to the mouthpiece can also be a factor that can be taken into account in assessing her credibility as a witness.

She was remarkably consistent one way in particular and that is this: she was consistent in her inconsistency, if I can put it that way. The officers were both

frustrated with the accused in the breath room, in that it was clear that she could push air into the instrument but she would go for a second or two or three and stop; go for another two or three seconds and stop; go for another three or four seconds and stop. Then after some time she was asked to try blowing consistently and constantly through a mouthpiece that wasn't attached to the instrument itself. On the video we saw that she was asked to take the mouthpiece off the tube and just blow constantly and consistently were Peel's instructions. Well, she blew off the tube exactly how she did on the tube. She would blow for two or three seconds and stop, almost as if she was drawing in a breath and then continuing to blow and then stop, bow and stop. So she was certainty behaving in a consistent fashion throughout her time in the breath room.

Can I say that I am satisfied beyond a reasonable doubt that she was faking it? Well, if she was, she is pretty good at it because it appeared as if she was making legitimate efforts but was incapable of blowing for the requisite period of time. There was no evidence offered as to what is the minimum period of time that a constant breath sample is required before it is suitable for analysis, so I cannot say how much longer she needed to go before she would have been safe.

Another factor is that she repeatedly asked for another chance. She was told about the 20th opportunity or so that, "That's it, you're being charged." And then she begged for more opportunities and she was given more opportunities. That again speaks to her bona fides or at the very least raises a reasonable doubt in my mind as to whether or not she was really faking or not.

The burden of proof is on the Crown to prove it beyond a reasonable doubt and not merely that she probably faked it. I resist the temptation to comment as to whether or not she would be found responsible on a civil burden of proof because this is not a civil case. I accept the evidence of the officers but I cannot say I reject the evidence of the defendant.

With some reluctance I find myself compelled to say that the Crown has not proven the mens rea component of this offence beyond a reasonable doubt and the defendant is found not guilty.

I wish to thank both counsel and, indeed, the officers who testified who, in my view, were excellent witnesses and very experienced individuals. I wish to thank everyone for their participation. I appreciate the way counsel handled the case and their professionalism throughout.

Madam, so stand up please. At the end an acquittal will be entered on the single count. I trust that lessons have been learned. Thank you, everybody.