

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Decuzzi*, 2018 ONCJ 254

DATE: 2018-04-13

COURT FILE No.: Halton - Burlington 7466833B

B E T W E E N :

Her Majesty the Queen

— AND —

Antonio Decuzzi

Before Justice of the Peace Kenneth W. Dechert
Heard on January 26, 2018 and March 23, 2018
Reasons for Judgment released on April 13, 2018
Provincial Offences Court – Burlington, Ontario

J. Stewart representative for the prosecution
A. Henderson representative for the defendant Antonio Decuzzi

Statutes, Regulations and Rules cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, as amended, ss. 78.1(1) and ss. 78.1(7).

Cases cited:

Regina v. Collins (2001), 160 C.C.C. (3d) 85 (Ont. C.A.);
Regina v. Cuming, [2001] O.J. No. 3578 (Ont. C.A.);
Regina v. Graat, [1982] 2 S.C.R. 819 (S.C.C.);
Regina v. Lifchus, [1997] 3 S.C.R. 320 (S.C.C.);
Regina v. Mina (Ont. C.J.), March 22, 2016 – Court File No. – Kitchener 4460
999 00 57171362 – unreported;
Regina v. Pizzurro, [2013] O.J. No. 4299 (Ont. C.A.);
Regina v. Starr, [2000] 2 S.C.R. 144 (S.C.C.).

Authorities cited:

Paciocco, Mr. Justice David M. and Stuesser, Professor Lee, - *The Law of Evidence*, seventh edition, (Irwin Law Inc., 2015).

K.W. DECHERT, J.P. (orally):

INTRODUCTION

[1] Under Certificate of Offence no. 1260-7466833B, the defendant, Antonio Decuzzi stands charged that he did on the 9th day of February, 2017, at QEW (Queen Elizabeth Way) westbound, east of Bronte Road, in the Town of Oakville, commit the offence of “drive – hand-held communication device”, contrary to subsection 78.1(1) of the *Highway Traffic Act*.

[2] The trial of this proceeding commenced before me on January 26, 2018. It continued before me on March 23, 2018 and was then adjourned to April 13, 2018 for my judgment.

[3] The prosecution was represented by Ms. J. Stewart. The defendant was represented by his paralegal, Ms. A. Henderson.

THE LAW

[4] Subsection 78.1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, hereinafter referred to as “the H.T.A.”, reads as follows:

No person shall drive a motor vehicle on a highway while holding or using a hand-held wireless communication device or other prescribed device that is capable of receiving or transmitting telephone communications, electronic data, mail or text messages.

[5] Subsection 78.1(7) of the H.T.A. provides, in part, that the Minister of Transportation may make regulations prescribing devices for purposes of subsection 78.1(1).

[6] In his decision in *Regina v. Pizzurro*, [2013] O.J. No. 4299 (Ont. C.A.), written on behalf of a unanimous panel of the Ontario Court of Appeal, Goudge J.A. made the following comments relative to the issue of the types of devices encompassed under subsection 78.1(1) of the H.T.A., at para 8 therein:

Section 78.1(1) applies to two kinds of devices: hand-held wireless communication devices (that is, cell phones) and other devices prescribed by regulation. Section 78.1(7) gives the Minister the power to make regulations prescribing devices for the purposes of s. 78.1(1).¹

Accordingly, I am able to take judicial notice that a cell phone is a “hand-held wireless communication device”, in the context of subsection 78.1(1) of the H.T.A.

¹ *Regina v. Pizzurro*, [2013] O.J. No. 4299 (Ont. C.A.), para. 8.

