

ONTARIO COURT OF JUSTICE

B E T W E E N :

Her Majesty The Queen

— AND —

Rui Silva

Before Justice of the Peace Kenneth W. Dechert
Heard on November 4, 2009
Reasons for Judgment released on March 31, 2010
Provincial Offences Court – Burlington, Ontario

C. Gelbard **for the prosecution**
F. Alfano **representative for the defendant**

Statutes, Regulations and Rules Cited:

Highway Traffic Act, R.S.O. 1990, c. H.8, as amended, sections 1(1), 172(1), 172(20)(c), 172(22).

Ont. Reg. 455/07, as amended, made under the *Highway Traffic Act*, *supra*. paragraph 3(1).

Cases Cited:

Regina v. Ancio, [1984] S.C.J. No. 12, [1984] 1 S.C.R. 225 (S.C.C.);

Regina v. Beatty, [2008] S.C.J. No. 5, [2008] 1 S.C.R. 49 (S.C.C.);

Regina v. Chartrand, [1994] S.C.J. No. 67, [1994] 2 S.C.R. 864 (S.C.C.);

Regina v. Kanda, (2008), 88 O.R. (3d) 732 (Ont. C.A.);

Regina v. Keegstra, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.);

Regina v. Kurtzman, (1991), 4 O.R. (3d) 417 (Ont. C.A.);

Regina v. Raham, 2010 ONCA 206 (Ont. C.A.);

Regina v. Sault Ste. Marie (City), [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C.);

Regina v. W.(D.), [1991] 1 S.C.R. 742 (S.C.C.).

Publications Cited:

Manning, Q.C., Morris and Sankoff, Peter, *Manning, Mewett and Sankoff - Criminal Law, Fourth Edition*: LexisNexis Canada Inc. 2009.

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

INTRODUCTION

[1] The defendant, Rui Silva, stands charged, by means of an information, that he on or about the 9th day of October, 2008, at the City of Burlington, “did drive a motor vehicle on North Service Road and did commit the offence of stunt driving, to wit: by driving a motorcycle with only one wheel in contact with the ground”, contrary to section 172(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8, as amended.

[2] On November 4th, 2009, the defendant, through his representative, entered a plea of not guilty to the subject charge and a trial then ensued before me. Upon completion of the trial on that date, the matter was adjourned to March 31st, 2010 for my judgment.

[3] During the trial, the prosecution was represented by Mr. C. Gelbard and the defendant was represented by Mr. F. Alfano.

RELEVANT STATUTORY PROVISIONS

[4] The defendant is charged with the offence of stunt driving, contrary to subsection 172(1) of the *Highway Traffic Act*, *supra*. (“H.T.A.”). That subsection reads as follows:

- (1) No person shall drive a motor vehicle on a highway in a race or contest, while performing a stunt or on a bet or wager.

[5] Additionally, the following subsections of section 172 of the H.T.A. are relevant to this proceeding:

- (20) The Lieutenant Governor in Council may make regulations,

...

- (c) defining the terms “race”, “contest” and “stunt” for the purposes of this section;

...

- (22) In this section and in section 172.1,

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

[6] The following definitions set out in subsection 1(1) of the H.T.A., which are applicable throughout the Act, are relevant to this proceeding:

‘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; ...

‘motor vehicle’ includes an automobile, motorcycle, 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 vehicles running only upon rails, or a motorized snow vehicle, traction engine, farm tractor, self-propelled implement of husbandry or road-building machine within the meaning of this Act;

‘motorcycle’ means a self-propelled vehicle having a seat or saddle for the use of the driver and designed to travel on not more than three wheels in contact with the ground, and includes a motor-scooter, but does not include a motor assisted bicycle.

[7] The word “stunt” for purposes of section 172, is defined in section 3 of *Ont. Reg. 455/07*, as amended, made under the H.T.A. (the “Regulation”). The definition of that word which is relevant to the subject charge, is set out in paragraph 3(1) of the Regulation, as follows:

3. For the purposes of section 172 of the Act, “stunt” includes any activity where one or more persons engage in any of the following driving behaviours:

1. Driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, including driving a motorcycle with only one wheel in contact with the ground, but not including the use of lift axles on commercial motor vehicles. ...

