

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty The Queen

— **AND** —

Bozo Petrovic

Before Justice of the Peace Kenneth W. Dechert
Heard on April 13, 2012 and May 31, 2012
Reasons for Judgment released on September 6, 2012
Provincial Offences Court – Burlington, Ontario

G. Larson for the prosecution
L. Carter representative for the defendant **Bozo Petrovic**

Statutes, Regulations and Rules cited:

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

Cases cited:

Lévis (City) v. Tétreault, [2006] S.C.J. No. 12; (2006), 36 C.R. (6th) 215 (S.C.C.);
Regina v. Cooper, [1978] 1 S.C.R. 860 (S.C.C.);
Regina v. Gill, [2012] O.J. No. 2511 (Ont. C.J.);
Regina v. Griffin, [2009] S.C.J. No. 28; (2009), 244 C.C.C. (3d) 289 (S.C.C.);
Regina v. Kanda, (2008), 88 O.R. (3d) 732 (Ont. C.A.);
Regina v. Kazemi, [2012] O.J. No. 2826 (Ont. C.J.);
Regina v. Kurtzman (1991), 4 O.R. (3d) 417 (Ont. C.A.);
Regina v. Lifchus, [1997] 3 S.C.R. 320 (S.C.C.);
Regina v. Marrocco, 2012 ONCJ 535 (Ont. C.J.);
Regina v. Pizzuro, [2012] O.J. No. 860 (Ont. C.J.);
Regina v. Raham, 2010 ONCA 206 (Ont. C.A.);

Regina v. Sault Ste. Marie (City), [1978] 2 S.C.R. 129; (1978), 40 C.C.C. (2d) 353 (S.C.C.);
Regina v. Starr, [2000] 2 S.C.R. 144 (S.C.C.);
Regina v. W.(D.), [1991] 1 S.C.R. 742 (S.C.C.).

Publications cited:

Paciocco, Mr. Justice David and Stuesser, Professor Lee, *The Law of Evidence, Sixth Edition* (Irwin Law Inc., 2011);
Watt, The Honourable Mr. Justice David. *Watt's Manual of Criminal Evidence, 2012* (2012, Thomson Reuters Canada Limited).

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

INTRODUCTION

[1] Under Certificate of Offence no. 1260-7327319A. the defendant, Bozo Petrovic stands charged that he on the 19th day of August, 2011 at 2:15 p.m., at northbound Appleby Line at Dundas Street, in the City of Burlington, “did commit the offence of drive motor vehicle while operating a handheld communication device, contrary to the *Highway Traffic Act*, section 78.1(1)”.

[2] Upon being arraigned on the said offence on April 13th, 2012, the defendant entered a plea of not guilty through his representative. A trial of the charge then ensued before me. As the trial was not completed on the said date, it was adjourned to May 31st, 2012 for continuation, when it was completed. The trial was then adjourned until September 6th, 2012, for my judgment.

[3] The prosecution was represented by Mr. G. Larson. The defendant was represented by his representative, Ms. L. Carter.

RELEVANT STATUTORY PROVISIONS

[4] The defendant is charged with the offence of “drive motor vehicle while operating a handheld communication device”, contrary to subsection 78.1(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended, hereinafter referred to as “the Act”. That subsection reads as follows:

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

[5] Additionally, the following subsections of section 78.1 of the Act are relevant to the subject charge:

(7) The Minister may make regulations,

(a) prescribing devices for the purpose of subsections (1) and (2);

...

(8) In this section,

‘motor vehicle’ includes a street car, motorized snow vehicle, farm tractor, self-propelled implement of husbandry and road-building machine.

[6] Furthermore, the following definitions of terms, contained in subsection 1(1) of the Act are material to the subject proceeding:

In this Act,

...

‘highway’ includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof;

...

‘Minister’ means the Minister of Transportation;

...

‘motor vehicle’ includes an automobile, a motorcycle, a motor assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine;

...

THE CATEGORIZATION OF THE OFFENCE

[7] In his decision in *Regina v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 129; (1978), 40 C.C.C. (2d) 353 (S.C.C.) written on behalf of the Supreme Court of Canada, Dickson J. (as he then was) determined that “offences” should be divided into three categories; offences in which *mens rea* must be proved, offences of strict liability and offences of absolute liability.

[8] The jurist stated that offences involving *mens rea* would be those consisting of “some positive state of mind such as intent, knowledge, or recklessness” the burden of proof of which would rest on the prosecution. He described strict liability offences as those “in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care”. Finally, he opined that offences of absolute liability would be those offences where it was “not open to the accused to avoid liability by showing that he was free of fault”.

[9] In commenting on the analytical approach to be employed in placing an offence into one of the three categories, Dickson J. wrote as follows:

Offences which are criminal in the true sense fall in the first category. Public wel-

fare offences would, *prima facie*, be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as ‘wilfully’, ‘with intent’, ‘knowingly’ or ‘intentionally’ are contained in the statutory provision creating the offence. On the other hand, the principle that punishment should in general not be inflicted on those without fault applies. Offences of absolute liability would be those in respect of which the legislature had made it clear that guilt would follow proof merely of the proscribed act. The over-all regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence falls into the third category.

