

ONTARIO COURT OF Justice
Central West Region

BETWEEN:

R.

-and-

Ricky Anthony Pizzacalla
Information Number 10-3426

Proceedings conducted 07 August, 2012, 11 October, 2012, and 05 December, 2012 at the City
of St. Catharines, Ontario

Decision and Reasons issued 30 January, 2013

Appearances:

N. Isak..... for the Crown
self..... for the defence

Statutes Considered or Cited:

Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25, as amended (hereinafter "CAIA")

Criminal Code of Canada, R.S.C., 1985, c. C-4, as amended

Highway Traffic Act R.S.O. 1990, c. H.8, as amended (hereinafter "HTA")

Insurance Act, R.S.O. 1990, c. I.8, as amended (hereinafter "Insurance Act")

Ontario Regulation 369/09

*Regulations Respecting Safety for Motor Vehicles and Motor Vehicle Components (C.R.C.,
c.1038)*

Provincial Offences Act R.S.O. 1990, c. P.33, as amended

Cases or Sources Considered or Cited:

Blacks Law Dictionary

*ING Insurance Company of Canada and Chubb Insurance Company of Canada, unreported
decision of Arbitrator Stanley C. Tessis, pursuant to the authority of the Insurance Act, below
(hereinafter "ING")*

Oxford Dictionaries. April 2010. Oxford University Press.

(<http://oxforddictionaries.com/definition/english/bicycle?q=bicycle>)

R. v. Freeman, unreported decision of Justice of the Peace Mary Shelly, St. Catharines Provincial
Offences Court, 27 September, 2011

R. v. Kulbacki, [2012] O.J. No. 4020

R. v. Mak, [2002] 1 S.C.R. 856

R. v. Pizzacalla [2012] O.J. No 2342 (Notice of Appeal filed)

R. v. Pizzacalla [2012], unreported decision of Justice of the Peace Macphail, St. Catharines
Provincial Offences Court, 28 May 2012 (Notice of Appeal filed)

R. v. Vanberlo, 2010 ONCA 1307

Rizzo & Rizzo Shoes Ltd. (Re) [1998] 1 S.C.R. 27

R. v. Stone, [1984] O.J. No. 912

R. v. Zachariou, [1999] O.J. No. 2488

Decision of the Court

1. For the reasons set out below, I am dismissing the charges against Ricky Pizzacalla.

Background

2. Ricky Pizzacalla is charged by way of a Part III Information, that on or about the 22nd day of February in the year 2010 at the City of St. Catharines in the Central West Region did commit the offence of being the owner of a motor vehicle, operate the said vehicle on Oakdale Avenue near Capner Street without the motor vehicle being insured under a contract of automobile insurance, contrary to Section 2, subsection (1), clause (a) of the Compulsory Automobile Insurance Act, and further
That Ricky Pizzacalla on or about the 22nd day of February in the year 2010 at the City of St. Catharines in the Central West Region did commit the offence of drive a motor vehicle on Oakdale Avenue near Capner Street and fail to have displayed on the vehicle, number plates showing the number of the permit issued for that vehicle, contrary to Section 7, subsection (1), clause (b), paragraph (i) of the Highway Traffic Act of Ontario.

3. The relevant statutory provisions are set out as follows:

Section 1 of the *HTA*, sets out the following definitions:

“**motor assisted bicycle**” means a bicycle,

- (a) that is fitted with pedals that are operable at all times to propel the bicycle,
- (b) that weighs not more than fifty-five kilograms,
- (c) that has no hand or foot operated clutch or gearbox driven by the motor and transferring power to the driven wheel,
- (d) that has an attached motor driven by electricity or having a piston displacement of not more than fifty cubic centimetres, and
- (e) that does not have sufficient power to enable the bicycle to attain a speed greater than 50 kilometres per hour on level ground within a distance of 2 kilometres from a standing start; (“cyclomoteur”)

“**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; (“véhicule automobile”)

“**power-assisted bicycle**” means a bicycle that,

- (a) is a power-assisted bicycle as defined in subsection 2 (1) of the *Motor Vehicle Safety Regulations made under the Motor Vehicle Safety Act (Canada)*,
- (b) bears a label affixed by the manufacturer in compliance with the definition referred to in clause (a),
- (c) has affixed to it pedals that are operable, and
- (d) is capable of being propelled solely by muscular power; (“bicyclette assistée”)

“**vehicle**” includes a motor vehicle, trailer, traction engine, farm tractor, road-building machine, bicycle and any vehicle drawn, propelled or driven by any kind of power, including muscular power, but does not include a motorized snow vehicle or a street car;

Section 7. (1) provides, *inter alia*, that

No person shall drive a motor vehicle on a highway unless,

- (a) there exists a currently validated permit for the vehicle;
- (b) there are displayed on the vehicle, in the prescribed manner, ...