THE CLASSIFICATION OF THE SUBJECT OFFENCE

[8] The subject offence under subsection 172(1) of the H.T.A., as defined by paragraph 3(1) of the Regulation, is a regulatory offence. Accordingly, in determining the appropriate classification for the subject offence, one must apply the common law relative to the categorization of offences enunciated by the Supreme Court of Canada in the seminal case of *Regina v. Sault Ste. Marie (City)*, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 (S.C.C.). In the said case, Dickson J. (as he then was), writing on behalf of the Court, determined that offences should be divided into three categories; offences in which *mens rea* must be proved by the prosecution, strict liability offences and absolute liability offences.

[9] In establishing those categories, Dickson J. stated as follows:

...

I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:

1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
2. Offences 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. This involves a consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in *Hickey's* case.

3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.

Offences which are criminal in the true sense fall in the first category. Public welfare 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., writing on behalf of the Court, stated that “on the authority of *Sault Ste. Marie*,” the rules of the road offences contained in Part X of the H.T.A., including section 172 thereof, are *prima facie* strict liability offences. In support of this proposition, he wrote as follows:

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.).
...

[11] It is noted that in paragraph 3(1) of the Regulation, the word “stunt” is, in part, defined to include the behaviour of driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, including driving a motorcycle with only one wheel in contact with the ground. This definition represents the gravamen of the subject charge against the defendant; one of a number of ways that a person may perform a stunt, while driving a motor vehicle on a highway, as set out in section 3 of the Regulation.

[12] While I acknowledge the *dicta* of the Ontario Court of Appeal, in *Raham*, *supra*. that offences under section 172 of the H.T.A. are *prima facie* offences of strict liability, I am of the view that the offence created by the operation of paragraph 3(1) of the Regulation, that of stunt driving, to wit: driving a motorcycle with only one wheel in contact with the ground, is properly categorized as a public welfare offence where the prosecution is required to prove *mens rea*.

[13] As stated above, public welfare offences, such as those created by the H.T.A. are presumptively offences of strict liability. However, the text of paragraph 3(1) of the Regulation contains the phrase “driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway”. The use of the word “intention” in that phrase signifies the intention of The Lieutenant Governor in Council to impose a burden on the prosecution to establish the element of *mens rea* beyond a reasonable doubt, in order to secure a conviction for the subject stunt driving offence. The presumption of strict liability is therefore rebutted.

[14] In reaching this conclusion, I have followed the declaration of Dickson J. in *Sault Ste. Marie, supra.*, that public welfare offences are classified as *mens rea* offences only “if such words as ‘wilfully’, ‘with intent’, ‘knowingly’ or ‘intentionally’ are contained in the statutory provision creating the offence”. The phrase in paragraph 3(1) of the Regulation “a manner that indicates an intention”, is sufficiently similar to the words “with intent” and “intentionally” so as to properly characterize the “stunt driving” offence established by paragraph 3(1) of the Regulation as an offence in which the element of *mens rea* or “guilty mind” must be proven by the prosecution.

[15] The subject offence is therefore classified as a *mens rea* regulatory offence.

THE EVIDENCE

[16] During the trial, I received *viva voce* evidence from Police Constable David Gruber, tendered on behalf of the prosecution and from the defendant, on his own behalf.

(i) The Testimony of Police Constable David Gruber

[17] Constable Gruber testified that he was a member of the Ontario Provincial Police and had been employed with that police force for two and one-half years.

[18] He testified that on the 9th day of October, 2008, he was assisting with an incident which had taken place on Highway 403 westbound, just east of Waterdown Road, in the City of Burlington, in the Region of Halton. He advised that at 5:50 p.m., he was standing outside of his police cruiser on Highway 403, when he heard “an r.p.m. increase” or a “revving of a motorcycle engine”, coming from the area of North Service Road, in the City of Burlington.

[19] The officer testified that at that time he turned and observed a “black motor vehicle, that being a motorcycle, eastbound on North Service Road”. He stated that his view of North Service Road, from where he was standing was unobstructed and he estimated that the said road was located approximately fifty feet from where he was standing.

