

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty The Queen

— **AND** —

Sabrina Marujo

Before Justice of the Peace Kenneth W. Dechert
Heard on May 26, 2015, June 4, 2015 and July 30, 2015
Reasons for Judgment released on November 20, 2015
Provincial Offences Court – Milton and Burlington, Ontario

G. Larson for the prosecution
G. Parker for the defendant Sabrina Marujo

Statutes, Regulations and Rules cited:

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

Cases cited:

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. Pizzurro, [2013] O.J. No. 4299 (Ont. C.A.);
Regina v. Raham, [2010] O.J. No. 1091 (Ont. C.A.);
Regina v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299 (S.C.C.);
Regina v. Starr, [2000] 2 S.C.R. 144 (S.C.C.).

Publications 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. 1260-9537206B, the defendant, Sabrina Marujo stands charged that she on the 25th day of January, 2015, at Highway 401 eastbound, east of Trafalgar Road, in the Town of Milton, did commit the offence of drive-hand-held communication device, contrary to section 78.1(1) of the *Highway Traffic Act*.

[2] On May 26th, 2015, the defendant entered a plea of not guilty to the subject charge and a trial of that charge then began before me. As the trial was not completed on May 26th, it was adjourned until June 4th, 2015 for continuation. Following the June 4th proceeding, the trial was adjourned for purposes of further legal submissions until July 30th, 2015. The trial was completed on that date and was then adjourned to November 20th, 2015, for judgment.

[3] The prosecution was represented by Mr. G. Larson. The defendant was represented by her paralegal representative, Mr. G. Parker.

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] In his decision in *Regina v. Raham*, [2010] O.J. No. 1091(Ont. C.A.), Doherty J.A. opined that the H.T.A. “is public welfare legislation designed to protect those who use the roads of the province” and that offences created by that Act “are properly regarded as public welfare offences”. Following the reasoning articulated by the Supreme Court of Canada in *Regina v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299 (S.C.C.), Mr. Justice Doherty noted that public welfare offences are “*prima facie* strict liability offences”.

[6] In his decision in *Regina v. Sault Ste. Marie (City)*, *supra*. Dickson J. determined that public welfare offences would only fall into the category of offences which would require the prosecution to prove both the prohibited act and the existence of *mens rea*, if the statutory provision creating the offence used words such as “wilfully”, “with intent”, “knowingly” or “intentionally”. It is noted that subsection 78.1(1) of the H.T.A. does not contain any such words and accordingly the subject offence may not be categorized as a *mens rea* regulatory offence.

[7] The offence of “drive - hand-held communication device” may, therefore, only be categorized as either a strict or absolute liability offence. Accordingly, if the prosecution is able to prove all of the elements of the subject prohibited act, beyond a reasonable doubt, the fault element of negligence is automatically imported into the offence. If the offence is one

of strict liability, an accused is afforded the opportunity of avoiding liability for the offence by proving, on a balance of probabilities, that in committing the offence he/she “took all reasonable care”. On the other hand, if the offence falls into the exceptional category of absolute liability, it is not open to an accused to exculpate him or her-self by showing that he or she “was free of fault”.

[8] Various trial-level courts of the Ontario Court of Justice have interpreted the subject offence as being one of either strict liability or absolute liability. The issue of the proper categorization of the offence has not yet been definitively resolved by a binding appellate authority.

[9] In this case, neither the prosecution nor the defence made any legal arguments pertaining to the issue of the categorization of the offence. In particular, I did not receive any submissions from the prosecutor as to why subsection 78.1(1) of the H.T.A. should be interpreted in favour of an absolute liability classification. The presumption that this public welfare offence is one of strict liability has not, therefore, been rebutted.

[10] Accordingly in this proceeding, if the prosecution is able to prove, beyond a reasonable doubt that the defendant committed the prohibited act, she will be found guilty of the offence unless she is able to show on a balance of probabilities, that in committing the offence she took all reasonable care. If she is able to establish this defence, her presumed negligence is rebutted and she will be excused of liability for the offence.

[11] In his decision, written on behalf of a unanimous panel of the Ontario Court of Appeal in *Regina v. Pizzurro*, [2013] O.J. No. 4299 (Ont. C.A.) at paragraph 8, Goudge J.A. stated as follows:

Section 78.1(1) [of the H.T.A.] 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).