Ontario Regulation 369/09 deals with “power-assisted bicycles”, and s.6, under the heading “No Modifications” reads:

6. A power-assisted bicycle must not be ridden on, driven or operated if it has been modified after its manufacture in any way that may result in increasing its power or its maximum speed beyond the limits set out in clause (d) of the definition of “power-assisted bicycle” in section 2 of the Motor Vehicle Safety Regulations made under the Motor Vehicle Safety Act (Canada). O. Reg. 369/09, s. 6.

Section 2(1) of the *CAIA* provides:

2. (1) Subject to the regulations, no owner or lessee of a motor vehicle shall,
- (a) operate the motor vehicle; or
 - (b) cause or permit the motor vehicle to be operated,
- on a highway unless the motor vehicle is insured under a contract of automobile insurance.

The *Insurance Act* contains the following:

In section 1, Definitions:

“**automobile**” includes a trolley bus and a self-propelled vehicle, and the trailers, accessories and equipment of automobiles, but does not include railway rolling stock that runs on rails, watercraft or aircraft; (“automobile”)

And likewise:

“**motor vehicle liability policy**” means a policy or part of a policy evidencing a contract insuring,

- (a) the owner or driver of an automobile, or
- (b) a person who is not the owner or driver thereof where the automobile is being used or operated by that person’s employee or agent or any other person on that person’s behalf,

against liability arising out of bodily injury to or the death of a person or loss or damage to property caused by an automobile or the use or operation thereof; (“police de responsabilité automobile”)

Section 224(1) provides:

224. (1) In this Part,
- “**automobile**” includes,
- (a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and
 - (b) a vehicle prescribed by regulation to be an automobile; (“automobile”)

In Section 2 of the *Regulations Respecting Safety for Motor Vehicles and Motor Vehicle Components*, the definition of a power-assisted bicycle is set out as follows:

“**power-assisted bicycle**” means a vehicle that:

- (a) has steering handlebars and is equipped with pedals,
- (b) is designed to travel on not more than three wheels in contact with the ground,
- (c) is capable of being propelled by muscular power,...

The *Criminal Code of Canada* defines a “motor vehicle” as follows:

“**motor vehicle**” means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment

Issues

4. The parties join in stating that the issue for the Court to consider is whether the vehicle operated by Mr. Pizzacalla on the date in question was a motor vehicle, for the purposes of the charges before the Court.
5. The approach to this question is vastly different as between the parties.

6. The Prosecution argues that “the lone contentious issue in this matter is whether or not a power-assisted bicycle being operated without its pedals affixed and solely via electric power, can be classified as a motor vehicle”
7. The Crown’s argument approaches the matter from the perspective that the burden for proving that the vehicle operated by Mr. Pizzacalla was a “power-assisted bicycle” and thereby exempted from the scope of the definition of a “motor vehicle” falls to the defendant, reminding the Court of the provision of s.47(3) of the *POA*, which reads:

The burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant, whether or not it is set out in the information.
8. In the Crown’s view, it does not fall to the prosecution to prove that the vehicle operated by Mr. Pizzacalla was a motor vehicle, but rather, it falls to Mr. Pizzacalla to prove that it is not a motor vehicle, on the theory that the *HTA* regulates operation of motor vehicles, and power –assisted bicycles are an exception to the type of vehicle that is scoped into the definition of a motor vehicle. By virtue of s.47(3) of the *POA*, the defendant, in the Crown’s view, bears the responsibility for proving that the vehicle operated by him fell within the definition of the exception.
9. In the Prosecution’s view, once it establishes that the pedals were removed from the “power-assisted bicycle” at the time it was being operated on a highway and observed, then it can no longer be sheltered within the definition of “power-assisted bicycle”, and, consequently, by operation of the *HTA*, falls within the scope of the definition of a “motor vehicle”. It is common ground between the parties that the pedals were removed at the relevant time.
10. In this context, the Crown prosecutor relies on *R. v. Freeman*, wherein Justice Shelley found