[20] Constable Gruber testified that upon observing the motorcycle, he noted that it appeared to be accelerating as it travelled in an easterly direction on North Service Road from Waterdown Road. The Constable stated that at that time, he noticed that the “front wheel of the motorcycle was approximately two feet in the air, that being the bottom of the wheel was approximately two feet from the paved roadway”. He advised that he heard the

engine of the motorcycle “revving loudly”, and noted that it travelled in an easterly direction on North Service Road with only one wheel in contact with the ground, for a distance of approximately 30 feet. He indicated that the front wheel of the motorcycle was in the air for “several seconds”.

[21] Constable Gruber testified that once the front wheel of the motorcycle returned to the ground, the motorcycle accelerated and continued to travel in an easterly direction on North Service Road “at a visual high rate of speed”. He estimated that at this time the motorcycle was travelling at a rate of speed of 80 kilometres per hour.

[22] Constable Gruber testified that he noted that the driver of the motorcycle was wearing a black jacket with “distinctive yellow stripes” as well as dark pants. He advised that he then entered his vehicle and proceeded to exit Highway 403 at Waterdown Road for purposes of pursuing the motorcycle on North Service Road. He stated that he lost sight of the motorcycle for approximately seven seconds as he turned his vehicle around for purposes of exiting Highway 403. He went on to state that he was able to regain visual contact with the subject motor cycle once he reached North Service Road.

[23] Constable Gruber testified that he then began to travel in an easterly direction on North Service Road. He noted that at that time there were two other motor vehicles between him and the subject motorcycle and that the motorcycle began to slow down due to heavy traffic in the area.

[24] Constable Gruber testified that he observed the motorcycle turn left onto King Road, at which time he initiated a traffic stop of the vehicle.

[25] The officer described the subject motorcycle as a black “Triumph”. He stated that the driver of the motorcycle then identified himself with an Ontario photo driver’s licence as Rui Silva, with a date of birth of November 15th, 1980 and an address in Hamilton, Ontario.

[26] At that point in the officer’s testimony the defendant’s representative, Mr. Alfano stated that the defendant was prepared to admit the issue of identity.

[27] Constable Gruber testified that at the time of the traffic stop, he had a brief conversation with the driver of the motorcycle noting that the driver “offered an excuse” at that time. The officer stated that he then laid the subject charge of stunt driving, providing the driver with a Part III summons for the offence.

[28] Constable Gruber then advised the Court of the “excuse” made by the driver. The officer stated that when he informed the driver of the reason for the traffic stop, the driver responded “Yeah, my clutch stuck”.

[29] In response to further questions posed by the prosecutor, Constable Gruber testified that at the relevant time, his attention was initially drawn to the area of North Service Road, when he heard the revving of a motorcycle engine. In that regard, Constable Gruber stated as follows:

It was the – initially the sound which drew my attention to North Service Road and then I observed this motorcycle just coming from Waterdown Road on North Service Road eastbound and then he proceeded with the wheel in the air manoeuvre.

The officer went on to state that there were no other motorcycles on the subject roadway at that time.

[30] When asked by the prosecutor, how he was sure that the vehicle he followed after regaining visual contact was the same motorcycle that he saw travelling in an easterly direction on North Service Road with one wheel in the air, the officer testified as follows:

It was the - the motorcycle was the same colour, same description that I saw, specifically with the jacket – with the black jacket which had yellow stripes on the back, and between the point where I regained visual contact with the motor vehicle from the point where I lost contact with the motor vehicle, the only other access into that area, North Service Road, is from Waterdown Road, which I had visual contact with as I was turning onto Waterdown Road, and no other motorcycles turned onto North Service Road in that time.

[31] During cross-examination, Constable Gruber stated that he observed the subject motor vehicle travel on North Service Road for a distance of “under a hundred feet”, before he turned to get into his car. He advised that he followed the motorcycle for a distance of approximately two kilometres before stopping it.

[32] During cross-examination, Constable Gruber acknowledged that at the time that he observed the motorcycle travelling with its front wheel in the air, it was not travelling at a speed of approximately 80 kilometres per hour. In this regard, he advised that his previous testimony that the motorcycle was travelling at a rate of speed of approximately 80 kilometres per hour was relative to its speed after its front wheel had returned to the ground. He clarified his evidence in this regard, acknowledging that at the time that he observed the motorcycle travelling with its front wheel in the air it was travelling at a “much slower speed”.

