R. v. Sakhuja, [2020] O.J. No. 4695

Ontario Judgments

Ontario Court of Justice

A. Dellandrea J.

Heard: January 14, March 26, 2020.

Judgment: October 29, 2020.

Court File No.: 988-18-7430

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Between Her Majesty the Queen, and Kapish Sakhuja

(102 paras.)

Counsel

Ms. A. Nigro, counsel for the Crown.

Mr. M. EngeL, counsel for the accused Kapish Sakhuja.

Reasons for Judgment

A. DELLANDREA J.

1 Mr. Sakhuja's arrest on June 16, 2018 followed a routine stop at a static "RIDE" check in Mississauga where he was asked to provide a breath sample into the "ASD" at the roadside. He did so and registered a fail. Following his arrest for Excess Alcohol, Mr. Sakhuja was transported to the Division where he ultimately provided two samples of his breath into the approved instrument. The defendant's truncated breath readings 130 and 120 mg/100mL led to the single charge of "Over 80" which is before the court.

2 The focus of this trial was not on what led up to the defendant's arrest, but rather on the sufficiency and legality of the procedures which the police followed afterwards. Two breaches of the defendant's *Charter* rights were argued, and one substantive argument was raised with respect to the proof of the Crown's case.

3 In particular, Mr. Engel advanced the following arguments:

(1) It is submitted that Cst. Halfyard's evidence failed to establish the concentration of the alcohol standard solution relied on within the approved instrument, such that the Crown should be disentitled from relying on the presumption of accuracy in s 320.31 of the *Criminal Code;*

(2) It is submitted that the investigating officers breached the applicant's implementational component of his right to counsel under s. 10(b) of the *Charter* by:

(i) Failing to implement his expressed wish speak with his counsel of choice;

(ii) 'Funnelling' the applicant towards duty counsel.

(3) It is submitted that the investigating officers breached the defendant's right's right to be free from arbitrary detention under s. 9 of the Charter by failing to make an informed assessment of his suitability for release following the breath tests, and "overholding" the applicant for two hours in police custody.

4 Finally, while this argument was less strenuously advanced, Mr. Engel suggested that the Peel Regional Police's failure to capture an audio recording of the booking procedure at the Divisions engages "constitutional concerns" under s. 7 of the *Charter*.

5 The applicant submits that the cumulative effect of the breaches occasioned here warrant exclusion of the breath results obtained, pursuant to s. 24(2) of the *Charter*.

6 The Crown argued that there was no merit to the *Charter* arguments. Ms. Nigro submits that since the applicant ultimately spoke with duty counsel, no 10(b) breach was occasioned. In the alternative, the Crown argued that if a breach of 10(b) were to be found, it should be characterized as minor, and favouring of inclusion under s. 24(2). With respect to the over-holding and audio recording issues, the Crown argued that there was no evidence of bad faith on the part of the officers, who were simply following police procedures. It is argued that the applicant's detention for two hours after the breath tests does not amount to one of the "clearest of cases" for which a stay of proceedings would be warranted, and ought not to lead to the exclusion of evidence.

7 On the presumption of accuracy issue, it is argued that the pre-conditions set out in s. 320.31 (1)(a) were sufficiently established through the *viva voce* evidence of the breath technician, Cst. Halfyard, and the presumption should apply.

8 The evidence was received on a blended *voir dire* and trial. The Crown called three officers. Mr. Sakhuja testified on the *voir dire* into the alleged *Charter* breaches, but called no evidence at trial.

Issue #1: Presumption of Accuracy

9 Section 320.31(1) of the *Criminal Code* codifies the new presumption of accuracy applicable in Over 80 cases. Where the Crown proves all of the prerequisites in that subsection, the defendant's blood alcohol concentration at the time is testing is deemed to be the lower of the two readings from the approved instrument. One of the prerequisites of the section is: "that before each sample was taken, the qualified technician conducted...a system calibration check the result of which is within 10% of the target value of an alcohol standard *that is certified by an analyst'*, [emphasis added]

10 Prior to the enactment of the new drink-drive provisions, courts routinely received and relied on the *viva voce* evidence of qualified breath technicians with respect to the proper functioning of the approved instruments relied on for the analysis of blood alcohol concentration.

11 In *Flores-Vigil*[1], Justice Parry held that proof of the actual value of the alcohol standard solution relied upon for the system calibration check must be established for the Crown to rely on the presumption of accuracy, and further, that hearsay evidence is inadmissible for this purpose.

12 Since *Flores-Vigil* was released, the preponderance of my colleagues in the Ontario Court of Justice have declined to follow its reasoning[2]. Moreover, while sitting as a Summary conviction court in *Bahman*[3] Justice Andre recently held that the presumption of accuracy does not depend solely on the certificate of an analyst but may also be proven by *viva voce* evidence of the breath technician.