THE ISSUES

[7] The only evidence proffered during this proceeding was the testimony of prosecution witness, Police Constable Jonathan Cannon of the Ontario Provincial

[8] Police. Based upon the officer's undisputed evidence and the admissions of the defendant's representative, I am satisfied that the following elements of the *actus reus* of the subject offence have been established beyond a reasonable doubt:

1. that on the 9th day of February 2017 at 2:14 p.m. the defendant, Antonio Decuzzi, was driving a motor vehicle, to wit: a grey-coloured Lexus sports utility vehicle, in a westbound lane of the Queen Elizabeth Way, east of Bronte Road, in the Town of Oakville and the Region of Halton;
2. that at that time, the defendant was driving the said motor vehicle in lane number four of four westbound lanes of the highway; being the lane immediately adjacent to the shoulder located on the right-hand side of the westbound highway;
3. that at that time, the defendant was holding a black-coloured object in his right hand;
4. that the Queen Elizabeth Way is a "highway" as defined by the H.T.A.

[9] The sole issue in this proceeding is whether the black-coloured object located in the defendant's right hand, was a cell phone. In order to sustain a conviction against the defendant on this charge, the prosecution must prove this remaining issue to the standard of proof beyond a reasonable doubt.

THE EVIDENCE RELATIVE TO THE ISSUE

[10] During examination-in-chief, Constable Cannon testified that at the material time, he was operating a fully marked sports utility vehicle, in lane number two of four westbound lanes of the Queen Elizabeth Way. He advised that at that time, he observed a grey-coloured Lexus motor vehicle being driven in lane number four; the lane immediately adjacent to the right shoulder of the highway. He then looked to his right and noticed that the male driver of this vehicle was holding a black-coloured object in his right hand. He identified this object as a cell-phone.

[11] The officer testified that the driver, later determined to be the defendant, was holding the cell phone "slightly towards the centre of the vehicle", "just below eye level". In describing the cell phone, Constable Cannon stated that it was a "smart phone type with a large screen". He noticed that the phone was facing the driver and that the driver was looking down at it.

[12] Constable Cannon testified that he observed the actions of the subject driver at the material time, from the driver's seat of his vehicle, looking to his right through his front passenger seat window and through the driver's door window of

the defendant's vehicle, while travelling at "highway speed". He advised that he made these observations from a distance equal to the width of two highway lanes, which he estimated to be approximately 20 to 25 feet, for a period of time of approximately 3 to 4 seconds. He went on to state that at the time of his observations, he had an unobstructed view across lane number three directly into the driver's door window, noting the absence of a vehicle in that lane.

[13] When asked how he was able to see what was in the driver's right hand from his position to the left of the driver, the officer noted that his observations were enhanced by the angle of his visibility into the vehicle and by the manner in which the driver was holding the phone. He advised that the driver was holding the cell phone up towards the centre of the vehicle, "in such a way that I had a clear view". In commenting on the visibility at the relevant time, the officer stated that it was "clear out", and that there were no weather related issues. Furthermore, he described the traffic conditions on the highway as "moderately heavy".

[14] When the prosecutor asked him how he satisfied him-self that what he saw was a cell phone in the gentleman's hand, Constable Cannon responded as follows:

What I saw was a cell phone and I was one-hundred per-cent certain of that, thus why I took the enforcement action that I did with the traffic stop and with the charge.

[15] Constable Cannon testified that although he saw a screen on the object which he recognized to be a cell-phone, he could not tell if the screen was illuminated. He went on to state that he did not see the defendant manipulating the screen of the phone, noting that it was "just being held".

[16] The officer advised that upon observing the cell phone, he stopped the defendant's vehicle on the right shoulder of the Queen Elizabeth Highway. At that time, he approached the vehicle and spoke with the defendant. He testified that at that time, he did not see the cell phone within the vehicle, indicating that the phone was "out of plain sight".

[17] During cross-examination, Constable Cannon advised that on the date in question, he was conducting general patrol duties, looking for traffic violations including "cell phone violations". He advised that in conducting general patrol, he was operating a police-issued sports utility vehicle which he described as a "Chevy Tahoe". He advised that since the defendant was also operating a sports utility vehicle, he would have been at a similar height to the defendant when he observed the defendant holding the cell phone.

[18] At this time the constable reiterated his testimony-in-chief that at the relevant time, there was no traffic immediately beside him in lane three blocking his view through his window and through the driver's side window of the defendant's vehicle. While he acknowledged the existence of traffic in lane three, he explained that there were no vehicles situated in the lane space immediately beside him.