[33] During cross-examination, Constable Gruber stated that upon stopping the subject motorcycle, the driver of the vehicle produced to him a class “G” driver’s licence with a “M1” endorsement, noting that the endorsement was approximately one week old at the time. The officer agreed with Mr. Alfano’s suggestion that a “M1” licence is a “learner’s licence for motorcyclists”.

[34] During re-examination, Constable Gruber reiterated his testimony during cross-examination that he stopped the subject motorcycle approximately two kilometres from the location where he first observed it travelling on North Service Road. In explaining why it took so long to conduct the traffic stop, Constable Gruber noted that traffic on North Service Road was “very heavy” at the time, moving at a rate of speed of between 20 and 40 kilometres per hour. He noted that in light of the volume of traffic he was unable to find a safe location to conduct the traffic stop, for a distance of two kilometres.

(ii) The Testimony of the Defendant

[35] During examination-in-chief, the defendant Rui Silva testified that on October 9th, 2008, at approximately 5:50 p.m., he was driving his motorcycle in the area of Waterdown Road and North Service Road. He stated that at the relevant time he was “going down Waterdown Road” and was in the process of turning right onto North Service Road. The defendant advised that as he turned right onto North Service Road, a car was approaching him from the other side of Waterdown Road.

[36] The defendant testified that while he was attempting to shift gears on the motorcycle from first gear to second gear, he tried to increase its speed. He stated that in attempting to accelerate the motorcycle while executing the turn, the engine of the motorcycle revved because its gear mechanism “stayed in neutral”.

[37] He testified that while he was attempting to shift from first to second gear, he failed to properly execute the gear shift manoeuvre with his right foot. He advised that he failed to bring his foot “all the way up into second gear” and accordingly the gear remained in the neutral position. He stated that when the motorcycle did not move into the second gear as anticipated, but remained in neutral, the motorcycle failed to accelerate when its engine was revved.

[38] The defendant then testified that at that moment the car which had been approaching him from the other side of Waterdown Road was behind him. He stated that as he was an inexperienced motorcycle driver, “he was worried about what was going to happen”. He advised that he then revved “the bike” in an effort to move away from the car behind him. He went on to advise that at that moment he was able to successfully move the gear mechanism into second gear, such that when he “let go of the clutch”, the front tire of the motorcycle “came up”.

[39] The defendant testified that as soon as the front tire came up, he “brought the clutch back in” such that the motorcycle lost speed and its front tire returned to the ground.

[40] The defendant testified that following the said incident, he continued to drive his motorcycle along North Service Road toward King Road. He advised that as he was in the process of turning onto King Road, the officer stopped him.

[41] The defendant testified that at the material time, he held a “M1 licence”, being a motorcycle “learner’s permit” as he was in the process of learning how to drive his motorcycle. He stated that as a holder of a “M1 licence” he was not permitted to drive his motorcycle with a passenger nor was he permitted to drive the motorcycle at night.

[42] The defendant testified that from the time that he purchased the motorcycle until the time of the subject incident, he had driven the motorcycle a distance of approximately 200 to 300 kilometres. He stated that he did not intend to cause the front wheel of the motorcycle to move up from the surface of the road. He advised that he had not experienced a similar incident at any time either before or after the subject incident.

[43] He testified that at the time that the front tire came up off the roadway, he estimated that he was driving his motorcycle at a rate of speed of 50 or 60 kilometres per hour.

[44] During cross-examination, the defendant testified that the motorcycle that he was driving at the material time was the first motorcycle he had ever owned or driven. He estimated that at the material time he had owned the motorcycle for a period of two or three months.

[45] During cross-examination, the defendant explained how the front wheel of his motorcycle unexpectedly lifted off the surface of the road, as follows:

...When you're in neutral position and you rev the bike to, to accelerate and it's not in gear, the bike revs but it doesn't go anywhere. So when, when the bike is still revved, because when you – it's hard to explain. The clutch – when, when you release the clutch and it's revved up and it's in gear at the same time, the bike will accelerate very suddenly and at that – when it accelerates that fast, the front tire comes up because it's a light weight vehicle. It's just like if you're, if you're in a rear wheel drive car and you're in neutral and you're revving the car and you put it into gear, the momentum would bring the front tire up.