13 In *Bahman*, the breath technician testified that the system calibration check was conducted before each sample, and that the result was within 10 percent of the target value of an alcohol standard that had been certified by an analyst from the Centre of Forensic Sciences.

14 In this case, Cst. Halfyard testified before me that the tests which he conducted on the approved instrument prior to the receipt of the breath samples were in compliance with the new legislation. He related the manufacturer's label and lot number of the standard alcohol solution and confirmed that the solution had been tested by an analyst of the CFS by his review of their certificate in which it was confirmed to have been suitable.

15 Cst. Halfyard testified that he was aware from his training and experience that the solution is only certified by the CFS if it has a target value of 100 mg of alcohol, and indicated that the calibration tests which he conducted using the standard alcohol solution yielded the result of 95 mg, which was well within the allowable 10 mg variable range.

16 Relying on the weight of authority on this issue, most notably the Summary conviction appeal decision in *Bahman*, by which I am bound, I conclude that the requirement that the alcohol standard solution be certified by an analyst can be proven through either direct or circumstantial evidence, including the hearsay evidence of the breath technician.

17 I conclude that the Crown has satisfied the preconditions of s. 320.31 (1)(a) through the evidence of Cst. Halfyard. I accept the officer's evidence, whose qualifications were not disputed. The officer clearly explained why he knew the alcohol standard solution that he used had a target value of 100 mg of alcohol and why the result he obtained during his calibration check (of 95) satisfied him that the machine was in proper working order. Cst. Halfyard relied on the details of certificate of an analyst from the CFS as confirmation of the suitability and reliability of the standard alcohol solution relied on by his approved instrument.

18 The presumption applies, and Mr. Sakhuja's readings are presumed to be accurate.

Issue #2: Right to Counsel

19 In this case, it was alleged that the applicant's s. 10(b) right to counsel was breached in two related ways. First, when the police failed to act on Mr. Sakhuja's specific request to be able to phone a particular friend in order to obtain the contact information for his lawyer of choice; and second, by "funnelling" Mr. Sakhuja to duty counsel, and ignoring his expression of dissatisfaction with their advice.

20 I will review the evidence relevant to this issue, then make my associated findings.

Review of Evidence on Right to Counsel

a) Cst. Taylor Halfyard (roadside)

21 Cst. Halfyard is an experienced member of the Regional Breath Unit ("RBU") whose duties include both roadside investigations as well as conducting breath tests as a qualified breath technician and drug recognition expert. His qualifications were conceded by counsel for Mr. Sakhuja.

22 Cst. Halfyard had set up a static "RIDE" stop to check every motor vehicle for sobriety on the Lakeshore Blvd in Mississauga on the night in question.

23 Mr. Sakhuja was stopped at the "RIDE". Cst. Halfyard asked him if he had been drinking and his response was "not really". The officer testified that he detected an odour of alcohol from the defendant's breath, and observed his eyes to be somewhat watery and red. He formed the suspicion at 12:36 a.m. and asked the defendant to pull over in front of his cruiser for an ASD test.

24 Moments later, Cst. Byrne arrived on scene. Cst. Byrne had been assigned as a "ride along" to be mentored by Cst. Halfyard in drink-drive investigations. Cst. Halfyard conveyed his grounds to Cst. Byrne and turned the investigation over the junior officer to continue with the ASD sampling, arrest, and rights to counsel.

25 Following the defendant's arrest, Cst. Halfyard attended the Division in order receive the breath samples from Mr. Sakhuja, following the demand from Cst. Byrne. Once at the station, Cst. Halfyard went directly to the breath room to take the Intoxilyzer out of 'standby' mode and to prepare the instrument for testing.

b) Cst. Connor Byrne

26 Cst. Byrne had been a police officer for one month when he became involved in Mr. Sakhuja's arrest. The officer was doing his first "ride along" with other members of the Regional Breath Unit ("RBU") on June 16, 2018, when he attended the static 'RIDE" stop on Lakeshore Drive in Mississauga.

27 Cst. Halfyard had just stopped the applicant's vehicle when Cst. Byrne arrived on scene and approached the driver's window. Cst. Halfyard told Cst. Byrne that he had formed the suspicion that Mr. Sakhuja had been drinking alcohol, and prompted the junior officer to make the corresponding ASD demand. Byrne did so. He said the defendant's eyes appeared red and he detected an odour of alcohol.

28 Mr. Sakhuja exited his vehicle and accompanied Cst. Byrne to his cruiser. Cst. Byrne described the

defendant as a "little unsteady" on his feet. He read the printed demand to Mr. Sakhuja from his notes to which the defendant agreed. At 12:37 a.m. Mr. Sakhuja registered a "fail" on ASD and was arrested by Cst. Byrne for Excess Alcohol.

29 At 12:39 a.m. Cst. Byrne provided rights to counsel. Mr. Sakhuja indicated that he understood. When asked if he wanted to call a lawyer, the defendant said "yes". Cst. Byrne asked him "is there a specific lawyer you want to contact?" and Mr. Sakhuja replied: "no". Cst. Byrne told the defendant that once they got to the station, he would arrange for him to speak with Duty Counsel.