[10] In his decision in *Regina v. Raham*, 2010 ONCA 206 (Ont. C.A.), Doherty J.A. made the following comments pertaining to the nature of offences created by the Act:

The *Highway Traffic Act* is public welfare legislation designed to protect those who use the roads of the province. The Act, and in particular Part X, ‘Rules of the Road’, creates a wide variety of offences, including the offence in s. 172. Those offences, taken together, are designed to regulate and control conduct on the roads. The offences are properly regarded as public welfare offences: see *R. v. Kanda* (2008), 88 O.R. (3d) 732 (C.A.); *R. v. Kurtzman* (1991), 4 O.R. (3d) 417 (C.A.). On the authority of *Sault Ste. Marie*, [*R. v. Sault Ste. Marie (City)*, *supra.*], these offences, including s. 172, are *prima facie* strict liability offences.

[11] Upon reviewing the text of subsection 78.1(1) of the Act, I am satisfied that the wording of the subsection does not support a conclusion that the offence created therein is one where the prosecution would be required to prove the existence of *mens rea* on the part of the accused. The subsection does not include words such as “wilfully”, “knowingly”, “with intent” or “intentionally” which would indicate the intent of the Legislature of the Province of Ontario to categorize the subject offence as a *mens rea* regulatory offence.

[12] As stated in *Regina v. Raham*, *supra.*, offences created by the Act are properly classified as public welfare offences. As stated in *Sault Ste. Marie (City)*, *supra.*, those types of offences are presumptively offences of strict liability.

[13] I acknowledge that despite the presumption that the subject public welfare offence falls within the category of strict liability, it might be properly classified as one of absolute liability where a defendant would not be able to attempt to show that he or she exercised reasonable care in committing the prohibited act. As stated by LeBel J. writing on behalf of the Supreme Court of Canada in *Lévis (City) v. Tétreault*, [2006] S.C.J. No. 12; (2006), 36 C.R. (6th) 215 (S.C.C.), “absolute liability offences still exist, but they have become an exception requiring clear proof of legislative intent”.

[14] In the case at bar, the defendant’s representative argues that the prosecution has failed to prove all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt. There does not appear to be any issue as to whether in allegedly committing the subject offence, the defendant exercised due diligence. Accordingly, the parties have not made any submissions as to the issue of whether or not, from the perspective of legislative intent, the presumption that the subject offence be categorized as one of strict liability had

been rebutted in favour of an absolute liability categorization.

[15] There is no evidence or argument before me in this proceeding upon which I could conclude that the presumed classification of the subject offence, as strict liability, has been overcome in favour of one of absolute liability. I shall, therefore, for purposes of this proceeding, treat the subject offence as a strict liability offence. In this regard, I have followed the reasoning expressed by Kowarsky J.P. in *Regina v. Marrocco*, 2012 ONCJ 535 (Ont. C.J.), where he concluded, in part, that the offence of “drive-hand held communication device”, contrary to subsection 78.1(1) of the Act, was a strict liability offence.

[16] In light of my decision in this regard, if the prosecution is able to establish all of the elements of the *actus reus* of the subject offence beyond a reasonable doubt, then the fault element of negligence is automatically imported into the offence. The defendant will, in that circumstance, be found guilty of the offence unless he is able to show on a balance of probabilities, that in committing the prohibited act he exercised due diligence by either taking all reasonable steps to avoid the act or by acting on the basis of an honest and reasonable mistake of fact.

RELEVANT COMMON LAW

[17] In my view, the leading cases pertaining to the interpretation of the subject offence are three decisions of the Ontario Court of Justice, sitting as provincial offence appellate courts, in *Regina v. Pizzuro*, [2012] O.J. No. 860 (Ont. C.J.), *Regina v. Gill*, [2012] O.J. No. 2511 (Ont. C.J.) and *Regina v. Kazemi*, [2012] O.J. No. 2826 (Ont. C.J.).

[18] In his decision in *Regina v. Pizzuro*, Mr. Justice W.G. Beatty, allowed the defendant’s appeal of his conviction of the offence of “driving a motor vehicle while holding or using a handheld wireless communication device that is capable of receiving or transmitting telephone conversations, electronic data, mail or text messages” and dismissed the subject charge.

[19] In allowing the defendant’s appeal, Beatty J. agreed with the defendant’s submission that the prosecution had failed to adduce any evidence of an essential element of the offence. The jurist stated that while the prosecution evidence had established that on the date and time in question the defendant was driving a motor vehicle on a highway while he was holding a cell phone in his left hand, “no evidence was proffered that such device was capable of receiving or transmitting telephone communications, electronic data, mail or text messages”. He noted that proof of the capability of the subject device, in the manner stated in the text of subsection 78.1(1) of the Act, was an essential element of the offence.

[20] In the concluding paragraphs of his decision, Mr. Justice Beatty stated as follows:

I agree with Mr. Pizzuro that the burden rests upon the Prosecutor to prove the essential elements of the offence, failing which it is an error in law to enter a conviction.

Had the Prosecution produced some evidence that the device was operative as set out in section 78.1(1), Mr. Pizzuro would have been put to his election to call

some evidence to the contrary, or that his use was excepted.

...

The appeal is allowed, a dismissal is entered.

[21] In her decision in *Regina v. Gill*, [2012] O.J. No. 2511 (Ont. C.J.), Madam Justice E.A. Ready dismissed the defendant's appeal of his conviction for the offence of "driving with a hand held communication device", contrary to subsection 78.1(1) of the Act. In upholding the decision of the trial justice of the peace, Ready J. rejected the three grounds of appeal proffered by the defendant's representative.