[46] In response to Mr. Gelbard's suggestion that the momentum would "shoot you forward" rather than bring the front tire up, the defendant disagreed stating that while the momentum caused the motorcycle to shoot forward, his weight shifted to the back of the motorcycle, and consequently the front tire rose. The defendant testified that at the material time, the front tire of his motorcycle was up off the ground for "moments", stating as follows:

As soon as I realized what was happening, I brought the clutch back in and as soon as that happens, the clutch releases the gear and your bike slows down. So as soon as your bike slows down, the momentum shifts back to centre and your front tire comes back down.

[47] During cross-examination, the defendant stated that he may have travelled thirty feet while the front tire of his motorcycle was up off of the surface of the road, although he was uncertain as to the distance.

[48] The defendant stated that once the wheel of the motorcycle came down to the surface of the roadway, he let go of the clutch and continued to travel on North Service Road. He disagreed with the allegation that he accelerated his motorcycle once its front tire came down and made contact with the ground, stating that at that time he was in heavy traffic and was unable to accelerate his vehicle. He specifically disagreed with Constable Gruber's evidence that at the time that the front-tire of the motorcycle returned to the ground there was no traffic around him. He disagreed with the officer's assertion that the heavy traffic on North Service Road was located in an area further to the east of the intersection of North Service Road and Waterdown Road.

[49] The defendant testified that his motorcycle was a lightweight "sport bike", which weighed approximately 400 pounds.

[50] The defendant acknowledged that at the relevant time he was revving the engine of the motorcycle prior to the moment that its front wheel lifted up off the surface of the highway. In explaining why he was revving the engine at this time, the defendant stated as follows:

The reason the engine was being revved was because it was in neutral and I believed that it was in second gear. If you have your car in neutral and you rev, you rev your – you push your gas pedal, what happens? The engine revs but you don't go anywhere. It's the same, it's the same thing on a bike.

[51] The defendant explained that at the time that he was revving his engine, he was already in first gear and was attempting to shift the transmission of the motorcycle into second gear. He testified that when he moved the gear from first into neutral, the motorcycle did not stop but was coasting. He stated that as he was attempting to shift from first gear into second gear, he was revving the engine to allow him to accelerate to the level of the normal speed of traffic. He testified, however, that he failed to shift directly from first to second gear. He went on to state that the vehicle's transmission momentarily remained in neutral, such that when he "brought it into second gear", the "bike was still revved" and the front tire came up when he "let go of the clutch".

[52] The defendant admitted that at the relevant time, the front wheel of his motorcycle lifted off the ground. He submitted that this incident was likely related to the fact that at the relevant time, he hadn't been trained in the operation of the subject motorcycle.

THE ISSUES

[53] As stated above, the offence of stunt driving by driving a motorcycle with only one wheel in contact with the ground, contrary to subsection 172(1) of the H.T.A. is a public welfare offence where the prosecution is required to prove *mens rea*. Accordingly, the burden of proof for this offence is similar to that required for criminal offences.

[54] Criminal offences are comprised of two essential elements; the *actus reus*, which refers to the prohibited act and the *mens rea* or the guilty mind. As stated by McLachlin C.J.C. in *Regina v. Beatty*, [2008] S.C.J. No. 5, [2008] 1 S.C.R. 49 (S.C.C.), "the theory upon which the criminal law is founded" is that "the *actus reus* and the *mens rea* of an offence represent two aspects of the criminal conduct". The Chief Justice went on to state that "the *actus reus* is the act and the *mens rea*, or guilty mind, the intention to commit that act".

[55] Accordingly, the ultimate issue in this proceeding is whether the prosecution has proved both the *actus reus* and the *mens rea* of the subject offence to the standard of proof beyond a reasonable doubt.

[56] For purposes of the stunt driving charge particularized in paragraph 3(1) of the Regulation, the *actus reus* of the offence is the driving of a motorcycle on a highway, with only one wheel in contact with the ground. The undisputed evidence clearly establishes that on October 9th, 2008, the defendant, Rui Silva, was driving a motor vehicle, being a motorcycle, on a highway (North Service Road), in the City of Burlington, when only one

wheel of the motorcycle was in contact with the ground. I am therefore satisfied that the prosecution has met its burden of proving all of the elements of the *actus reus* of the subject offence, beyond a reasonable doubt.