In light of this statement, I am of the view that 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.

THE EVIDENCE

[12] The only evidence I received during the trial of this charge was the testimony of Police Constable Jonathan Cannon of the Ontario Provincial Police, tendered on behalf of the prosecution.

(i) The Testimony of Police Constable Jonathan Cannon

[13] At the outset of his testimony, I granted Constable Cannon permission to make reference to his investigative notes during the course of his testimony for purposes of refreshing his existing memory of the events relevant to the subject charge as recorded in the notes, under the doctrine of present memory revived.

[14] During examination-in-chief Constable Cannon testified that on the 25th day of January, 2015, he was operating an unmarked police motor vehicle which he described as a sports utility vehicle, in an easterly direction on Highway 401, in the Town of Milton. He stated that at the material time, as he was travelling in the centre lane of three eastbound lanes of the said highway, east of Trafalgar Road, he had occasion to notice a white-coloured B.M.W. sports utility motor vehicle travelling in the left eastbound lane. He observed that this vehicle was being driven by a female person, who was holding a cell phone in her right hand. The officer stated that he made this observation during the daylight hours and that the weather conditions at that time were “clear and dry”.

[15] Constable Cannon testified that he observed what he recognized as a cell phone in the driver’s right hand as he was travelling directly beside the said B.M.W. motor vehicle, to the right of the vehicle, in the centre lane. He stated that he made this observation from a distance equivalent to the width of one lane of the subject highway, and that his view of the driver in the vehicle was unobstructed.

[16] In elaborating on his observations at the relevant time, the officer stated that as the said driver was holding the cell phone in her right hand, it appeared that she was “putting” or “bringing” the cell phone down towards the centre console of the vehicle. He specifically advised that he observed the phone in the driver’s right hand “towards the centre console”. The officer went on to state that when the driver noticed his presence, making the said observations, she “appeared to mouth something angrily”.

[17] Constable Cannon testified that upon making the said observations, he initiated a traffic stop of the B.M.W. motor vehicle on the left shoulder of the highway. He stated that upon stopping the vehicle he approached its female driver, the sole occupant of the vehicle. He advised that the driver identified herself by means of a valid Ontario driver’s licence, as Sabrina Marujo with a date of birth of December 24, 1978. He indicated that he was satisfied, based upon this evidence, that the driver was, in fact, Sabrina Marujo as stated on the driver’s licence.

[18] Constable Cannon testified that upon determining the identity of the driver, he issued provincial offence notice number 9537206B to Sabrina Marujo, charging her with the subject offence.

[19] When the prosecutor asked Constable Cannon if he saw the cell phone again after stopping the vehicle being driven by Ms. Marujo, the officer replied: “I don’t believe so. To be honest I don’t have it noted. I don’t recall.” In response to further questions from the prosecutor as to how he knew that the object which he observed in Ms. Marujo’s right hand was a cell phone, the constable stated that “it looked like a cell phone”. When he was asked to describe what it looked like, he advised: “Well, I can’t exactly remember exactly what the phone looked like but it appeared to be a cell phone anyways, in her right hand”.

[20] During cross-examination, Constable Cannon advised that when he stopped the subject vehicle, he did not ask Ms. Marujo if he could see the alleged cell phone. Accordingly, he was not able to confirm the brand of the cell phone that he had previously observed in

Ms. Marujo's right hand.

[21] In response to questions from the defendant's representative, Constable Cannon reiterated his testimony-in-chief that the object he observed being held by the defendant at the relevant time, "appeared to be a cell phone". He was not, however, able to recall whether the cell phone was a "touch screen" or a "blackberry style" type of phone. Furthermore, the officer was unable to recall the colour of the phone.

[22] Constable Cannon agreed with the representative's proposition that "other things could appear to be a phone". When the representative asked the constable how he knew "for sure" that the object he observed in the defendant's hand was a cell phone "as opposed to some other piece of equipment or something else", the constable stated, in part, as follows:

To be honest what I saw appeared to be a cell phone. To know, like I said, I didn't see it after but to know 100 percent for sure what it was after, no I can't say that. But at the time it appeared to be a cell phone, the reason why I stopped it. I also noted in my original evidence what I observed. ...