[22] In arguing that the defendant's conviction should be overturned, the defendant's representative argued that the justice of the peace erred in law by failing to determine, beyond a reasonable doubt, that the cell phone that the police officer observed the defendant holding in his left hand while driving, was a device which fell within the description of a hand-held wireless communication device as set out in subsection 78.1(1) of the Act. Secondly, the representative argued that the justice of the peace erred in law by finding the defendant guilty of the subject offence even though the prosecution had failed to prove that the subject cell phone was at the relevant time, "capable of receiving or transmitting telephone communications, electronic data, et cetera". Lastly, the representative argued that the justice of the peace erred in her judgment by failing to properly analyze the evidence of the police officer relative to the credibility of his observations of the defendant while driving the subject motor vehicle, being a taxi.

[23] In briefly describing the evidence received by the trial justice of the peace in this proceeding, Madam Justice Ready noted that the investigating police officer was the only witness called during the trial. She summarized the police officer's testimony as follows:

...The police officer saw the accused with his left hand to his left ear, clearly seeing what appeared to be a cell phone in his hand. He was talking. There was nobody else in the motor vehicle. The driver looked over at the police officer as he was doing this.

The police officer looked at him as well, and then proceeded to U-turn, and stop the taxi with the defendant and told him the reasons of the stop. The police officer clearly saw a cell phone located beside him on his right hand side console, centre console, where it would be – where this flip phone would be available to the driver of this vehicle. The police officer did no inspection of the phone; however, he satisfied – the justice of the peace was satisfied from the evidence of the police officer that a cell phone was there, accessible to the driver without blue tooth devices hand free devices.

...

[24] In dismissing the third ground of appeal, that the trial justice of the peace failed to properly analyze the credibility of the testimony of the investigating police officer, Ready J. made, in part, the following comments:

The police officer was the only witness. He was examined, and he gave his evidence, and he was cross-examined and gave his evidence in response to the questions from the defence. And he testified that notwithstanding the cross-

examination that he received, that he kept his eye on the taxi, and that is during cross-examination, as he U-turned, and explained the techniques that police officers are trained in to do so. The evidence is uncontradicted and not compromised by cross-examination.

So there was no error, I find, in the justice of the peace relying on it, even though the justice of the peace did not specifically say she found the police officer's evidence to be credible. It is clear from her reasons that she accepted it unconditionally and concluded as she could, and there is no error in her so doing. ...

[25] In dismissing the first ground for appeal that the trial justice of the peace failed to explain how the evidence established, beyond a reasonable doubt, that the cell phone which the police officer observed being held in the defendant's left hand constituted a hand held wireless communication device, Ready J. stated in part, as follows:

...

The common dictionary meaning of a cell phone and the notorious nature of a cell phone, that what it does, is and does namely, a wireless phone or a device that allow you to carry it around and call someone or to be called by someone without being hooked up to a telephone line, and to carry on a conversation, a communication with someone. And this very nature and the reliance on the common dictionary meaning of a cell phone, would allow the justice of the peace to infer, in other words conclude, that a cell phone is a wireless communication device as set out in the section.

In addition, the evidence of the police officer was that the accused, not only was holding what he said was a cell phone in his hand, but it was up to his ear and he appeared to be talking. On stopping the defendant there was, in fact, a flip phone, cell phone, on the console without any blue tooth device or hand free device attached to it. This, I feel, on appeal, would have allowed the justice of the peace to conclude that the device was a hand held communication device.

The very notorious nature of a cell phone would make it unnecessary for the justice of the peace to state how she found the device was a wireless communication device. There was no error in law, I find, in her decision on the area of argument.

...

[26] In dismissing the second ground of appeal stated above, that the trial evidence failed to establish, beyond a reasonable doubt, that the subject cell phone device was "capable of receiving or transmitting telephone communications, et cetera, at the time of the offence", noting that there was no evidence that the police officer took steps to inspect the cell phone upon stopping the defendant/driver at the material time, Madam Justice Ready reasoned, in part, as follows:

...

On these facts, with the notorious nature of a cell phone, and the court's opinion that the justices of the peace can take judicial notice of what a cell phone does, together with the position of the cell phone to the ear of the defendant, talking with nobody else in the car, and with a cell phone later noted on the console accessible to the defendant, a reasonable inference could be drawn by the justice of the peace that on this occasion, this accused was talking on a cell phone, and that his cell phone, this device in his hand at his ear, was not only capable of receiving and transmitting, but on these particular facts, from what the court can see from the

facts in the transcript, that it was actually doing so on this occasion.

What other reason, what other common sense conclusion could one draw from these facts, especially given that there is no evidence of a contrary nature? People do not normally talk to themselves with an object held up to their ear. This would draw, in this court's estimation, unwanted attention to the person by the police. Who wants to be doing that? There is – in this court's estimation, there is no need or reason on these facts to embark, and nor did the justice of the peace need to embark, on a determination of whether the Crown must prove, as an essential element of the offence, that the device was capable of receiving or transmitting telephone communications et cetera, at that time. That is something that will have to be argued on different facts and for another day.

...

[27] In response to the appeal argument made by the defendant's representative that the device in the defendant's hand at the material time, "could have been a toy, or for example, as others have argued in respect of these offences, a flashlight or a garage door opener, that looks like a cell phone but is not", Ready J. stated briefly as follows:

Mere suggestions as they were put to the justice of the peace, without something more concrete, with an air of reality [to] them, cannot lead to reasonable doubt.

[28] It is apparent therefore, that the decision in *Regina v. Gill, supra.*, stands in part, for the propositions that one may take judicial notice of the fact that a "cell phone" is a hand-held wireless communication device, as described in subsection 78.1(1) of the Act and that such a hand-held wireless communication device is capable of receiving or transmitting telephone communications. Madam Justice Ready found, that based on the particular facts of the case under appeal, the prosecution was not required to lead evidence to prove, beyond a reasonable doubt, that the subject cell phone was a device capable of receiving or transmitting telephone communications or the other modes of electronic messaging described in subsection 78.1(1) of the Act. She concluded that the issue of the capability of the cell phone device to receive or transmit telephone communications, electronic data, mail or text messages, was not an essential element of the case before her.