[57] The remaining issue pertains to the element of *mens rea*. The burden of proof with respect to this element rests with the prosecution and never shifts to the defendant. The standard of proof pertaining to this element is that of proof beyond a reasonable doubt.

[58] The requirement to prove *mens rea* in respect of the subject offence is rooted in the wording of the first clause of paragraph 3(1) of the Regulation, which reads as follows:

Driving a motor vehicle in a manner that indicates an intention to lift some or all of its tires from the surface of the highway, ...

[59] As stated in the textbook, *Manning, Mewett and Sankoff - Criminal Law, Fourth Edition*, authored by Morris Manning Q.C. and Professor Peter Sankoff (LexisNexis Canada Inc., 2009) page 173, the term “intent” signifies only the highest form of mental consciousness. Accordingly, the use of the term “intention” in the subject regulatory provision is an indicator that concepts such as “objective considerations of reasonableness and subjective conditions like recklessness”, are excluded (*Regina v. Ancio* [1984] S.C.J. No. 12, [1984] 1 S.C.R. 225 (S.C.C.)).

[60] In the Supreme Court of Canada decisions in *Regina v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.) and *Regina v. Chartrand*, [1994] S.C.J. No. 67, [1994] 2 S.C.R. 864 (S.C.C.), the scope of the term “intention” was defined in the following manner: “one intends a consequence any time they either: (a) commit an act with the desire of bringing about the consequence, or (b) commit an act knowing that the consequence will be certain or virtually certain to occur as a result”, (*Manning, Mewett and Sankoff - Criminal Law, Fourth Edition, supra.*, page 164).

ANALYSIS

[61] The prosecution bears the onus of establishing, beyond a reasonable doubt, that the defendant’s driving behaviour at the material time was indicative of an intention to lift the front wheel of the motorcycle from the surface of the highway. In that regard, I must determine whether the conduct of the defendant in revving the engine of his motorcycle immediately prior to changing the gears of the vehicle, was an act committed with the desire of bringing about the consequence of the front wheel of the motorcycle rising off of the surface of the highway or was committed knowing that the lifting of the front wheel of the motorcycle off the highway was a certain or virtually certain consequence of the said act.

[62] In my view, the evidence of Constable Gruber is sufficient to establish on a *prima facie* basis, an inference that at the material time, the defendant drove his motorcycle in a manner consistent with a plan to lift the front wheel of his motorcycle off the surface of the highway. I am able to reach this conclusion based on the combination of Constable Gruber’s observations of the subject motorcycle travelling at a high rate of speed for a distance of approximately thirty feet, with its front wheel lifted up off of the surface of the roadway, and

his detection of a loud revving sound emanating from the vehicle's engine.

[63] On the other hand, I must remind myself that the legal burden of proof with respect to the issue of *mens rea* rests with the prosecution and that it never shifts to the defendant. There is conflicting evidence pertaining to the circumstances surrounding the few seconds when the defendant was operating his motorcycle with only one wheel in contact with the ground. These circumstances, together with the evidence pertaining to the defendant's lack of experience in the operation of a motorcycle at the subject time, are in my view determinative of the issue as to whether the defendant intended to drive his motorcycle with only one wheel in contact with the ground.

[64] The resolution of the issue of whether the prosecution has met its onus of proof pertaining to the *mens rea* element is, in my view, dependent on the assessment of the credibility of both witnesses in this proceeding. The concept of reasonable doubt applies to the sub-issue of the assessment of the credibility of the evidence. Furthermore, I must instruct myself that the determination of the defendant's guilt is not a simple credibility contest between the prosecution and defence witnesses.

[65] The principles set forth in *Regina v. W.(D.)*, [1991] 1 S.C.R. 742 (S.C.C.), are relevant to the issue of the assessment of the credibility of evidence. Those principles set out in paragraphs 26, 27 and 28 of the decision, read as follows:

...