[23] At this time, the officer reiterated his testimony-in-chief that when the defendant realized that she was being watched by the officer at the time that she had the purported cell phone in her hand, she appeared to be upset and was "mouthing something".

[24] During cross-examination, the defendant's representative asked the defendant if the object he observed being held by the defendant at the relevant time could have been a number of things other than a cell phone. In that regard, Constable Cannon specifically rejected the representative's suggestions that the said object was a digital recording device, a bluetooth speaker, a wallet or a calculator.

[25] In rejecting the suggestion that the subject object was a digital recording device, the constable stated that he "didn't believe so" because the object that he "viewed was a cell phone". Moreover in disagreeing with the proposition that the subject object "could have been a bluetooth speaker", the officer stated that the only bluetooth speakers which he was familiar with were too large to fit within one's hand, noting that that device was "definitively not" what was in the defendant's hand at the material time.

[26] When Constable Cannon was asked whether the subject object could have been a wallet, the officer denied that proposition stating that the object which he saw in the defendant's hand was a cell phone. The officer then acknowledged the representative's suggestion that what the officer meant was that the subject object "appeared" to be a cell phone.

[27] The defendant's representative then altered the wording of his questions in this regard slightly, asking Constable Cannon if the subject object "could have appeared" to be either a wallet or a calculator. In response to the question respecting a wallet, the officer stated in the negative and in response to the question regarding a calculator, the officer remarked "No. What I saw, again, what I saw was a cell phone. I did not see a calculator."

[28] In completing his cross-examination of Constable Cannon, the defendant's representative asked the officer what he saw which differentiated the alleged cell phone from a

wallet, a calculator, a digital recording device or something else. In re-phrasing that question, the representative asked the officer what he saw that made him believe that the subject object was a cell phone and “not a wallet, a calculator, a digital recording device or something else”. The officer responded to this question as follows:

It could have been all of the above based on the fact that phones these days function for all those devices, but what I saw was a cell phone.

THE ISSUES

[29] In his final submissions in this proceeding, the defendant’s representative argues that the prosecution has failed to discharge its burden of proving, beyond a reasonable doubt, that the object that the defendant was holding in her right hand at the material time, was a cell phone. It does not appear that the issue of the proof of any of the other elements of the subject offence are in dispute.

[30] Accordingly, based upon the undisputed evidence in this proceeding, 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 25th day of January, 2015, Sabrina Marujo was driving a motor vehicle to wit: a white-coloured B.M.W. sports utility vehicle, in the left eastbound lane of Highway 401, east of Trafalgar Road, in the Town of Milton;
2. that at that time, Sabrina Marujo was holding an object in her right hand such that she was bringing it down to place on the centre console of the motor vehicle;
3. that Highway 401 at the subject location, falls within the definition of a “highway” under the H.T.A.

[31] Accordingly, the remaining issue is whether or not the prosecution has proven, beyond a reasonable doubt, that the object which Constable Cannon observed in Sabrina Marujo’s right hand at the material time was a cell phone; being a hand-held wireless communication device.

[32] If I find that the prosecution has proven all of the elements of the *actus reus* of the offence, beyond a reasonable doubt, then the fault element of negligence is automatically imported into the subject strict liability offence. I must then determine whether the totality of the evidence before me establishes on a balance of probabilities, that in committing the offence the defendant took all reasonable steps to avoid the particular event or did so on the basis of an honest and reasonable mistake of fact.

[33] If the evidence fails to establish that in committing the offence, the defendant took all reasonable care, her presumed negligence is not negated and she will be found guilty unless she is able to establish the applicability of a common law defence operating in her favour so as to justify the dismissal of the charge.

[34] In this regard, the defendant’s representative argues, in the alternative, that if the evidence in this proceeding proves all of the elements of the subject charge beyond a reason-

able doubt, and if the defendant is not excused from liability for the charge by operation of the defence of due diligence, then the subject charge should be dismissed on the basis of the discretionary common law defence of *de minimis non curat lex*.