I am satisfied under the definitions provided under the *Highway Traffic Act* that when Mr. Freeman removed the pedals for his bike that it ceased to be a power assisted, something, we pedal, bike and it became a motor vehicle. It also ceased to be a motor assisted bike because the pedals were off.
Once it became a motor vehicle and it ceased to be a motor assisted or power assisted bike it is subject to the law with regard to motor vehicles.
11. Further, the Crown takes heart from the comments of Nadel, J. in *R. v. Pizzacalla*, in dealing with a charge against this same defendant under the *Criminal Code of Canada*. In that case, when making a finding with respect to whether the vehicle operated by Mr.

Pizzacalla on that day was a “motor vehicle” for the purposes of the *Criminal Code*.

Justice Nadel found:

15 ... Mr. Pizzacalla shelters under that definition and urges me to find that the item that he was using that day was merely a power-assisted bicycle and that even though the pedals were not affixed to it, in plural, there was at least one pedal affixed.

16 There are two problems with his submission. The first is that two pedals have to be affixed, or at least more than one, and the pedals that are affixed. That means actually attached at the time, not capable of being attached as Mr. Pizzacalla would ask me to find, and are operable.

17 In this case, there were no operable pedals on the device and accordingly, while in some circumstances, the item Mr. Pizzacalla was operating might come within the definition of power-assisted bicycle, the device was not, on that occasion, in the manner in which he used it, a power-assisted bicycle. Rather it was a motor vehicle as defined by the Criminal Code of Canada, namely a vehicle that is, “... drawn, propelled or driven by any means other than muscular power.”

12. The Crown argues that Mr. Pizzacalla has failed to prove that he was protected or sheltered under the excepted category of excluded device, since, on its face, it did not have pedals attached *at the relevant time*.
13. In response to inquires by the Court as to whether and if so how the French language version of the statute assists in interpreting the definition for “power-assisted bicycles”, the Prosecutor relies on the Oxford Dictionary definition of “bicycle” which reads:

a vehicle consisting of two wheels held in a frame one behind the other, propelled by pedals and steered with handlebars attached to the front wheel.

 Based on this definition, it is the Prosecutor’s argument that the vehicle was indeed not even a “bicycle”.
14. Mr. Pizzacalla relies on a combination of statutes and cases to assert that the vehicle is excluded from being considered a motor vehicle. To this end, he starts by relying on the exception set out in the definition of motor vehicle” under the *HTA*, which expressly excludes “power-assisted bicycles”.
15. He also relies on the current *Regulation* that deals with “power-assisted bicycles”, as well as its predecessor *Regulation*. He believes that the wording of s.6 of the current *Regulation* supports his proposition that removal of pedals is not a proscribed modification.
16. Further, he refers to the *ING* arbitration decision, the decision of the Ontario court of Appeal in *R. v. Vanberlo*, and the *Insurance Act*. Fundamentally, he relies on the principle enunciated in *Vanberlo* at paragraph 19, that reads

to be ‘converted for a specific use ...’ a vehicle must be changed significantly enough that, viewed objectively, its essential character or function has been transformed for that

specific use, although it may retain some limited capacity for other functions. The transformation cannot just be for general use in farming, it must be for a specific use.

17. It appears he is heartened in his belief by some of the words in the oral reasons of Macphail, J.P., which include, among other things, the following, at page 4, starting at line 11:

There was no evidence presented however that this power-assisted bicycle, as it was designed and with the features built into it, was not capable of being propelled solely by muscular power however.
18. Justice Macphail also considered the inclusion of definitions for both motor-assisted bicycles and power-assisted bicycles and determined that he must give weight to the absence of the phrase “at all times”, which is included in the definition for “motor-assisted bicycles” and requires that a “motor –assisted bicycle” have pedals at all times, and which modifier does not apply to a “power-assisted bicycle”.
19. Justice Macphail discussed the notion flowing from the Crown’s argument that a “defective or incomplete E-bike somehow becomes a motor vehicle, if used on a roadway under mechanical propulsion”.
20. In the end, he was not persuaded that, in the case before him, the law was drafted in such a way as to capture Mr. Pizzacalla in an offence-creating situation. Accordingly, he dismissed the charges against Mr. Pizzacalla.
21. Justice Macphail certainly attempted to discern the legislators’ intent when they incorporated the term power-assisted bicycle in the legislation, and made related enactments. I note, however, that neither HW Macphail nor I were assisted with any relevant statements from the legislative record to assist in our considerations.
22. In Mr. Pizzacalla’s view, and based on his review of the various pieces of legislation and Court decisions, he believed that, as long as the vehicle was classed as a power-assisted bicycle, he was free to operate it without registration or insurance.