[29] In his decision in *Regina v. Kazemi*, [2012] O.J. No. 2826 (Ont. C.J.), Mr. Justice S.S. Nakatsuru allowed the defendant's appeal of her conviction of the offence of "holding or using a hand-held wireless communication device" pursuant to subsection 78.1(1) of the Act. The defendant raised the following three issues in the course of her appeal:

- that her right to a fair trial was compromised by the misleading notice of trial and an ambiguous charge,
- that the 'holding' of the cell phone within the meaning of subsection 78.1(1) of the Act should be interpreted in such a fashion that the holding must be for the purpose of sending or receiving wireless communication, and
- that the prosecution must prove that the cell phone was operative at the time of the holding in the sense it was capable of sending or receiving wireless communication.

[30] Nakatsuru J. rejected the defendant's appeal based on the first and third grounds of

appeal, but granted the appeal based on the second ground stated above. In this regard the jurist noted that even though the trial justice of the peace accepted the defendant's testimony that in holding her cell phone while operating her motor vehicle, she was not using it, but merely retrieving it from the floor of the vehicle after it had fallen from the passenger seat, he nevertheless determined that she had committed the offence under subsection 78.1(1) of the Act by "holding" the phone. After considering the appropriate rules of statutory interpretation, and informing himself of the legislative objectives of section 78.1 of the Act, Nakatsuru J. opined that the "momentary handling of a cell phone" by the defendant, did not fall within the ambit of the word "holding" as that word is found in subsection 78.1(1) of the Act. He concluded that the defendant's conviction of the subject charge was unreasonable and he acquitted her of the charge.

[31] In interpreting the term "holding" in the context of subsection 78.1(1) of the Act, Nakatsuru J. stated, in part, as follows:

...

In my opinion, the 'holding' or the 'using' of a hand-held wireless communication device must be interpreted in a manner that has regard to the design and function of such devices. Thus, for example, 'holding' must mean more than simply possessing or carrying a device. Since what is prohibited is the holding of a *hand-held* device, the prohibition should only extend to the holding of such a device in one's hands. Having it otherwise on one's person, in a pocket, for instance, would not come within the meaning of the section. Furthermore, common dictionary definitions of 'hold' include keeping fast, grasp, or keep, sustain in a particular position, or grasp so as to control. Consequently, to be 'holding' a hand-held wireless communication device requires more than merely touching or briefly handling of such a device. This interpretation is consistent with the common meaning of the term 'holding' and the objective of the legislation. Given the objective is to promote road safety by banning resort to and the use of such devices while operating a motor vehicle, it is not necessary to prohibit a driver from merely touching a cell phone, for example, just to hand it to a passenger or to move it within the car. The short mental distraction and physical interference with the ability to drive caused by such acts are not intended to be caught by the provision. There must be some sustained physical holding of the device in order to meet the definition found within ss. 78.1(1).

...

[32] In addressing the third ground of appeal identified above, being whether the prosecution must prove that the hand-held wireless communication device in question was operable at the time that it was being held or used by the driver of the motor vehicle, Nakatsuru J. advised that the defendant relied upon the decision of Beatty J. in *Regina v. Pizzuro*, *supra*. Mr. Justice Nakatsuru noted that the decision in *Pizzuro* stood for the proposition that in trying a charge under subsection 78.1(1), the prosecution "must prove as an essential element" of that offence that the hand-held wireless communication device was "capable of receiving or transmitting telephone communications, electronic data, mail or text messages at the time of the offence".

[33] In respectfully disagreeing with the conclusion reached by Mr. Justice Beatty in *Pizzuro*, Mr. Justice Nakatsuru reasoned as follows:

... In my opinion, the proper interpretation does not require such proof. Again, the relevant subsection states the following:

78.1(1) 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.*

The devices subject to the provision are 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’. It is only other prescribed devices that are subject to this qualification. The legislature placed this condition upon the government in order to limit the type of devices that could properly fall within its regulatory power to prescribe. It is not meant to add an additional element that the prosecution is required to prove. The prosecution need only prove that the device held or used by the driver was a ‘hand-held wireless communication device’. Alternatively, the prosecution could prove that it was another prescribed device. There is no requirement that the prosecution prove in either case that the device was operable at the time.

In my view, not only is this interpretation the grammatically correct one, but it is also consistent with the objective of the provision. As already analyzed above, the ‘holding’ of such devices is prohibited by the subsection since the holding in addition to the use of such devices creates a potential danger on the road. Using such a device may require the device to be operable. However, it is not necessary for the device to be operable for a person to be liable for holding the device. The distraction and interference with driving occurs whether the device is operable at the time or not. For example, a cell phone whose battery is so low as to be unable to transmit or receive calls, will still pose a distraction to a driver who, unaware of this, decides to hold or attempt to use it.

As a practical matter, if the appellant’s argument was acceded to, the police would have to conduct further investigations to gain evidence that the device was operable at the time. This would include the more intrusive action of taking a cell phone at the road side and operating it in a fashion to show it was capable of receiving or sending messages. Depending on the device and an officer’s familiarity with such a device, this may involve more or less time and effort; potentially transforming a brief detention to write out a ticket to a longer and more involved investigation and detention. This would also lead to greater incursions into the driver’s privacy interest given the nature of information stored on these devices. It would surprise me that the legislation intended these consequences when it passed this important but simple provision; one enacted as much for its educative effect as for the regulation of traffic.