ANALYSIS

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

[35] During the course of his testimony relative to the aforementioned issue, Constable Cannon provided direct evidence as to the identity of the object which he observed in the defendant's right hand at the material time. The constable stated that he observed the defendant driving a motor vehicle in the left eastbound lane of Highway 401, east of Trafalgar Road in the Town of Milton, while she was holding what appeared to him to be a cell phone in her right hand, as she was in the process of bringing it down towards the centre console of the vehicle. In identifying the said object as a cell phone, Constable Cannon was offering a lay opinion as to what it was.

[36] This type of non-expert opinion evidence is admissible for purposes of identifying things, which a person of ordinary knowledge and experience is able to make on the basis that the opinion constitutes a "compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly". 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 his decision, Dickson J. (as he then was) made, in part, the following comments relative to the issue of the admissibility of lay opinion evidence:

...

We start with the reality that the law of evidence is burdened with a large number of cumbersome rules, with exclusions to the exclusions, and exceptions to the exceptions. The subjects upon which the non-expert witness is allowed to give opinion evidence is a lengthy one. The list mentioned in *Sherrard v. Jacob*, *supra*, [[1965] N.I.L.R. 151] is by no means exhaustive: (i) the identification of handwriting, persons or things; (ii) apparent age; (iii) the bodily plight or condition of a person, including death or illness; (iv) the emotional state of a person- e.g. whether distressed, angry, aggressive, affectionate or depressed; (v) the condition of things – e.g. worn, shabby, used or new; (vi) certain questions of value; and (vii) estimates of speed and distance.

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.

...

[37] At a later point in his decision, Mr. Justice Dickson noted that while non-expert opinion evidence is admissible relative to matters such as those enumerated above, the issue of the weight to be given to such evidence is a matter for the trier of fact to determine. In this regard, the said jurist stated, in part 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 the opinion will depend on the view that the court takes in all the circumstances.

...

[38] In this proceeding, Constable Cannon rendered an opinion identifying the thing which he saw in the defendant's hand as a cell phone. In reaching this conclusion, the officer is drawing upon his ordinary experience. Accordingly, when he is expressing the view that an object appears to be a cell phone, he is basing that opinion upon his general knowledge of the appearance of that device. The officer's lay opinion in that regard is admissible evidence.

[39] I must now examine the totality of the officer's testimony, being the only evidence before me in this proceeding, in order to determine whether I should accept the opinion and if so, the degree of weight to assign to it. Essentially I must ask myself whether I believe the officer's testimony.

[40] In their textbook titled *The Law of Evidence*, seventh edition, (Irwin Law Inc., 2015), at p. 36, Mr. Justice David M. Paciocco and Professor Lee Stuesser, made, in part, the following comments pertaining to the informativeness of evidence:

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, '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 evidence is therefore its believability.

...

[41] In discussing the issue of the believability of evidence at pp. 35 and 36 of their textbook, the said authors defined the concepts of "credibility" and "reliability", 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 witness testimony can be affected, for example, by (1) inaccurate observations, (2) memory problems, or (3) a failure by the witness to communicate observations accurately.

...

[42] Constable Cannon testified with the aid of his investigative notes to refresh his existing memory of the relevant events. He did not attempt to exaggerate or overstate his observations of the relevant events. Furthermore, there is no evidence before me which ei-

ther discredits the officer's character or in any either way casts doubt on the genuineness of his testimony in this proceeding. Accordingly, I have found Constable Cannon to be a credible witness in the sense of his honesty as a witness.

[43] I acknowledge however, that the weight to be afforded to Constable Cannon's opinion that the object which he observed to be in the defendant's right hand at the material time was a cell phone, is largely related to its reliability. As stated above, the notion of reliability of the evidence is related to its accuracy.

[44] In assessing the accuracy of Constable Cannon's opinion as to the identity of the thing that he saw in the defendant's right hand at the material time, I have focussed my mind on the following factors: (i) the officer's opportunities to observe and assess the relevant circumstances, (ii) the clarity of his memory relative to the circumstances and (iii) the consistency of his testimony pertaining to his said opinion. In balancing these factors in the context of the totality of the evidence in this proceeding, I am of the view that the officer's opinion that the subject thing was a cell phone may not be considered reliable.