Evidence

23. The facts are not materially in dispute. On 22 February, 2010, Cst. David Attwood, then of the Niagara Regional Police Service, observed a blue and white O2O2 Sports Cycle operating along the curb lane, northbound on Parkdale Avenue in the City of St. Catharines. Parkdale Avenue is described as roadway with two travel lanes in each direction.
24. Officer Attwood described the vehicle as looking like a scooter, encased in plastic, emitting no noise, appearing to be battery operated, and having no pedals. The roadway featured a slight downhill slope.

25. Officer Attwood followed the vehicle for a period of some fifteen to twenty seconds, and advised that the feet of the person riding upon the vehicle were not moving but positioned on a platform. There were no pedals to be seen during Cst. Attwood's observations. Apparently, no muscle power was involved in the movement of the vehicle.
26. Constable Attwood effected a traffic stop and requested documents for driver's licence, registration and insurance. He was met with a response that none were required, and, indeed, it would appear, none were provided. However, Cst. Attwood was able to access police computer records to satisfy himself as to the identity of the person who had been operating the vehicle. Based on a statement tendered in evidence with the concession of the defendant that his statement was voluntary, the Court understands that Mr. Pizzacalla had conducted extensive research into the questions of requirements for documents for driver's licence, registration and insurance, and it was his view that none are required for this vehicle. In Mr. Pizzacalla's evidence, it is clear that his view is that the vehicle is not a motor vehicle, falling within the category of vehicle described under the *HTA*, as a "power assisted bicycle".
27. Under cross examination, Cst. Attwood advised that Mr. Pizzacalla eventually produced the pedals for the vehicle – which had been stored under the seat of the vehicle - and affixed them prior to departing the location of the traffic stop.
28. Joe Mogenson gave evidence in support of Mr. Pizzacalla. Mr. Mogenson owns and operates Go Green E-Cycles in St. Catharines. He advised that he sells the type of vehicle operated by Mr. Pizzacalla, and confirmed that as long as the vehicle complies with Ministry of Transportation requirements, it does not require registration with the Ministry. He confirmed that the pedals on this vehicle are detachable, and they can equally be re-attached should the battery power source runs out.

Court's Analysis

29. This case is beset by a troubled history and context. It may well be that this troubled history simply reflects ambiguity in legislative drafting. Mr. Pizzacalla has been persistent in requiring the Crown prosecutor to prove numerous charges against him under both the *HTA* as well as the *Criminal Code of Canada*, as is his right. He has brought appeals when he has been convicted, successfully in the case of his prior conviction for these charges. Similarly, the Crown has pursued these matters with equal vigour, and has achieved a *Criminal Code of Canada* conviction against Mr. Pizzacalla. As indicated above, Mr. Pizzacalla also obtained a dismissal of similar charges brought against him, in the decision of Justice Macphail.

30. To start, I am mindful that neither the Crown prosecutor nor the defence made any representations as to the nature of the offences before the Court, that is, as to whether they are absolute or strict liability matters. Since my reasoning does not turn on this question in either case, I find it unnecessary to determine that question.
31. There was little, if any direct evidence as to the nature of the vehicle operated by Mr. Pizzacalla. Indeed, the Crown witnesses focussed more on what it could not do than what it could do.
32. Similarly, neither did Mr. Pizzacalla give any evidence with respect to the requirements set out in sub-paragraphs (a) or (b) of the statutory definition for “power-assisted bicycle”.
33. The evidence with respect to sub-paragraph (c) of the definition of a “power-assisted bicycle” was heartily contested, both in fact and submission. In respect of facts, it is clear that the charging officer was satisfied that the device could not be powered by muscular power *at the time of his investigation* but prior to the time the pedals were re-attached by the defendant. Similarly, Mr. Pizzacalla asserts that the vehicle was “capable of being propelled solely by muscular power”, once the pedals, which were readily available, were subsequently attached.
34. The parties took opposing views as to whether the vehicle was “capable of being propelled solely by muscular power”. On the one hand, at the time of the first observations, the pedals were not attached. By contrast, they were readily available and were in fact attached before the defendant left the area of the traffic stop.
35. Moving to the question of whether the definition of “power-assisted bicycle” and the related statutory provisions operate to establish an exception to the requirement for registration and insurance of motor vehicles, I begin my analysis by reference to *R. v. Vanberlo*, in which the Ontario Court of Appeal wrote
- 2 The appellant was convicted of offences that require the vehicle in question to be a “motor vehicle”, such as permitting the operation of motor vehicle on a highway without a permit. The definition of “motor vehicle” in the HTA excludes a “self-propelled implement of husbandry”. Thus, the appeal turns on whether Mr. Van Berlo’s vehicle comes within this exception, as a self-propelled implement of husbandry. If so, the parties agree that the appeal must succeed and the convictions must be set aside. If not, the appeal fails.