30 Cst. Byrne could not recall if there was any further discussion between he and Mr. Sakhuja about access to counsel on the way to the Division. The officer admitted in cross-examination that he did not record Mr. Sakhuja's responses to the right to counsel inquiry *verbatim* in his notes.

31 The booking video was introduced into evidence through Cst. Byrne. It does not include any sound but has a running time stamp.

32 Upon their arrival to the Division at 1:00 a.m., Cst. Byrne and his partner escorted the defendant to the booking hall. Byrne testified that the "first thing" he did was to call Duty Counsel in an effort to facilitate Mr. Sakhuja's right to counsel. Indeed, Cst. Byrne is seen on the video at 1:02 a.m. using the phone to make a call, then completing paperwork while the booking officer is conversing with the defendant.

33 Cst. Byrne testified that during the booking procedure, he was preoccupied with calling duty counsel and completing his notes, such that he did not play any meaningful role in terms of engaging further with the defendant. Cst. Byrne understood that it was the booker's job to lead that process.

34 At 1:05:44 a.m., while Cst. Byrne is attending to his paperwork, it is apparent on the video that the booking officer is engaged in a conversation with Mr. Sakhuja. The booker retrieves the property bag in which the defendant's phone had been placed, and then gives Mr. Sakhuja his phone. Mr. Sakhuja scrolls through his phone, stops at a particular screen, and turns the phone to show the screen to the booking officer. The booker takes the defendant's phone, examines it, and appears to write down a number which is displayed on the phone. Then he puts the phone back in the property bag, and appears to instruct Mr. Sakhuja to sit back down.

35 Cst. Byrne agreed that it was entirely possible that during the exchange captured at the booking desk on video, that Mr. Sakhuja had asked if he could retrieve the number of a friend who could put him in touch with a lawyer. The officer said he wasn't paying attention and couldn't say one way or another if that is what the booker and the defendant had been discussing. Cst. Byrne testified that it was his understanding that if a detainee asked for a call to be placed to a third party to assist in identifying a lawyer, it was necessary for the police to facilitate that request.

36 Duty counsel called back at 1:15 a.m., and Cst. Byrne brought Mr. Sakhuja to the private interview room to facilitate the call. At 1:20 a.m., following the defendant's brief discussion with duty counsel, Cst. Byrne escorted Mr. Sakhuja to the breath room.

37 Cst, Byrne could not recall if Mr. Sakhuja complained about the brevity of the call with Duty counsel or asserted his wish to speak to a friend to find a lawyer on the way to the breath room. The officer agreed

that it was possible that Mr. Sakhuja made these complaints and that he neither noted nor recalled them.

c) Cst. Halfyard (breath tech)

38 Upon receiving Mr. Sakhuja in the breath room. Cst. Halfyard confirmed that the defendant had spoken with duty counsel, and that he had understood "what was said". He did not ask Mr. Sakhuja if he was satisfied by the call with Duty counsel, or if he wished to speak with anyone else.

39 Mr. Sakhuja provided the first suitable sample, which registered a reading of 136 mg/100mL.

40 Between the first and second tests, at 1:38 a.m., the defendant asks Cst. Byrne if anyone has "called my friend yet". There is no real response from the officers. Mr. Sakhuja's second test registered a result of 120 mg/100mL.

d) Mr. Sakhuja

41 The applicant testified on the *voir dire*,

42 Mr. Sakhuja was a polite and articulate witness. He is 29 years old, having come to Canada from India as a student in 2008. He earned his bachelor's degree in business from the University of Manitoba and is a permanent resident. The applicant gave his evidence in a forthright and serious manner.

43 Mr. Sakhuja testified that when he was asked by Cst. Byrne at the roadside if he wanted to contact a lawyer he said "yes". When asked if he had a specific lawyer who he wanted to call, the defendant testified that he responded: "I don't know any".

44 En route to the division, Mr. Sakhuja remembered that one of his colleagues had mentioned having gone through an arrest, and that she knew a lawyer. He testified that when he was presented to the booking sergeant, he realized "this must be my only chance", so he asked if he could retrieve his colleague's number from his phone in order to try to reach that specific lawyer.

45 According to the applicant, the soundless booking video depicts this very exchange, in which he is seen addressing the booker, who then retrieves his phone, who then provides it to Mr. Sakhuja, who is clearly seen scrolling through his phone and then showing a number back to the officer. The officer is then seen writing a number down. I have no difficulty accepting the applicant's testimony that this is precisely what occurred.

46 What follows on the booking video is also consistent with the applicant's testimony. He was instructed by the booker to be seated, which he did. Minutes later, he was directed by Cst. Byrne to the interview room where he was placed on the phone with duty counsel.