[45] There is no question that the accuracy of the officer's opinion that the object was a cell phone is enhanced by his evidence as to the circumstances surrounding his observation of the defendant in the driver's seat of her motor vehicle. Constable Cannon's view of the defendant's right hand at the material time was unobstructed and was made in the daylight from his position in the driver's seat of his police vehicle travelling parallel to the defendant's vehicle, a distance of the width of one highway lane from the defendant's location seated in the driver's seat of her vehicle. While I acknowledge that there is no evidence before me relative to the duration of the officer's observations of the defendant's right hand at the material time, I find that this factor does not detract from the trustworthiness of the officer's assertion pertaining to those observations derived from his optimal and proximate vantage point, that the object in the defendant's right hand at that time was a cell phone.

[46] On the other hand, in considering the factor of the clarity of Constable Cannon's memory of the relevant circumstances, I find that the officer's memory of those circumstances lacks precision. His notes lack sufficient detail to trigger his independent recollection of the particulars of the alleged cell phone. During his testimony-in-chief, Constable Cannon quite candidly states that he could not "exactly remember what the phone looked like", noting only that the subject object "appeared to be a cell phone". Furthermore, during his testimony-in-chief, the officer advised that he could not recall whether he saw the cell phone again after he had stopped the defendant's motor vehicle, remarking only that he did not have that issue recorded in his notes.

[47] During cross-examination, Constable Cannon acknowledged that he could not recall the colour of the cell phone or whether it was a "touch screen" or "blackberry" type of phone. Additionally, when he was pressed by the defendant's representative to be more specific as to the appearance of the phone in terms of other devices, such as digital recording devices, bluetooth speakers, calculators or wallets, the officer admitted that he was unable to provide any information which would explain why he believed that the subject object was a cell phone, rather than one of the said suggested devices. In fact, the officer was unable to

recollect any one feature of the purported cell phone, which differentiated it from any of the aforementioned devices.

[48] In my view, the officer's inability to remember and adequately articulate particulars relative to the description of the alleged cell phone, detracts from the strength of his lay opinion that the object which he observed in the defendant's right hand at the material time was, in fact, a cell phone. His opinion in this regard is no more than a bare assertion, and accordingly may only be afforded minimal weight in the assessment of its reliability.

[49] Finally, the reliability of Constable Cannon's opinion relative to the nature of the object in the defendant's right hand at the material time is, in my view, significantly weakened by a number of internal inconsistencies in his testimony as to his identification of the object as a cell phone. A balanced and objective review of the whole of the officer's testimony leads me to conclude that the officer is uncertain as to what he saw in the defendant's right hand at that time.

[50] In reaching that conclusion, I note that the officer's testimony, both in chief and in cross-examination, contains both categorical statements that the subject object was a cell phone and equivocal expressions of the officer's belief pertaining to the "appearance" of the object as a cell phone. In fact what I find to be the most surprising is the officer's reluctance during testimony-in-chief, to clearly and confidently state his opinion that the relevant object was a cell phone. In this regard, near the end of his testimony-in-chief the officer seemed to move away from his earlier unequivocal assertion that the subject object was a cell phone to a less certain description of the item as one which "appeared" to be a cell phone.

[51] Similarly during cross-examination, the defendant would at times, unreservedly describe the object as a cell phone, yet at other times equivocate in his opinion as to the identity of the object, stating simply that the thing "appeared like" or "appeared to be" a cell phone.

[52] Finally it is noted that during cross-examination, Constable Cannon acknowledged that he was not 100 per cent sure as to the identity of the thing as a cell phone, because he did not see the device in the defendant's motor vehicle when he stopped the vehicle. This statement significantly diminishes the strength of his general lay opinion that the object was a cell phone, not only because it shows that the officer was, in retrospect, uncertain as to the identification of the thing, but because it discloses the internal inconsistency in the officer's evidence as to the identification of the object.

[53] The officer's apparent inability to consistently justify his opinion that the object was a cell phone discloses his ambivalence as to the accuracy of his opinion. This ambivalence is understandable given the fact that the officer's observations of the purported cell phone was likely of short duration and given the fact that the officer did not recall seeing the cell phone in the defendant's vehicle after he stopped the vehicle.