It is clear that the trial judge erred in his recharge. It is incorrect to instruct a jury in a criminal case that, in order to render a verdict, they must decide whether they believe the defence evidence or the Crown's evidence. Putting this either/or proposition to the jury excludes the third alternative; namely, that the jury, without believing the accused, after considering the accused's evidence in the context of the evidence as a whole, may still have a reasonable doubt as to his guilt.

In a case where credibility is important, the trial judge must instruct the jury that the rule of reasonable doubt applies to that issue. The trial judge should instruct the jury that they need not firmly believe or disbelieve any witness or set of witnesses. Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole. ...

Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

If that formula were followed, the oft repeated error which appears in the recharge

in this case would be avoided. The requirement that the Crown prove the guilt of the accused beyond a reasonable doubt is fundamental in our system of criminal law. Every effort should be made to avoid mistakes in charging the jury on this basic principle.

...

[66] After carefully reviewing the *viva voce* evidence received by me in this proceeding, I am of the view that both witnesses delivered their testimony in a clear and detailed fashion. They were responsive in the delivery of their testimony and they did not attempt to embellish or exaggerate their respective versions of the relevant circumstances. Furthermore, the strength of their respective evidence was not significantly diminished through cross-examination. In my view, both Constable Gruber and the defendant presented as credible witnesses.

[67] In applying the *W.(D.)* principles, however, I must focus on the exculpatory evidence tendered by the defendant. During his testimony, the defendant stated that at the relevant time he did not operate his motorcycle in a manner so as to deliberately cause its front wheel to rise off of the surface of the road. While he acknowledged that the front wheel of the motorcycle did in fact lift off of the ground for a short distance when he began to accelerate the vehicle on North Service Road, he submitted that this phenomenon represented an unexpected consequence of his actions in driving the motorcycle at that time.

[68] The defendant testified that at the time of the subject incident he was in the process of learning how to operate his motorcycle, as he had just obtained his motorcycle learner's licence approximately one week earlier.

[69] Furthermore, the defendant advised that the circumstance of the front wheel of the motorcycle lifting off of the ground was directly attributable to his lack of skill in the operation of the vehicle at the time. He testified that he revved the engine of his motorcycle for the sole purpose of increasing its speed after he had completed a right turn manoeuvre and in order to allow him to safely move away from a vehicle which was directly behind him at the relevant time.

[70] In summary, the defendant testified that at the time of the subject incident he was an inexperienced motorcycle driver, who, due to his specific lack of experience in the operation of the gear shifting and acceleration mechanisms of the motorcycle inadvertently caused its front wheel to lift off of the surface of the roadway while it continued in motion.

[71] In my view the defendant's explanation of his actions in operating the motorcycle are certainly plausible and worthy of credit. While I find that I am not able to firmly believe the defendant's exculpatory evidence, when I consider his testimony in the context of the evidence as a whole, including the police officer's observations that the motorcycle travelled a very short distance with its front wheel in the air, I find that I am left in a state of reasonable doubt as to whether, at the material time, the defendant intentionally drove his motorcycle with only one of its wheels in contact with the ground.

[72] Accordingly in applying the second prong of the *W.(D.)* principles, I have a reasonable doubt as to the guilt of the defendant on the subject charge. In particular, the defendant's testimony has left me in a state of reasonable doubt as to whether he committed the *actus reus* of the offence with the requisite guilty mind.

[73] I am, therefore, of the view that the prosecution has failed to prove the element of the *mens rea*, relative to the *actus reus* of the subject offence, beyond a reasonable doubt.

THE DECISION

[74] In this proceeding, the prosecution has succeeded in proving that the defendant committed all of the elements of the *actus reus* of the subject offence of stunt driving, to the standard of proof beyond a reasonable doubt.

[75] Based on the application of the second prong of the *W.(D.)* principles, I have concluded that I am left in a state of reasonable doubt as to whether at the material time, the defendant intended to cause the front wheel of his motorcycle to rise up off of the surface of North Service Road. Accordingly, I am left in a state of reasonable doubt as to the guilt of the defendant on the subject charge.

[76] The prosecution has failed to prove the element of *mens rea* relative to the *actus reus* of the stunt driving offence, beyond a reasonable doubt. The defendant is therefore found not guilty of the subject charge and it is endorsed as being dismissed.

March 31, 2010

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