[19] During the early portion of his cross-examination, Constable Cannon confirmed his evidence that at the material time he observed the defendant operating his motor vehicle while holding a “black phone” in his right hand, for “about 3 to 4 seconds”. He re-affirmed his position that he was “one hundred per-cent sure” that the object in the defendant’s hand was a “phone”. He then rejected the representative’s suggestion that given the short duration of his observations at the material time, the black-coloured object in the defendant’s right hand was something other than a phone.

[20] As the cross-examination continued, the representative asked the officer if he knew the difference between an “i-pod” and an “i-phone”. In response, the officer stated that they were “visually”, pretty similar, later acknowledging the representative’s suggestion that the two devices were very similar. When the representative inquired as to how the officer was satisfied that the device in the defendant’s hand was a cell phone, the officer answered as follows:

Well, i-pod, i-phone, they are communication devices, they are able to - they are both essentially the same as to what I was observing.

[21] When the representative asked whether it was possible that the thing he observed could have been an i-pod, the officer disagreed with that proposition, asserting that he saw the defendant with a phone in his hand and stating “I don’t know that it was an i-pod or an i-phone”. In responding to the representative’s suggestion that the thing “could have been an i-pod”, Constable Cannon stated that “it appeared to be a phone that I saw in his hand”.

[22] Under intense cross-examination, Constable Cannon maintained his position that the object he observed was a phone rather than an “i-pod”, stating that he “didn’t see an i-pod” and that he “observed a phone”, noting that he stopped the defendant for that. In response to the representative’s comment that “i-pods” and “i-phones” could look identical, the officer remarked as follows:

I think that they are not identical but again I only have a description of a black cell phone in his hand, and it appeared to be a smart phone, so I don’t know that it was an i-pod or not.

[23] When the defendant’s representative asked the officer, “what made it appear to be a cell phone?”, the officer responded as follows:

It was a phone, like we all know what phones look like, we all have phones ourselves. Like I can’t say what brand it was. It was not in plain view after I stopped the vehicle, which is not uncommon. People put it away so I can’t see it.

[24] Constable Cannon completed his cross-examination, by stating that at the time of his observation of the cell phone, for a period of 3 to 4 seconds, he could not see any illumination coming from the screen. Furthermore, he advised that he did not notice the defendant’s lips moving at the material time.

[25] During re-examination, the officer advised that the device in the defendant's hand contained a screen, and that, in general, a cell phone has a screen.

ANALYSIS

Issue: Has the prosecution established, beyond a reasonable doubt, that the object which Constable Cannon observed in the right hand of Antonio Decuzzi at the material time, was a cell phone?

[26] As stated above, at the relevant time, Constable Cannon observed a black-coloured object in the defendant's right hand. He identified this object as a cell phone describing it as a "smart phone type with a large screen". In identifying the thing in the defendant's hand as a cell phone, the constable was offering his lay or non-expert opinion as to what it was. As stated by Charron J.A. (as she then was) in *Regina v. Collins* (2001), 160 C.C.C. (3d) 85 (Ont. C.A.) at para 17, "[i]n the law of evidence, an opinion means an 'inference from observed fact'".²

[27] This type of non-expert opinion evidence is admissible for purposes of the identification of things, persons or handwriting (among a number of other subjects), which a person of ordinary knowledge and experience is able to make, on the basis that it constitutes a "compendious statement of facts that are too complicated to be narrated separately and distinctly"³. This proposition of law was established by the Supreme Court of Canada in its decision in *Regina v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.). In that decision, Dickson J. (as he then was) commented on the rationale for the admission of non-expert opinion relative to the identified subjects as follows:

Except for the sake of convenience there is little, if any, virtue, in any distinction resting on the tenuous and frequently false antithesis between fact and opinion. The line between 'fact' and 'opinion' is not clear.⁴

[28] In their textbook, titled *The Law of Evidence, seventh edition*, (Irwin Law Inc., 2015), Mr. Justice D. Paciocco and Professor L. Stuesser, made the following comments pertaining to this aspect of the "lay opinion evidence rule":