...

[34] In the second to last paragraph of his decision in *Kazemi*, Mr. Justice Nakatsuru stated that “a cell phone is a wireless hand-held communication device”. I am of the view therefore that I may take judicial notice that a cell phone is, in fact, a hand-held wireless communication device, for the purposes of the application of the provisions of subsection 78.1(1) of the Act.

[35] Upon comparing the extensive reasons enunciated by Nakatsuru J. in *Kazemi*, relative to the issue of whether the prosecution is required to prove the operability of the subject

hand-held wireless communication device, beyond a reasonable doubt, as an essential element of the subject offence, with the brief opinion stated by Beatty J. in *Pizzuro*, with respect to that issue, I find the reasons delivered by Mr. Justice Nakatsuru to be persuasive and I have, therefore, followed his conclusions in that regard. In my view, in conducting prosecutions under subsection 78.1(1) of the Act, the prosecutor is not required to establish as an essential element of the offence, that the cell phone in question was capable of receiving or transmitting telephone communications, electronic data, mail or text messages, at the time of the alleged offence.

THE EVIDENCE

[36] During the trial of this proceeding, the prosecution tendered evidence through the testimony of Police Constable Norman Deneault. The defendant did not proffer any evidence.

[37] Constable Deneault testified-in-chief on April 13th, 2012. Upon completion of his examination-in-chief, the trial was adjourned to May 31st, 2012 for continuation, when he underwent cross-examination and re-examination.

[38] At the outset of his testimony in chief, Constable Deneault stated that he was employed with the Halton Regional Police Service and had been so employed as a police constable, for the past fifteen years. He went on to advise that prior to the advent of his employment with the Halton Regional Police Service, he had been employed by the Toronto Police Service for a period of ten years. He testified that as of April 13th, 2012 he was working with the “District Response Unit”, being a traffic enforcement unit.

[39] Constable Deneault testified that he made notes of the incident relative to the charge, on the back of his copy of the subject provincial offence ticket. He advised that he made the notes in ink “at the time of the offence and immediately thereafter”, and that there had been no additions or deletions to the notes since the time of making. He stated that he required the notes to “refresh his memory”, noting that he had “a recollection of the original offence”.

[40] During cross-examination pertaining to the qualification of the notes, the officer agreed with the suggestion put to him by the defendant’s representative that he had “an independent recollection in regards to this stop”. When the representative asked the officer if there would be any information that he would be relating to the Court that was not in his notes “in regards to the elements of the case” before the Court, the officer replied “just his location at the time of the offence”. In elaborating on his response in that regard, the constable stated that in making reference to his location, he was referring to his “actual physical location” when he made his observations. When the defendant’s representative asked if there was anything extra that he was “going to be adding in regards to the type of device or anything of that sort”, the officer responded, “no, not that I can think of right now”.

[41] Upon completion of the officer’s testimony relative to the making of his notes and their proposed use, the Court granted him leave to make reference to the notes in respect of

the subject charge, for the purpose of refreshing his existing memory of the events under the “doctrine of present memory revived”.

[42] Constable Deneault presented his testimony-in-chief relative to the subject charge, in a narrative style, as follows:

On the 19th day of August in the year 2011, at 2:15 p.m., I was at the intersection of Appleby Line at Dundas Street. I was in the northbound direction. I was stopped at a light observing traffic around me when I noticed a vehicle to my right in the right-turn lane travelling northbound. This vehicle was in the right-turn lane coming up to the intersection at approximately forty kilometres per hour.

When the vehicle was next to me I observed the driver of the vehicle with a black device in his left hand, holding it to his left ear and appeared to be talking to the device. There was an electrical cord from the device going down to the dash area.

The vehicle made a right turn onto Dundas Street. I made the same turn and pulled the vehicle over on Dundas Street east of Appleby Line. There was only one person in the vehicle. That was the driver. He identified himself with a valid Ontario driver’s licence as Bozo Petrov, that’s P-E-T-R-O-V-I-C, Bozo being B-O-Z-O, it’s his ‘G1’.

The accused presented his driver’s licence. I went back to my police cruiser and wrote up an offence notice number 7327319A, for the offence of driving a motor vehicle while operating a hand held communication device.

[43] Constable Deneault testified that the intersection of northbound Appleby Line at Dundas Street, was located in the City of Burlington. He went on to testify that at the time of the subject event, he observed that the defendant was driving a Pontiac Montana vehicle, being a “motor vehicle” under the *Highway Traffic Act*.

[44] Constable Deneault reiterated his earlier testimony in chief that the driver’s licence produced to him by the driver of the said Pontiac Montana, identified the driver as Bozo Petrovic. In response to the prosecutor’s question as to how he was satisfied that the person who gave him the driver’s licence was the person “on the driver’s licence”, the officer stated “the photo on the driver’s licence matched that of the driver. I was satisfied”.

[45] When the constable was asked as to describe the black device that he observed the defendant holding at the subject time, the officer responded that he “believed it to be a cell phone”, but he had “no notation of the make, model”. The prosecutor then asked the officer what made it appear to him that the defendant was talking into the cell phone, to which the officer replied, “lips were moving at the time”.

[46] In describing the “layout” of the road at the intersection of Appleby Line and Dundas Street, Constable Deneault testified that at the said intersection for northbound traffic, Appleby Line was comprised of two left-turn lanes, two northbound lanes to the right of the left-turn lanes and then a right-turn lane to the right of the two northbound through lanes. The officer testified that in making his observations of the defendant at the material time, he was positioned in the northbound through lane of Appleby Line, being the lane “right next to the right-turn lane” on the south side of Dundas Street.

