

ONTARIO COURT OF JUSTICE

**Central West Region
Brampton Ontario**

B E T W E E N :

HER MAJESTY THE QUEEN

-and-

EUGENIO RUSSO

REASONS FOR JUDGMENT

Duncan J.

1. The defendant was charged with an offence under section 78.1(1) of the *HTA*, commonly referred to driving while using a cell phone. He was convicted following trial and now appeals that conviction.
2. A police officer testified that he saw the defendant holding a cell phone to his ear while driving. The defendant denied that he was holding a phone and pointed out that he had Bluetooth connection in his car and there would be no reason for him to handle his phone. He further explained that at the relevant time he was holding up a picture for his child in the back seat to see, the suggestion being that the officer mistook the picture for a phone.

3. In conviction the learned trial Justice twice referred to the distinction between doubt and reasonable doubt, citing the well-known *Lifchus* decision from the Supreme Court of Canada. She said:

The issue is, was Mr Russo holding a cellphone or not. I would have to correct Mr Walpole, it is not doubt created in my mind, it is reasonable doubt. It is doubt based on reason. R v Lifchus is a Supreme Court of Canada case that defines what reasonable doubt is. I am very familiar with that case. I am sure that Mr. Walpole is and madam Crown as well. It is not just any doubt, it is doubt based on reason.

.....

I am accepting the evidence of the officer in this case. I am considering that there is no reasonable doubt. There may be doubt, but it is not reasonable doubt as defined by Lifchus.....

4. The distinction made by the Supreme Court in *Lifchus* was between a reasonable doubt based on reason and common sense and a doubt based on sympathy, prejudice, imagination or frivolity rather than evidence or lack of evidence: see Para 39. Also see more recently *R v Villaroman 2016 SCJ No 33*.
5. With respect, it is my view that the distinction had no application to the circumstances of this case where the issue was one of credibility between two differing, first-hand versions of what occurred. There was nothing unreasonable or nonsensical in either version; sympathy and prejudice could play no role; there was no requirement to draw inference or latitude to engage in speculation. Any doubt held by the trier of fact in such circumstances would necessarily have to be a reasonable doubt as defined in *Lifchus*.

6. While there may be some ambiguity, I view the underlined passage above as an acknowledgement that the trial Justice had a doubt. For the reasons given, that doubt must have been reasonable. The defendant accordingly should have been acquitted.
7. The appeal is allowed. An acquittal is entered.

September 15 2016



B Duncan J