...when a witness identifies the driver of the vehicle by pointing her out in court, he is stating as a fact that she is the driver. Yet, in a real sense he is offering his opinion that the person in court is the same person who was driving the vehicle. Numerous apparent statements of fact are arguably no more than expressions of opinion; things like age, height, weight, the identification of people or things, the speed of vehicles, distance, whether someone is happy or angry, all call for judgment to be made about what has been observed and for conclusions to be drawn. Obviously, it is common for witnesses to testify about such things.⁵

[29] At a later point in his decision in *Graat, supra*, Mr. Justice Dickson advised

² *Regina v. Collins* (2001), 160 C.C.C. (3d) 85 (Ont. C.A.), at para. 17.

³ *Regina v. Graat*, [1982] 2 S.C.R. 819 (S.C.C.), para. 62.

⁴ *Ibid*, at para. 47.

⁵ *The Law of Evidence, seventh edition*, (Irwin Law Inc., 2015), page 198.

that while the admissibility of non-expert opinion evidence is determined by the trial judge or justice, the issue of the weight to be afforded to such evidence is one within the jurisdiction of the trier of fact. In this regard, the said jurist stated as follows:

Whether or not the evidence given by police or other non-expert witnesses is accepted is another matter. The weight of the evidence is entirely a matter for the judge or judge and jury. The value of opinion will depend on the view the court takes in all the circumstances.⁶

[30] In her decision in the case of *Regina v. Cuming* [2001] O.J. No. 3578 (Ont. C.A.), Charron J.A. (as she then was) ruled that an evidential basis for the opinion was necessary before such evidence could be given any weight. In that regard, she stated, in part, as follows:

...Non-expert opinion evidence on such matters as identification is admissible but, as with any opinion evidence, there must be some basis for the opinion before it can be given any weight and the jury should be given some assistance in assessing the basis for the opinion. Crown counsel submits that the officer had a better opportunity to make the visual comparison than the jury did. It is not clear from the record to what extent he would have had a better opportunity. There was no evidence that he knew the appellant other than through his investigation of this robbery and no particulars on the extent of his dealings with the appellant. ...⁷

[31] Constable Cannon's non-expert opinion that the object which he observed in the defendant's right hand was a cell phone, has been admitted into evidence in this proceeding. I must now determine, based upon the totality of the evidence including the circumstances surrounding the officer's observations, the degree of weight to be assigned to the opinion. In that regard, I am obliged to undertake an evaluation of the quality of the officer's testimony, being the only evidence before me in this proceeding.

[32] In their textbook, *The Law of Evidence, seventh edition, supra*, at pp. 35, 36 and 37, Mr. Justice Paciocco and Professor Stuesser discuss the issue of "evaluating and weighing the probative value of evidence". The authors state that "while relevance describes the tendency of evidence to support logical inferences, the concept of 'weight' relates to how 'probative' or influential the evidence is". They write that "the concept of 'weight' is not legally challenging as the weight of evidence is simply a function of how believable and how informative the trier of fact considers it to be, as a matter of human experience".⁸

[33] In discussing the issue of how informative the evidence is, the said authors state, in part, as follows:

The ability of particular evidence to inform depends upon (1) how live the issue it addresses is, and (2) how cogent the evidence is in proving the thing it is offered to prove. Assuming the fact it describes is a live issue,

⁶ *Regina v. Graat, supra*, at para. 56.

⁷ *Regina v. Cuming*, [2001] O.J. No. 3578 (Ont. C.A.), at para. 21.

⁸ *The Law of Evidence, seventh edition, supra*, at p. 35.

‘direct evidence’ is completely informative since it directly asserts the very thing that is of interest. ... The only thing affecting the weight of the material direct evidence is therefore its believability.⁹

[34] In discussing the notion of the believability of the evidence, Justice Paciocco and Professor Stuesser comment as follows:

When deciding whether evidence is believable, legal theory draws a helpful distinction between ‘credibility’ and ‘reliability’. ‘Credibility’ is about the honesty of the witness. Evidence showing that a witness has been corrupted, has a motive to mislead, or has discreditable character will be relevant to credibility. ...