[54] As stated above, upon weighing my findings pertaining to the factors which I have identified relative to my assessment of the reliability of Constable Cannon's lay opinion that the subject object was a cell phone, I find that his opinion is unreliable and therefore inaccurate.

rate. In coming to this conclusion, I have determined that the lack of clarity of the officer's memory pertaining to the circumstances surrounding the formulation of his said opinion and the internal inconsistencies in the officer's evidence pertaining to his confidence in his opinion as to the identity of the object as a cell phone, outweigh the fact that when formulating his opinion as to the nature of the thing in the defendant's right hand, he had an unobstructed view of the thing from an optimal vantage point.

[55] Based upon the foregoing analysis, I am satisfied that the testimony of Constable Cannon that the object in the right hand of the defendant at the material time was a cell phone, may be characterized as credible in the sense of being genuine, but not reliable in the sense of being accurate. In light of this determination, on balance, I do not find Constable Cannon's evidence to be believable, and therefore, I am only able to afford limited weight to his lay opinion that the subject object was a cell phone.

[56] I must now determine whether the prosecution has proven, beyond a reasonable doubt that at the material time, Ms. Marujo was holding a cell phone in her right hand, while she was driving her motor vehicle. In order to resolve this issue, I must first remind myself of the definition of the expression "beyond a reasonable doubt" as crafted by Mr. Justice Cory in his decision in *Regina v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.). The said expression, as contained in a model jury charge crafted by Justice Cory, was defined in the said decision, as follows:

What does the expression 'beyond a reasonable doubt' mean?

The term 'beyond a reasonable doubt' has been used for a very long time and is part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something needs to be said regarding its meaning.

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 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 before the court, 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.

[57] 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 *Regina v. Lifchus*, *supra*, by opining 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".

[58] The only evidence in this proceeding establishes that at the material time, the defendant was driving a B.M.W. motor vehicle in an easterly direction on Highway 401, east of Trafalgar Road, in the Town of Milton, while she was holding an object in her right hand. While I acknowledge the existence of direct evidence in the form of the lay opinion of Constable Cannon that the object seen in the defendant's right hand was a cell phone, I have found that the opinion is not believable because it is unreliable in the sense that it is not accurate and, accordingly, I have afforded a low degree of weight to it.

[59] In light of my assessment of the weight to be attached to Officer Cannon's opinion as to the identification of the thing in the defendant's right hand, I find myself left in a state of reasonable doubt as to the element of the *actus reus* of the subject offence relating to whether the defendant was actually holding a cell phone (hand-held wireless communication device) at the material time. My determination that the prosecution has failed to prove, beyond a reasonable doubt, that the object which the defendant was holding in her right hand while driving her motor vehicle was a cell phone, is an objective determination based upon common sense, logically derived from the lack of cogent evidence pertaining to the identity of the subject object.

[60] While I acknowledge that the Crown is only required to prove every element of the *actus reus* of the subject offence beyond a reasonable doubt, rather than to an absolute certainty, I must remind myself of the *Starr* refinement to the *Lifchus* model jury charge that the reasonable doubt standard falls much closer to proof to an absolute certainty, than to proof on a balance of probabilities.

[61] In the case at bar, I am of the view that while the totality of the prosecution evidence in this proceeding has proven that the defendant was probably holding a cell phone in her right hand while she was driving her motor vehicle, there is insufficient evidence to establish beyond a reasonable doubt; falling much closer to absolute certainty than to a balance of probabilities, that she was actually holding a cell phone at that time.

THE DECISION

[62] While the prosecution has proven that on January 25th, 2015, Sabrina Marujo was driving a motor vehicle on Highway 401, in the Town of Milton, beyond a reasonable doubt, it has not proven, beyond a reasonable doubt, that at that time Ms. Marujo was holding a hand-held wireless communication device. Accordingly, the prosecution has failed to meet its burden to prove all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt. Accordingly, the defendant is found not guilty of the charge of drive hand-held communication device, contrary to subsection 78.1(1) of the H.T.A., and the charge is endorsed as being dismissed.

[63] In light of my decision to dismiss the subject charge, I do not need to address the defendant's alternative argument in this proceeding pertaining to the potential applicability of the common law defence of *de minimis non curat lex*.

Released: November 20, 2015

Signed: “Justice of the Peace Kenneth W. Dechert”