[47] In describing the manner in which he observed the motor vehicle being driven by the defendant approach the subject intersection, the officer stated that he observed the defendant's motor vehicle approaching the intersection while travelling in a northerly direction on Appleby Line at a rate of speed of approximately forty kilometres per hour, through his rear-view mirror. He indicated that at that time he was stopped for a red traffic light at the intersection. He advised that his "common practice" was to look for cell phones and red light offences whenever he was stopped for a red light at an intersection.

[48] When the constable was asked if he had "the opportunity to see the device again", upon conducting the traffic stop, he responded by stating that he did not make a notation of seeing the device at the time of the traffic stop and that he did not have an independent recollection of seeing the device at that time.

[49] At the conclusion of his examination-in-chief, Constable Deneault was asked by the prosecutor as to how he satisfied himself "that the device being used in deed was a communication device". The officer responded to that query as follows:

At the time I saw what I believed to be a cell phone being used by the driver talking to it. Left hand was to his left ear and the vehicle was in motion. I was satisfied that the time I pulled him over that that's what the device was and that's what he was doing, he was using a hand held communication device while operating a motor vehicle.

[50] During cross-examination, Constable Deneault testified that he made his observations of the subject driver [the defendant] when he was stopped at the red traffic light governing northbound traffic on Appleby Line, at its intersection with Dundas Street. He reiterated his testimony-in-chief that at the relevant time he was situated in the northbound through lane of Appleby Line to the left of the right-turn lane on Appleby Line.

[51] In specifically describing his actions and those of the said driver at the relevant time, Constable Deneault testified as follows:

He was making a right turn. We were both at the red light. I was observing traffic around me, specifically looking for cell phones. That's one of my number one tickets to give out. At which time I saw the driver of the vehicle with what appeared to me to be a cell phone in his left hand to his left ear. From the unit there was a black cord that went downwards towards the dash area.

I will correct myself. I was stopped at the light. He was coming northbound. He went into his right turn and I observed him while he was making his right turn he had the phone to his ear, what appeared to be a phone, and he continued into his right turn.

[52] Constable Deneault stated that he made his observations of the driver while the subject motor vehicle was in the process of turning to its right from Appleby Line onto Dundas Street. He agreed with the suggestion put to him by the defendant's representative that at the time of his observations, the subject vehicle was in continuous motion. He indicated that he would have observed the actions of the driver at the relevant time for a period of three to four seconds from a distance of between eight and ten feet.

[53] In following up on the officer's testimony that he made his observations of the driver of the subject vehicle from a distance of between eight and ten feet to the left of the said vehicle, the defendant's representative posed the following question:

From that distance you indicated that you saw a black device. Were you able to make out or ascertain the type of device, the make, the model, the size, anything specific to the device?

[54] In response to this query, Constable Deneault stated; "No, just the fact that he had it in his hand and he was talking to the unit".

[55] In response to further questions under cross-examination, as to his actions after he observed the driver holding the purported cell phone, Constable Deneault testified that he activated his emergency lights at the intersection of Appleby Line and Dundas Street, "made a wide right turn" to follow the said driver, pulling him over "a short distance from there".

[56] Constable Deneault agreed with the representative's suggestion that after he made his initial observation of the driver holding the alleged cell phone, he could not recall if he saw the device again. Moreover, he advised that he couldn't recall seeing the "black cord" after the time of his initial observations.

[57] The defendant's representative completed her cross-examination of Constable Deneault by engaging in the following question and answer exchange:

Q: What investigation, if any, did you undertake to confirm that the device that you believed you saw was in fact a cell phone or capable of transmitting?

A: None. I have no notation of any. It was just what I saw at the time and what I believed.

Q: Okay. So you never did see that device up close?

A: I have no notation of it. No recollection of it either.

...

Q: You indicated that when you were stopped at the stop light that your usual practice is to observe for cell phone violations. Have you issued a lot of cell phone violations since the new legislation has come out?

A: Yes. Do you want a number?

Q: Sure, if you have a number.

A: To the end of last year 1,000.

Q: Oh, okay.

A: And 455 this year.

Q: This year being January to...

A: That's correct.

...

Q: Would it be fair to say your investigation for your earlier charges are different than your investigations of those being done this week or last week?

A: That is correct.

Q: Okay. In what way would you have changed your investigation techniques?

A: Now that we've seen a lot go through the Courts and we know what the Courts are after I ask a lot more questions and add a lot more details to my notes.

Q: Okay. Thank you. Did you ask in this case to see the device in which you were investigating?

A: No, I did not.

Q: In this particular case you believe what you saw was a communication device or the cell phone?

A: That's correct.

Q: But you don't have any evidence to substantiate what your first thoughts or findings were?

A: No, just my observation.

THE ISSUES

[58] The ultimate issue in this proceeding is whether or not the prosecution has proven the guilt of the defendant on the subject charge, beyond a reasonable doubt.

[59] The subject offence is presumed to be one of strict liability. Accordingly, in order to discharge its burden of proof, the prosecution need only establish that the defendant committed all of the essential elements of the *actus reus* of the offence, to the standard of proof beyond a reasonable doubt. In this proceeding, the prosecution does not bear the onus of proving the element of *mens rea*.

[60] If the prosecution is able to prove the *actus reus* of the offence, beyond a reasonable doubt, the fault element of negligence is presumed and the defendant will be found guilty of the charge unless he is able to show, on a balance of probabilities, that in committing the offence he exercised reasonable care. If the defendant establishes the defence of reasonable care, his presumed negligence is negated and he is entitled to be excused of liability for the offence.