47 Mr. Sakhuja testified that he spoke to duty counsel, but was dissatisfied with the call. He said that on the way to the breath room he told Cst. Byrne that he felt the call with duty counsel was surprisingly brief, and that he was still hoping that he could call his friend in order to get the name of an 'actual' lawyer.

48 Mr. Sakhuja was delivered by Cst. Byrne to the breath room. The defendant testified that he was never asked by Cst. Halfyard whether he was dissatisfied with the discussion with duty counsel, and he didn't repeat what he had just said to Cst. Byrne.

49 Mr. Sakhuja explained that having never been arrested before, he was intimidated by the process of being in detention, and was trying to be as cooperative and compliant as possible. He testified that he felt he had made his request to call his friend for help in getting a lawyer "very clear" when he had been asked about rights to counsel by the booking officer and had been permitted to retrieve the number from his phone for this very purpose. Mr. Sakhuja testified that he didn't know if he had the right to "say any more to convince them to call her," and that he figured that the officers "were the ones who knew" what was allowed.

Findings & Analysis

50 As Justice D. Harris astutely observed in *Hamasaki*, (2020) ONSC 2579, when the state "meddles in the choice of counsel" the result is often a functional detriment to the accused, as well as a real risk of promoting the appearance of unfairness. Section 10(b) of the *Charter* was designed as an important safeguard in adversarial criminal proceedings in which the individuals are inevitably disadvantaged against the power of the state.

51 The right to counsel of choice aims to level the playing field, by assuring detainees of prompt access to counsel whom they trust to protect their interests, as their only available counterweight against the advantage of the state in whose control they remain. It is therefore among the most fundamental rights protected by the *Charter*, and conjoined with the right to silence[4].

52 The right to retain and instruct counsel of choice has been interpreted to include the right to request the opportunity to call third parties to assist in this exercise.[5]

53 In this case, the Crown argues that any lapse of the investigators' duty to facilitate rights to counsel was inconsequential, and that it was the defendant who failed to pursue his right to counsel of choice with reasonable diligence.

54 I disagree.

55 I have no difficulty accepting the defendant's testimony on the *voir dire* that when he was paraded before the booking sergeant and offered rights to counsel that Mr. Sakhuja immediately asked permission to phone one of his cellphone contacts to get the name of a particular lawyer. I make this finding for three reasons. First, although there is no sound on the booking video, this is the only reasonable interpretation of the dynamics of the silent recording. The phone is produced from the property bag at the defendant's apparent request, Mr. Sakhuja is given the phone to scroll through, and the same officer appears to write down the contact details shown to him by the defendant. This exchange occurs immediately following the standard review of rights to counsel which takes place when a detainee enters a division. It is readily apparent that the defendant was asserting his right to communicate with counsel of choice.

56 Second, the defendant's testimony on this point was uncontradicted. Although Cst. Byrne was present at the duty desk when the exchange between the booker and the defendant was occurring, Cst. Byrne was

preoccupied with other tasks (including calling duty counsel) and remained oblivious to the details of the conversation which was apparently happening right before him. I make no finding of bad faith here with respect to Cst. Byrne. As Mr. Engel very fairly stated, Cst. Byrne was a rookie officer who was very clearly focused on calling duty counsel, as he believed he was obligated to do. I accept that his efforts were earnest. But the fact remains that the investigative team as a whole failed to respect and properly facilitate Mr. Sakhuja's 10(b) rights. While Cst. Byrne was calling duty counsel, Mr. Sakhuja was asking a senior officer for access to a third party in order to exercise his right to counsel of choice. For reasons which remain unknown, that request was never acted upon by the police, and the booking officer was not called by the Crown to explain why.

57 Finally, the defendant's evidence of having retrieved and provided his friend's phone number to the police was confirmed by their own later conduct of having used that very number to call the friend to come and pick the defendant up. Neither Cst. Byrne nor Cst. Halfyard remembered ever receiving the number from Mr. Sakhuja - which means the number must have been the one provided to the booker by the defendant on his arrival.

58 As a result of the investigators' collective conduct, Mr. Sakhuja was left believing that the option of calling his friend must not have been allowed, since his asked for it twice (once to the booker, and again after the conversation with duty counsel). I accept Mr. Sakhuja's testimony that he was nervous about his first experience in custody and confused about the extent of his right to counsel. He spoke to duty counsel not by choice, but because he inferred that it was his only option when his request for help in identifying a particular lawyer were essentially ignored.

59 The Supreme Court of Canada in *Willier* described the obligation of the police created by s. 10(b) as the requirement to give detainees a "reasonable opportunity" to consult counsel of choice:

> Detainees who choose to exercise their s. 10(b) right by contacting a lawyer trigger the implementational duties of the police. These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. However, these obligations are contingent upon a detainee's reasonable diligence in attempting to contact counsel: *R. v. Tremblay*, *1987 CanLII 28* (SCC), *[1987] 2 S.C.R. 435*; *R. v. Black*, *1989 CanLII 75* (SCC), *[1989] 2 S.C.R. 138*; *R. v. Smith*, *1989 CanLII 27* (SCC), *[1989] 2 S.C.R. 368*. What constitutes reasonable diligence in the exercise of the right to contact counsel will depend on the context of the particular circumstances as a whole...