And further,

11 The HTA excludes a “self-propelled implement of husbandry” from the definition of “motor vehicle”. If the appellant’s vehicle is a self-propelled implement of husbandry it escapes the requirements placed on a motor vehicle by the HTA. Thus, the central issue in this appeal is how the statutory definition of “self-propelled instrument of husbandry” unpacks in the context of this case. To repeat, that definition is as follows:

“Self-propelled implement of husbandry” means a self-propelled vehicle manufactured, designed, redesigned, converted or reconstructed for a specific use in farming.

12 The proper approach to statutory interpretation was set out in the well-known words adopted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at para. 21:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

13 The interpretive task required in this case must therefore be informed by the broad objective of the HTA. Murray Segal has described its primary objective this way:

The Act has many purposes. It is first and foremost a collection of duties and obligations imposed on drivers in relation to the operation of vehicles, especially motor vehicles, to ensure the safety of motorists and others. See *Harris v. Yellow Cab Ltd.*, [1926] 3 D.L.R. 254 (Ont. C.A.).

14 It is important that the provision to be interpreted excludes a vehicle from the requirements that the HTA imposes on motor vehicles in order to achieve its objective. This suggests that a narrower interpretive approach to the exception is necessary to avoid undermining the broad purpose of the legislation: see Sullivan and Driedger on the Construction of Statutes, 4th ed., at pp. 396-397. Moreover, s. 47(3) of the Provincial Offences Act, R.S.O. 1990, c. P.33, puts the onus on the appellant as defendant to bring this vehicle within the exception.

36. As *R. v. Vanberlo* is entirely on point with the case before me with respect to the question of burden, I am of the view that I am bound by the finding of the Ontario Court of Appeal, and the burden falls to the defendant.

37. It is of note that earlier appellate decisions at a lower level took a different view. In *R. v. Stone* and *R. v. Zachariou*, the Courts reflected upon the purpose of s.47(3), and left open the possibility that in cases such as the one before this Court, a defendant may not be required to “prove the exception”, if knowledge of the material facts are available to the prosecution.

38. In *R. v. Zachariou*, the Court stated:

¶ 13 The rule that the Crown is required to prove every element of the offence charged is deeply rooted in the common law. However, the rule was never absolute. The common law recognized an exception for certain offences created by regulatory legislation, an exception which is now embodied in s. 47(3) of the POA, and s. 794 of the Criminal Code. The proper approach to the question of whether the exception applies was described by Lawton L.J. in *R. v. Edwards*, [1975] 1 Q.B. 27 (C.A.) at pp. 39-40:

It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with special qualifications or with the license or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely on the exception.