‘Reliability’ is a term used to describe the accuracy of evidence. It can relate to the accuracy of a scientific or forensic process, but when applied to witnesses, reliability captures the kinds of things that can cause even an honest witness to provide inaccurate information. The reliability of a witness can be affected, for example, by (1) inaccurate observations, (2) memory problems, or (3) a failure by the witness to communicate observations accurately. ...¹⁰

[35] The issue of the proper identification of the black-coloured object in the defendant’s right hand at the material time is clearly a crucial, “live” question in this proceeding. Constable Cannon’s lay opinion that the object was a cell phone constitutes direct evidence of the fact that the defendant was holding a hand-held wireless communication device at the relevant time. For this reason the opinion is completely informative of the remaining issue in this prosecution. Accordingly, the only factor affecting the weight of the non-expert opinion is its believability.

[36] I must now turn to the question of the believability of the lay opinion evidence as part of my evaluation of the weight to be assigned to the opinion. As indicated above, the factors to be considered are the credibility and reliability of the evidence.

[37] Initially, I must give substantial deference to the principle enunciated by the Ontario Court of Appeal in *Regina v. Cuming, supra*, that non-expert opinion evidence relative to matters of identification, should not be given any weight unless there is some evidential basis for it.

[38] In the case at bar, the opinion that the subject object is a cell phone appears to be a bare assertion. In formulating this opinion, Constable Cannon observed a black-coloured thing identified as a “smart phone”, with a “large screen”. He noted that the screen was facing the defendant and that the defendant was looking down at it.

[39] The officer was not able to provide any further detail pertaining to the description of the phone. He justified his conclusion that the object was a cell phone

⁹ *Ibid*, p. 36.

¹⁰ *Ibid*, pp. 35 and 36.

by drawing on his ordinary experience as an owner of a cell-phone and as a member of a society in which cell-phone use is prevalent. His inference was nothing more than a compendious statement of facts, which lacked precision.

[40] The subject non-expert opinion evidence is clearly admissible under the “lay opinion evidence rule” as enunciated in *Graat, supra*. However, during the course of his testimony, Constable Cannon failed to establish a cogent factual basis for his opinion. While I acknowledge that the officer proffered some evidence pertaining to the description of the object in question, the evidence lacked sufficient detail to establish a cogent factual basis for his opinion that the object was a cell phone. In accordance with the principle enunciated in *Cuming, supra*, I am only able to afford a minimal amount of weight to the officer’s said opinion.

[41] In assessing the believability of Constable Cannon’s opinion, I find Constable Cannon to be a credible witness in the sense of his honesty. I am satisfied that the officer truly believed that the defendant was holding a cell phone in his right hand at the material time.

[42] In that regard, it is noted that the officer testified with the aid of his investigative notes to refresh his existing memory of the events and did not attempt to exaggerate or overstate his observations of the relevant circumstances. Furthermore, there is no evidence before me which either discredits the officer or casts any doubt on the genuineness of his testimony.

[43] On the other hand, there are a number of factors which cast doubt on the reliability of the officer’s opinion as to the identification of the subject object.

[44] Firstly, the officer did not have sufficient opportunity to make a trustworthy assessment of the purported cell phone. He made his observations of the object situated in the middle of the defendant’s vehicle, as it was travelling on the QEW to his right, at “highway speed”, in moderately heavy traffic. In these circumstances it would have been difficult for the officer to focus on the identity of an object in the defendant’s right hand for a sustained period of time, while regularly monitoring traffic around him. Constable Cannon’s vantage point at the relevant time could not, in my view, be considered optimal.

[45] Secondly, the officer made his observations of the subject object from a significant distance over a relatively short period of time. He testified that the defendant’s right hand in the vehicle would have been situated a distance equivalent to the width of two highway lanes, from his position in the driver’s seat of his police-issued sports utility vehicle. The officer estimated this distance to be 20 to 25 feet, across one open lane of traffic and through two windows. He made his unobstructed observations of the actions of the defendant holding a cell phone in the daylight, in these circumstances, for a period of 3 to 4 seconds.