60 The assessment of the adequacy of the police's implementation of the right to counsel asks not what the detainee would have done to facilitate their access to counsel of choice, but rather whether the police took all steps that were reasonable in the circumstances[6].

61 Mr. Sakhuja made a specific request of the booker to be able to call a friend for a lawyer's number immediately upon arrival to the division. He repeated the request to Cst. Byrne after having telling him of his dissatisfaction in the brief call with duty counsel. The investigators here failed on two occasions to take the most obvious step which was reasonably available for them to take, namely: to call the number which the defendant had identified for help in reaching counsel of choice.

62 Mr. Sakhuja's interpretation of his request as having been either dismissed or ignored was entirely rational. The applicant felt overwhelmed by the imbalance of power between himself and the police. After his initial attempt at asking to call a friend for a lawyer failed, he was put in contact with duty counsel. After he repeated his request to the arresting officer, he was delivered without comment to the breath room.

63 I accept the defendant's evidence that he never asked to speak to duty counsel, but that he agreed to speak with them by default.

64 It is well-recognized that where investigators "short circuit" the right to counsel, by presenting duty counsel as the *only* available option, then they render the independent choice guaranteed by s. 10(b) meaningless[7]. This is precisely what happened in this case.

65 I conclude that collectively, the investigators in this case failed to fulfil their duty to facilitate the defendant's expressed wish for counsel of choice, thereby breaching his right to counsel under s. 10(b).

Issue #3: Overholding

66 Cst. Byrne and Cst. Halfyard both testified that Mr. Sakhuja's condition improved during the time that he was in their custody, and that he did not appear to be impaired "at all" by the conclusion of the second test. Cst. Halfyard said Mr. Sakhuja "had all his faculties to him", and was both polite and cooperative. Cst. Halfyard explained that it was "not his call", but rather it was the responsibility of the unit commander to decide when to release people from the station.

67 Mr. Sakhuja testified that after providing his second sample, he was taken to a holding cell where there were 2 other individuals were also being held. Mr. Sakhuja said he was upset and confused about why the police were continuing to hold him. His residence was 5-10 minutes from the station. The defendant said that when the officers came to the holding cell to serve him with paperwork at approximately 2:30 a.m., he asked again if his friend had been called to come and pick him up. The officers told him that they had not been able to reach her. Apparently they called on two occasions, and got no answer. There was no discussion of any alternative release plan.

68 Mr. Sakhuja was ultimately seen by the unit commander, S/Sgt. Gottsching at 3:50 a.m., and approved for release. He took an Uber home from the station.

69 Staff Sgt. Michael Gottschling was the officer in charge of A platoon at the Division on the night in question. His duties included booking and lodging prisoners on their arrival, supervising approximately 45 officers, monitoring incoming calls, and giving advice to officers on the road throughout the shift.

70 S/Sgt. Gottschling was notified of the defendant's arrival at the station at approximately 1:10 a.m. He attended the cells to be present for Mr. Sakhuja's booking procedure. The officer engaged only briefly with the defendant, in order to ask him if he had any medical issues or questions about his arrest.

71 In cross examination, the Staff Sgt. testified that he had the "feeling" that the defendant was "significantly" intoxicated based on his brief observation of the defendant at the booking hall, during which he smelled alcohol and saw the defendant's red-rimmed eyes. The officer acknowledged, however, that the

officers who had the most contact and longest observation of the defendant did not charge him with the offence of Impaired, and that Mr. Sakhuja was at all times polite and cooperative.

72 S/Sgt. Gottschling's next interaction with Mr. Sakhuja was at 3:50 a.m. He said the division was "extremely busy" that night and this was his first opportunity to get back down to the cells to assess the defendant. The officer explained that it is necessary for him to physically view individuals before they are released from his custody in order to ensure that they understand their forms and appearances notices, and have no outstanding medical or safety concerns in terms of getting home.

73 Upon seeing Mr. Sakhuja, the officer cleared him for immediate release based on his condition.

74 S/Sgt. Gottschling conceded that he personally conducted no evaluation of the defendant's condition after the second breath test, at 1:50 a.m. The officer agreed that where possible, the best time to determine a person's suitability for release is immediately or shortly after the testing procedure is concluded. The officer knew it was his legal obligation to release persons in his custody as soon as practicable, but said that he was simply unable to get to Mr. Sakhuja until 2 hours after the breath tests, because he was too busy with other duties.