[61] In analyzing the ultimate issue in this proceeding, I must remind myself of the applicability of the following principles of law:

1. that the defendant is presumed innocent of the subject offence until proven guilty;
2. that the burden of proving the defendant's guilt of the *actus reus* of the subject offence rests on the prosecution and that this burden never shifts to the defendant; and
3. that the burden of proof is not discharged until the prosecution has established all of the essential elements of the *actus reus* of the subject offence, beyond a reasonable doubt.

[62] As this case is one where the issue of the credibility of the prosecution witness is important, I must apply the principles enunciated by Cory J., on behalf of the majority of the Supreme Court of Canada, in *Regina v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.); in particular the third prong of the model jury instruction stated therein. In that regard, I must ask myself whether on the basis of the evidence which I accept, I am “convinced beyond a reasonable doubt by that evidence of the guilt of the accused”.

[63] In this proceeding the defendant’s representative submits that the prosecution evidence lacks sufficient detail to permit me to find that the “black device”, which Constable Deneault observed being held by the defendant, was a cell phone. In the alternative, the representative argues that if I find that the prosecution has succeeded in proving beyond a reasonable doubt, that the said device was, in fact, a cell phone, that the prosecution has failed to establish that the cell phone, was capable of receiving or transmitting telephone communications, electronic data, mail or text messages. Finally, the representative contends that if I find that the prosecution has proven that the said device was a cell phone, that I may not take judicial notice that it constitutes “a hand-held wireless communication device” as described in subsection 78.1(1) of the Act.

[64] In my view, based on the decisions of both Ready J. in *Regina v. Gill*, *supra.* and Nakatsuru J. in *Regina v. Kazemi*, *supra.*, I am able to take judicial notice of the fact that a cell phone is a hand-held wireless communication device. Furthermore, based on the reasoning expressed in *Kazemi*, I find that the prosecution is not required to prove that a hand-held wireless communication device was, at the time of an alleged offence under subsection 78.1(1) of the Act, capable of receiving or transmitting telephone communications, electronic data, mail or text messages, as an essential element of the offence.

ANALYSIS

[65] The only evidence presented in this proceeding was the testimony of Police Constable Norman Deneault, tendered on behalf of the prosecution.

[66] In my view, Constable Deneault testified in a clear and concise fashion. His evidence, which was internally consistent, was based upon his three to four second observation of a driver of a motor vehicle, made from his stationary position approximately eight to ten feet to the left of the vehicle. The officer did not appear to embellish his testimony relative to that observation and the strength of his evidence was not weakened through cross-examination. Furthermore, during the course of his testimony, Constable Deneault relied on his investigative notes which were made contemporaneously with the time of the alleged incident. He presented as a credible witness.

[67] Based on the direct, credible and uncontradicted evidence of Constable Deneault, I find that the following facts relative to the majority of the essential elements of the subject offence, have been established beyond a reasonable doubt:

1. that on the 19th day of August, 2011, at approximately 2:15 p.m., the defendant Bozo Petrovic was driving his Pontiac Montana vehicle in the northbound right-

- turn lane of Appleby Line, just south of its intersection with Dundas Street and in an eastbound lane of Dundas Street, just east of the said intersection, in the City of Burlington;
2. that the Pontiac Montana vehicle is a “motor vehicle” under the *Highway Traffic Act*;
 3. that both Appleby Line and Dundas Street fall within the definition of a “highway” under the *Highway Traffic Act*;
 4. that at the material time, while he was driving his motor vehicle in the north-bound right-turn lane of Appleby Line, just south of Dundas Street and in the course of turning right to proceed in an easterly direction on Dundas Street, the defendant had a black device in his left hand and he was holding it to his left ear;
 5. that at the said time the defendant was using the black device by talking to it, as his lips were moving.

[68] My findings of fact confirm that the prosecution has proved, beyond a reasonable doubt, all of the elements of the *actus reus* of the subject offence with the exception of the issue of whether the black device in question was 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”. In my view, this element has been established to the requisite standard, through the totality of the circumstantial evidence adduced in this proceeding.

[69] In discussing the concept of “standards of proof” in their textbook titled *The Law of Evidence, Sixth Edition* (Irwin Law Inc., 2011) at page 530, Mr. Justice David Paciocco and Professor Lee Stuesser, made, in part, the following comments:

Rules of law assign the relevant standards of proof. In a criminal case both the common law and the Charter require the Crown to prove the guilt of the accused beyond a reasonable doubt. In other words, the trier of fact can convict only if, at the end of the case on the basis of all admissible evidence, the trier of fact is left without a reasonable doubt on each of the elements of the alleged offence, in spite of any defences raised by the accused. Where one or more of the elements of the Crown’s case rest on circumstantial evidence, this standard requires that the only rational inference from the evidence shows guilt.

...

[70] In her decision, written on behalf of the majority of the panel of the Supreme Court of Canada, in *Regina v. Griffin*, [2009] S.C.J. No. 28; (2009), 244 C.C.C. (3d) 289 (S.C.C.), at para. 33, Charron J. confirmed the common law with respect to jury instruction relative to the application of circumstantial evidence in a criminal proceeding, by stating as follows:

We have long departed from any legal requirement for a ‘special instruction’ on circumstantial evidence, even where the issue is one of identification: *R. v. Cooper*, [1978] 1 S.C.R. 860 (S.C.C.). The essential component of an instruction on circumstantial evidence is to instil in the jury that in order to convict, they must be satisfied beyond a reasonable doubt that the only rational inference that can be drawn from the circumstantial evidence is that the accused is guilty. ...