[46] Constable Cannon’s vantage point relative to his observation of the subject

object in the defendant's right hand, may not be described as either optimal or proximate. It does not, therefore, seem reasonable that the officer would have had an adequate opportunity to focus on the black-coloured object in order to unequivocally identify it as a cell phone. I find that the circumstances of the officer's observations of the defendant and the object over a very brief span of time, are insufficient to enhance the reliability of his inference that the object was a cell phone. Accordingly, I have only afforded a moderate degree of weight to his non-expert opinion as I do not consider it to be trustworthy in the context of the totality of the evidence.

[47] Finally, in evaluating the weight to be assigned to Constable Cannon's non-expert opinion as to the identity of the subject object, I have considered the issue of the internal consistency of his testimony. While the officer initially stated that he was one-hundred per-cent certain that the object was a cell phone, he did not display the same degree of confidence in his opinion during cross-examination. In my view there were significant internal inconsistencies in his testimony which served to diminish the reliability of his absolute opinion that the thing was a cell phone.

[48] During cross-examination, the officer acknowledged that an i-pod and an i-phone are visually "very similar" and that "they are both essentially the same". He initially disagreed with the proposition of the defendant's representative that the object "could have been an i-pod" by firmly stating that the item was a phone and then expressing some ambivalence by indicating that he did not know "that it was an i-pod or an i-phone". When the representative pressed the issue by asserting that the device "could have been an i-pod", the officer responded in an equivocal fashion stating that "it appeared to be a phone".

[49] While Constable Cannon was unwavering in his assertion that the thing in the defendant's right hand was a cell phone, he was unable to explain the basis for his certainty. For example, when the defendant's representative commented that i-pods and i-phones could look identical, the officer remarked that while he did not think that they were identical, he recorded a description of a "black cell phone in his hand and it appeared to be a smart phone" in his notes. He then stated that he did not know "that it was an i-pod or not".

[50] While it is evident that the officer was adamant that the thing which he saw in the defendant's right-hand, was a cell phone, he, at times, equivocated in this position; stating on two occasions that the thing "appeared" to be a phone/smart phone.

[51] In his *Provincial Offences Act* (P.O.A.) appellate level decision in *Regina v. Mina*, (March 22, 2016, Ont. C.J.), Mr. Justice J.E. Allen quashed the conviction against the defendant for an offence of "driving with a hand held communication device". In doing so, he noted that the police officer was equivocal in his opinion that the thing which he saw being held by the driver, Ms. Mina, was a cell phone. In that

case, the officer was only able to say that the thing “appeared” to be a cell phone.¹¹

[52] In articulating his reasons for quashing the conviction, Allen J. stated that when the investigating police officer testified that the item being held by the defendant/driver “appeared to be a cell phone”, the trial Justice of the Peace should have ended the trial at that point and dismissed the charge. At paragraphs 4 and 5 of his decision, Mr. Justice Allen reasoned as follows:

Rather than recognizing that if the officer was equivocal he could not convict, the Justice of the Peace focussed on the perceived inadequacy of the accused’s explanation at the roadside, reversing the onus in a case that did not call for an answer.

The conviction is quashed. There will be an acquittal.¹²

[53] The reasoning expressed in *Regina v. Mina, supra*, is in my view, binding on me, as it is part of a P.O.A. appellate level decision. I interpret the decision as standing for the legal proposition that in the context of the offence of driving with a hand-held communication device, a non-expert opinion that a thing being held by the driver appears to be a cell phone, constitutes an equivocal opinion, which substantially reduces the weight to be assigned to the opinion.

[54] In the case at bar, Constable Cannon was, at times, uncertain that the item which the defendant was holding at the material time was a cell phone. While he initially stated absolutely, that the subject thing was a cell-phone, he later acknowledged that the item “appeared” to be a phone, being a “smart phone”. This internal inconsistency in the officer’s testimony, weakens the reliability of his non-expert opinion. As the officer’s opinion that the subject object was a cell phone is not unequivocal, relying on the reasoning expressed in *Mina, supra*, I am only able to assign a moderate degree of weight to it.