Analysis & Findings

75 Section 498 of the *Criminal Code* sets out the circumstances in which a person who has been arrested without a warrant can be detained by a peace officer. A person is to be released as soon as practicable unless the officer, on reasonable grounds and having regard to "all of the circumstances", determines that the person's detention is necessary in the public interest. The enumerated circumstances for consideration in s. 498 (1.1) include the need to establish the identity of the person, secure or preserve evidence relating to the offence, preventing the continuation or repetition of the offence or any other offence, ensuring the safety and security of any victim of or witness to the offence, and assessing the person's likelihood of attending court to be dealt with according to the law.

76 In *Price*[8], Justice Durno provided a non-exhaustive list of factors to be considered in the assessment of the reasonableness of the "circumstances" of an individual's continued detention following an arrest for a drinking and driving offence. These include:

(1) The accused's blood alcohol level;

(2) Whether the accused was charged with impaired driving;

(3) The accused's apparent level of comprehension;

(4) The impact of the administrative driving suspension;

(5) Whether the accused has outstanding charges

(6) The accused's demeanour (which may include consideration of the poor judgment exhibited by drinking and driving).

77 An objective analysis of these, and any other relevant factors, should guide the analysis with respect to

the accused's suitability for release. It is improper for this assessment to be guided only by the blood-alcohol levels, which is too narrow a focus[9]

78 Turning to the *Price* factors, in this case Mr. Sakhuja had been identified, there were no concerns with respect to the preservation of evidence, and no issue with respect to the safety or security of any victims or witnesses. Mr. Sakhuja had no criminal record and there was no belief that he would not attend court as required. Both Cst. Byrne and Cst. Halfyard testified that the defendant was polite, cooperative, and in their estimation suitably sober enough for release by the end of the second test.

79 Unlike the circumstances in *Price*, this was not a case in which the unit commander's decision to continue to detain was focused exclusively on the accused's breath readings. Indeed, S/Sgt. Gottschling did not refer in his evidence to Mr. Sakhuja's breath readings at all.

80 Rather, the following two factors predominated the officer's decision to detain: 1) the officer's assessment of the defendant's apparent sobriety upon his *arrival* at the station; and 2) the demands of the officer's other significant responsibilities as the supervisor of the Division.

81 S/Sgt. Gottschling's assessment of the defendant's suitability for release was flawed for a number of reasons. The first of these is timing. The officer's only assessment of Mr. Sakhuja was at the defendant's first arrival at the station, *before* the breath tests were even taken, roughly an hour before he might have been eligible for release. It is clear that the assessment mandated to be made under section 498 is designed to invite the commanding officer to consider of "all of the circumstances" presented at the time when the person's potential release becomes theoretically possible. To be sure, an earlier assessment (as in this case, of apparent intoxication) may provide some context to the ultimate determination. However, an accurate assessment of "all of the circumstances" must surely be a timely one, made at the point when the factors of safety and public interest engaged by potential release are weighed against the presumptive release of the defendant "as soon as practicable".

82 To be clear, I acknowledge that the administrative responsibilities of the unit commander at a bustling urban police station such as this one are considerable. I accept S/Sgt. Gottchling's evidence that he was very busy on the night in question, and had several other duties beyond prisoner evaluation. It would be unreasonable to expect an officer in charge to be immediately available to perform an assessment of every prisoner's capacity for release at the moment that their breath readings have concluded. The detainee's suitability for release is to be objectively evaluated and achieved "as soon as practicable", not "as soon as possible". However, the constitutional significance of the evaluation outlined in s. 498 requires that the assessment be conducted within a "timely manner,[10]" in the circumstances. I conclude that this was not done in this case.

83 My conclusion on this issue finds support in the other evidence informing the *Price* assessment criteria. There was a stark contradiction between S/Sgt. Gottschling's assessment of the defendant's demeanour and the two other officers who had far closer and more prolonged contact with Ms. Sakhuja. Cst. Byrne and Halfyard both described the defendant as being polite, seemingly sober and in their view - suitable for release after the second test. No impaired driving charge was laid by either officer. Had S/Sgt. Gottschiing inquired of these officers of their assessment of Mr. Sakhuja's condition earlier, he might have found an earlier opportunity to satisfy himself of the defendant's condition and directed his prompt release. No inquiry

was made, or information shared as part of the evaluation process. As a result, Mr. Sakhuja remained in detention for an additional two hours beyond what was reasonably necessary.

84 For these reasons, I conclude that Mr. Sakhuja has established on a balance of probabilities that his rights under section 9 of the *Charter* were violated.

24(2) Analysis

85 The applicant seeks the exclusion of the breath samples as a remedy under s. 24(2).

86 The Supreme Court's decision in *Grant*[11] outlines the test for the exclusion of evidence once *Charter* breaches are found. Evidence which was "obtained in a manner" that infringed or denied a claimant's rights under the *Charter* shall be excluded if it is established, having regard to all of the circumstances, that its admission in the proceedings would bring the administration of justice into disrepute. The burden of proof rests on the Applicant, on a balance of probabilities.