[71] In his textbook titled *Watt's Manual of Criminal Evidence, 2012*, (2012, Thomson Reuters Canada Limited), at page 45 therein, The Honourable Mr. Justice David Watt set forth the general principles pertaining to circumstantial evidence, in part, as follows:

Circumstantial Evidence

§9.01 – General Principles

Commentary

Circumstantial evidence is any item of evidence, testimonial or real, other than the testimony of an eyewitness to the material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue. It is for the trial judge to determine whether circumstantial evidence is relevant.

Where evidence is circumstantial, it is critical to distinguish between inference and speculation. *Inference* is a deduction of fact that may be logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. There can be *no* inference without objective facts that a party seeks to establish. If there are *no* positive proven facts from which an inference may be drawn, there can be no inference, only impermissible speculation and conjecture.

...

[72] Furthermore, at page 107 of his said textbook, Mr. Justice Watt stated that an inference is “a conclusion that *may* not must be drawn in the circumstances”. He went on to advise that an inference “does *not* change the allocation of the burden of proof, nor alter the standard of proof to be met by any party”.

[73] In the Supreme Court of Canada decision in *Regina v. Lifchus*, [1997] 3 S.C.R. 320 (S.C.C.), Cory J. fashioned a “model of instruction”, which could be used by either a jury or a judge sitting without a jury. In that “suggested” jury charge, Mr. Justice Cory defined the expression “beyond a reasonable doubt”, 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 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 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.

[74] 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”.

[75] I have found as a fact that the “black device” which the defendant was holding in his left hand to his left ear at the material time, was a cell phone. In reaching this decision, I have drawn a reasonable inference from the totality of the circumstantial evidence before me as derived from the credible and uncontradicted testimony of Constable Deneault, relative to his observations of the defendant at the relevant time.

[76] My deduction that the subject device was a cell phone is based upon a combination of the following facts, which were established through Constable Deneault’s direct evidence:

1. that at the relevant time, the officer observed the defendant with a black-coloured device in his left hand, which he was holding to his left ear;
2. that at that time, it appeared to the officer that the defendant was talking to the device, as the defendant’s lips were moving;
3. that at that time, the officer observed a black-coloured electrical cord running from the device downwards towards the dash area of the subject motor vehicle; and
4. that at that time, the officer observed that the defendant, who was driving the subject motor vehicle, was the only occupant of the vehicle.

It is therefore, reasonable to conclude that the facts established by Constable Deneault’s eye-witness account of the subject incident, considered as a whole, logically support an inference that the observed “black device”, was a cell phone.

[77] In order to find that the circumstantial evidence establishes this element of the *actus reus* of the subject offence, beyond a reasonable doubt, I must ask myself whether the inference which I have drawn is the *only rational* inference which could be drawn from the circumstantial evidence.

[78] In applying reason and common sense to the aforesaid proven group of facts, it is, in my view, logical to infer that a device which is being held by a driver of a motor vehicle to his/her ear while he/she is in talking into it and which is connected to an electrical cord running down toward the dashboard of the vehicle, in circumstances where the driver is the only occupant of the vehicle, is a cell phone. Is that conclusion, however, the only rational one which may be made? I find that it is the only reasonable deduction which may be made in the circumstances.

[79] It is quite apparent that the defendant was, at the material time, utilizing the device to engage in a telephone conversation with a third party. The defendant’s actions in holding this device to his ear while talking into it are typical actions performed regularly by cell phone users. This observation is based upon ordinary human experience and common

sense. To attempt to draw any other inference relative to the nature of the object or device in question would require me to embark on an exercise of impermissible speculation and/or conjecture.

[80] There is no evidence before me to find that the subject black-coloured device was a “prescribed device capable of receiving or transmitting telephone communications, electronic data, mail or text messages”. In fact I am convinced that the circumstantial evidence in this proceeding supports only one reasonable inference; that at the material time the defendant was holding and using a cell phone. As stated above, I am able to take judicial notice that a cell phone is “a hand-held wireless communication device”, as described in subsection 78.1(1) of the Act.

[81] For the foregoing reasons, I am persuaded that the prosecution has met its onus of proving all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt. I accept the evidence of Constable Deneault in this proceeding as being credible and trustworthy. Furthermore, the officer’s evidence is uncontradicted. Accordingly, based upon that evidence, I am convinced beyond a reasonable doubt of the guilt of the defendant of the subject charge.

[82] While I acknowledge that the prosecution has not proved the *actus reus* of the offence to an absolute certainty, given the paucity of evidence as to the make, model or type of cell phone held and/or used by the defendant at the relevant time, I am, however, satisfied that the combination of the direct and circumstantial evidence before me has established the defendant’s guilt to a standard significantly higher than that of a likelihood or a probability; one which lies much closer to proof to an absolute certainty than proof on a balance of probabilities.

THE DECISION

[83] The prosecution has discharged its burden of proving all of the essential elements of the *actus reus* of the subject offence against the defendant, beyond a reasonable doubt. Accordingly, the fault element of negligence is presumed and automatically imported into the offence.

[84] There is no evidence before me which shows that in committing the prohibited act herein, the defendant acted with due diligence. He is not therefore, excused of liability for the offence.

[85] The defendant is therefore found guilty of the offence of “drive motor vehicle while operating a handheld communication device”, contrary to section 78.1(1) of the Act and a conviction is registered.

Released: September 6th, 2012

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