THE DECISION

[55] In this case, the prosecution bears the onus of proving all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt. As stated above, the undisputed evidence establishes, beyond a reasonable doubt, that at the relevant time and place the defendant was driving a motor vehicle on a highway, while holding an object in his right hand.

[56] The direct evidence as to the identity of the object is the non-expert opinion of Constable Cannon. The officer has opined that the item was a cell phone. For the reasons stated above, based upon the totality of the evidence before me, I have not found the said opinion to be sufficiently reliable so as to assign it significant weight. Accordingly, I am of the view that the prosecution has failed to prove the identity of

¹¹ *Regina v. Maria Mina* (Ont. C.J.), March 22, 2016 – Court File No. Kitchener 4460 999 00 57171362 – unreported, paras. 2 and 4.

¹² *Ibid*, paras. 2, 4 and 5.

the subject object, as a cell phone, beyond a reasonable doubt.

[57] In reaching this decision, I have considered the definition of the phrase “beyond a reasonable doubt”, stated by Mr. Justice Cory in his decision in *Regina v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.). He defined the said phrase in his model jury charge, in part, as follows:

...

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather it is based on reason and common sense. It is logically derived from the evidence or lack of evidence.

Even if you believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the Crown has failed to satisfy you of the guilt of the accused beyond a reasonable doubt.

On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the Crown is not required to do so. Such a standard is impossibly high.

In short if, based upon the evidence, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilt beyond a reasonable doubt.¹³

[58] In his judgment, written on behalf of the majority of the Supreme Court of Canada in *Regina v. Starr*, [2000] 2 S.C.R. 144 (S.C.C.), Iacobucci J. refined the “suggested” jury charge set out in *Lifchus*, *supra*, by stating that a jury should be instructed that the reasonable doubt standard “falls much closer to absolute certainty than to proof on a balance of probabilities”.¹⁴

[59] In applying the *Lifchus* definition of the expression “beyond a reasonable doubt” to the evidence in this case, I find myself left in a state of reasonable doubt as to the defendant’s guilt on the subject charge. My conclusion in that regard is derived from the lack of cogent evidence identifying the object in the defendant’s right hand at the material time, as a cell phone.

[60] The officer’s lay opinion that the object was a cell phone, was equivocal as he was not able to adequately describe the object to bolster his opinion. While he recognized the item to be a cell phone, he was not able to state one feature which distinguished it from an i-pod and in fact acknowledged that he did not know whether it was an i-pod or not. Upon considering the totality of the officer’s testimony objectively, I find that although the prosecution has succeeded in proving that the subject object was more likely a cell phone than not, it has failed to prove that allegation beyond a reasonable doubt.

[61] I am of the view that there is insufficient direct and circumstantial evidence

¹³ *Regina v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.), para. 39.

¹⁴ *Regina v. Starr*, [2000] 2 S.C.R. 144 (S.C.C.), at para. 242.

before me to establish beyond a reasonable doubt; being a standard falling much closer to absolute certainty than to the balance of probabilities, that the defendant was actually holding a cell phone, being a hand-held wireless communication device, at the material time. The evidence does, however, establish that fact on a balance of probabilities.

[62] In conclusion, while all of the elements of the *actus reus* of the subject offence have been established on a balance of probabilities, only some of those elements have been proven to the standard of proof beyond a reasonable doubt. While I believe that the evidence before me establishes the defendant's probable guilt; as stated in *Lifchus, supra*, that is not sufficient. Accordingly, I am required to give the benefit of the doubt to the defendant and acquit him of the subject charge.

[63] The defendant, Antonio Decuzzi, is found not guilty of the offence of "drive – hand-held communication device", contrary to subsection 78.1(1) of the H.T.A. The charge is, therefore, dismissed.

Released: April 13, 2018

Signed: "Justice of the Peace Kenneth W. Dechert"