87 In *Pino*[12] our Court of Appeal held that the following considerations should guide a trial judge's approach in determining whether evidence was "obtained in a manner" that infringed a *Charter* right:

(1) The approach should be generous, consistent with the purpose of s. 24(2);

(2) The court should consider "the entire chain of events" between the accused and the police;

(3) The requirement may be met where the evidence and the *Charter* breach were part of the same transaction or course of conduct;

(4) The connection between the evidence and the breach may be causal, temporal, or contextual or any combination of these three connections;

(5) But the connection cannot be either too tenuous or too remote.

88 In this case, the s. 10(b) breach occurred when the defendant was denied his right to communicate with counsel of choice before the breath readings, and the s. 9 breach occurred when Mr. Sakhuja's detention was arbitrarily extended after the readings had been received.

89 In considering the entire chain of events between the defendant and the police, I conclude that the evidence was captured within the same "course of conduct" such that s. 24(2) is engaged. The defendant's detention ran continuously from the RIDE stop at 12:30 a.m., through his arrest at 12:37 a.m., transport to the division, transfer to the cells officer and then breath technician's custody, and finally to the bullpen where he waited an additional two hours until his release. In the midst of that detention, two samples of his breath were taken under legal compulsion. Immediately preceding the taking of the breath samples, the applicant was denied his right to counsel of choice. The capturing of the evidence and the *Charter* breaches were temporally connected as part of the same transaction. I am satisfied that the evidence here was "obtained in a manner" that was coincident with the *Charter* violations.

90 I now turn to consideration of the *Grant* criteria.

i) Seriousness of the *Charter*- infringing state conduct

91 Police conduct can run the gamut from technical inadvertence, through negligence, to conduct showing a blatant disregard for *Charter* rights. The legal label attached to the conduct is less important than its proper placement along the spectrum of fault[13].

92 Here there were two breaches. The first of these was a serious lapse of police duty, in which the booking officer essentially ignored Mr. Sakhuja's specific request to call a friend to receive a lawyer's number. One officer wrote the number down, but did nothing with it. Another officer directed Mr. Sakhuja moments later to duty counsel, unaware that the request by the defendant had just been made. As a result, the defendant spoke to duty counsel believing it was his only available option. It wasn't. Investigators had a positive duty to facilitate the defendant's expressed wish to speak to counsel of choice. The breach was exacerbated when investigators also ignored his subsequent inquiry in the breath room as to whether his friend had been called. While I cannot ascribe bad faith to the investigators' conduct here, it reflected a cavalier if not negligent disregard for the significance of Mr. Sakhuja's *Charter*-protected right to counsel. I would characterize this breach as significant, and favouring of exclusion.

93 An additional comment is warranted here, in response to Mr. Engel's persuasive submissions aimed at the Peel Regional Police booking video protocols. In characterizing the breach of the applicant's 10(b) rights as significant, I hasten to repeat the observation made 7 years ago by Justice Durno in *Theoret*[14] that it is "difficult" to understand why there is no audio capacity in such recordings, which would be of "great assistance" to the court in capturing rights to counsel accurately. Fortunately, in this case, even the silent video recording provided objective verification of the applicant's claim of having sought to exercise his counsel of choice.

94 The s. 9 breach here was occasioned by inadvertence on the part of the commanding officer, as opposed to a blatant disregard for the claimant's rights. S/Sgt. Gottschling had numerous important responsibilities as the officer in charge of his Division on the night in question, with prisoner evaluation being but one of them. Having made a brief, and perhaps precipitous assessment of the defendant's level of intoxication on his arrival at the station, the officer concluded that Mr. Sakhuja needed some time to sober up before being released. He didn't check in on the defendant for another 2 hours, nor did he invite input from the arresting officers on his suitability for release as he might have. I recognize that it might have been challenging for Sgt. Gottchling to juggle his various duties that night. However, had he been more attentive to his obligation to assess the defendant's suitability for release in a timely fashion, Mr. Sakhuja would have been granted his liberty sooner, as he was entitled to. Overall, I would characterize this breach as modest.

ii) Impact of the breach on the Charter protected interests of the accused

95 The second branch of *Grant* invites consideration of how seriously the protected rights were compromised by the state action. In some circumstances, the interference with the claimant's rights can be merely technical, trivial or transient: in others it may be more pronounced, and profound.

96 The Crown argues that the impact of the breach of Mr. Sakhuja's s. 10(b) rights was minimal because the defendant was able to consult with duty counsel. I'm unable to accept this submission in the applicant's case, given the clarity of the request which he had made for assistance in facilitating his right to counsel of

choice, and the primacy of that guarantee. I have accepted Mr. Sakhuja's evidence that he was made to feel that speaking with duty counsel was his only option, after his request for help in calling a friend to find his own lawyer proved futile.

97 It is well-recognized that the opportunity to select counsel of choice is fosters trust in the advice received by the detainee, and in turn, the substance of the right to counsel[15].

98 Mr. Sakhuja was constitutionally entitled to a reasonable opportunity to speak to a friend for help in finding a lawyer he wanted and trusted. Rather than facilitate that opportunity, the actions of the police denied him this right and 'channelled' him towards accepting an offer of duty counsel which he felt he could not refuse. The foreclosure of his choice of counsel was a significant breach of his rights. This factor points significantly towards exclusion.

99 The defendant was kept in custody for a total of two hours after the conclusion of the breath readings. He was visited by the arresting officers after one hour, when the documents were served on him. He described the experience as unpleasant and unsettling. The deprivation of liberty has been described by our highest court as a loss which is "never regained and can never be fully compensated for"[16]. Standing alone, the impact of the defendant's prolonged detention for approximately two hours would be considered fairly minimal. When considered in combination with the applicant's denial of his right to counsel, the compounded breaches weigh more heavily.

iii) Society's interest in adjudication

100 The breath sample obtained from the defendant is reliable, admissible evidence in a proceeding for which the public retains a significant interest in the resolution. Without this evidence, the Crown's case on the "over 80" necessarily fails. This factor weighs against exclusion.

Conclusion: 24(2)

101 Having considered the three *Grant* factors and considered the Court of Appeal's decision in *Jennings*, I conclude that the *Charter* breaches that occurred in this case require the exclusion of evidence. The breaches in this case were neither minor, nor technical. Public confidence in the administration of justice would not be enhanced by permitting into evidence the Intoxilyzer readings obtained during the course of successive cavalier breaches by the investigators of Mr. Sakhuja's constitutional rights. The court cannot condone the compounded failure by the police to deliver on their important responsibilities given to them under the *Charter*.

102 As a result, the results of the breath samples are excluded and the Over 80 charge against Mr. Sakhuja is dismissed.

A. DELLANDREA J.

1 *Flores-Vigil*, *2019 ONCJ 192*.

2 *Baboolal*, *2019 ONCJ 244*; *Does*, *2019 ONCJ 233*; *Yadav*, unreported, April 16, 2019 per Schwarzl, J; *Porchetta*, *2019 ONCJ 244*; *McAlorum*, *2019 ONCJ 282*; *McRae*, *2019 ONCJ 310*; *Fulkerson*, *2019 ONCJ 335*;*Pereula*, *[2019] O.J. No. 3333* (C.J.); *Bhandal*, *2019 ONCJ 337*; *Yip Chuck*, 2019 ONCJ 2773; *Brar*, *2019 ONCJ 339*; *Magondo*, *2019 ONCJ 401*; *Nguyen*, *[2019] O.J. No. 4288*; *Cox*, *2019 ONCJ 491*; *Aulenbach,* 2019 ONCJ 4315; *Patel*, *2019 ONCJ 544*; *Couto*, 2019 O.J. No. 3208; *Paradzayi*, *2019 ONCJ 599*; *Zebrowski*, *[2019] O.J. No. 4312*, *Chhao*, *[2019] O.J. No 4501*; *Sisson*, *2019 ONCJ 641*.

3 *Bahman*, *[2020] O.J. No. 444* (S.C.), at para. 14, per Andre, J.

4 See: *Hebert*, *[1990] 2 S.C.R. 151* at para. 109; *Bartle*, *[1994] 3 S.C.R. 173* at para. 191; *Sinclair*, *2010 SCC 35* at paras. 24-29.

5 *Kumarasamy*, *(2002) 22 M.V.R. (4th) 234*; *Paul*, *[2017] O.J. No. 2593*; *Manuel*, *2018 ONCJ 381*.

6 *Wijesuria*, *2020 ONSC 253* at paras. 64-71; *O'Shea*, *2019 ONSC 1514* at para. 22.

7 *Vlasic*, 2016 O.J. No 6892, at para 30; *Della-Vedova*, *[2018] O.J. 1596*, at para 58.

8 *Price*, *[2010] O.J. No. 1587* (S.C.J.).

9 *Price*, at para. 93.

10 *McEwan*, *2018 ONCJ 702*, at para. 54 per Brown, J.

11 *Grant*, *[2009] 2 S.C.R. 353*.

12 *Pino*, [2016] O.J, No, 2656 (C.A.)

13 See: *R. v. Kitaitchik* *(2002), 166 C.C.C. (3d) 14* (Ont. C.A.); *R. v. Harrison*, *[2009] 2 S.C.R. 494* at paras. 23,39

14 *Theoret*, *[2013] O.J. No. 920* (S.C.J), at para. 29.

15 See: *Manuel*, *[2018] ONCJ 381* at paras. 54-56; *McFadden*, *2016 ONCJ 777*; *McCallen*, *(1999), 131 C.C.C. (3d)518*(Ont.CA).

16 *Hall*, *(2002) 167 C.C.C. (3d) 449* at 467, per lacobucci, J.

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