39. In *R. v. Stone*, the Court in *obiter* comments endorsed the reasoning set out as follows:
- ¶ 17 Laidlaw, J.A., in *Rex v. Roher* (1947) 89 C.C.C. 365 considered whether the burden of proof rested on the accused in certain cases. Having satisfied himself as to guilt of the accused he went on in the following vein at p. 374:
- "The burden of proof may be shifted by legislative interference, and certain exceptions to the general rule have been recognized by the common law. One of those exceptions is that "where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favour": Taylor on Evidence, 12th ed. vol. 1, s. 376. "This exception equally prevails in all civil or criminal proceedings instituted against parties for doing acts which they are not permitted to do unless duly qualified": *ibid.*, s. 377.
- In Archibold's Criminal Pleading, Evidence & Practice, 31st ed., p. 330, the present rule upon the subject of negative averments is stated as follows: "In cases where the subject of such averment relates to the prisoner personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the prisoner, as matter of defence; on the other hand, if the subject of the averment does not relate personally to the prisoner, or is not peculiarly within his knowledge or at least in as much within his knowledge as within the knowledge of the prisoner, the prosecutor must prove the negative."
40. There is nothing in the definition of motor vehicle as set out in the *HTA* that is "peculiarly within the knowledge" of the defendant, such that he should be required to prove the exception. Indeed, any evidence required to prove that the vehicle operated by Mr. Pizzacalla was a motor vehicle (or not) was available to be produced in evidence by the Crown through its witness(es), based on a complete investigation. In this case, it is clear that the operating presumption of the investigating officer was that, upon being satisfied that one of the characteristics required for the vehicle to be a "power-assisted bicycle" was missing, then there was no need to investigate further.
41. I am mindful that Justice Macphail took the view, set out in the concluding statements of his oral ruling, that "the proof of the motor vehicle is a necessary element of each of the offences remaining before the Court", and, finding that "There been no evidence presented to persuade the Court that it was a motor vehicle." On this basis, he declared "all charges are dismissed".
42. So, notwithstanding the decisions in *R. v. Stone* and *R. v. Zachariou*, the Court in *R. v. Vanberlo* directs that the burden falls to Mr. Pizzacalla to prove his vehicle was not a "motor vehicle".
43. Curiously, the Prosecutor may have rendered that easier than thought and argued, since the Prosecution's position acknowledges that the vehicle was a "power-assisted bicycle" that was "operating without pedals". This, arguably, disposes of the question of whether the vehicle was a "power-assisted bicycle". Having said that, it becomes problematic for the Prosecution to insist, then, that the defendant prove that the vehicle *remained* a "power-assisted bicycle" when the pedals were removed. It is not clear that the burden

of proving this point is properly an issue of proof of the exception, as framed by the Prosecution.

44. But, perhaps the question needs to be framed differently. The question might properly be framed as “when a ‘power-assisted bicycle’ is operated while missing some piece or part, does it then get taken outside the scope of the exception?”
45. I do not accept that the Oxford Dictionary definition of “bicycle” is helpful. I am aware of the direction of the Supreme Court in *Rizzo & Rizzo Shoes Ltd. (Re)*, however, I believe that the meaning of the terms “bicycle” and “power-assisted bicycle” can be discerned within the meaning of the relevant statutes themselves. However, given the common ground that the device was a “power-assisted bicycle”, and it was operating while missing a component, I believe that the decision in *R. V. Vanberlo* now comes back into play, as argued by Mr. Pizzacalla.
46. To mirror the principle set out in *R. V. Vanberlo* would be to ask, “does the change to the power-assisted bicycle (by removing the pedals), result in it being “changed significantly enough that, viewed objectively, its essential character or function has been transformed for that specific use, although it may retain some limited capacity for other functions?”
47. What changes or modifications were made? The pedals were removed and stored in the space available in the seat. They were immediately accessible and re-attachable, as they were designed.
48. Notwithstanding, my answer to the question would have to be no. Ontario *Regulation 369-09* gives support for this view. It prescribes that a “power-assisted bicycle” that has been modified in certain ways disentitles the rider from operating it. The primary concern of the legislators appears to be to prohibit changes that would allow the vehicle to go faster. There is no evidence that the change created by removing pedals (and keeping them close at hand and ready to be re-attached) makes the vehicle go any faster. In fact, logic would suggest that the vehicle might indeed go slower (subject to the physical capabilities of the rider), or have to stop completely if the power runs out. How does this give rise to any concern with regard to “the safety of motorists and others”, as considered by the Court in *R. v. Vanberlo*? There is certainly no evidence concerning this.
49. Based upon the *ratio decidendi* in *R. V. Vanberlo*, it is clear that a change to a vehicle must be substantial to establish a basis for finding that it has converted from one use to another. The corollary of this is that only with such a change does its status in law change.
50. Justice Nadel’s decision, dealing with a charge under the *Criminal Code* a portion of which is set out above, is persuasive and supports the Crown’s view of the case. However, it can be distinguished because he was deciding a charge pursuant to the *Criminal Code* and his comments with respect to the *HTA* would have been *obiter* in nature, and, as such, is not

binding on me. Notably, the definition of “motor vehicle” in the *Criminal Code of Canada* is far more expansive and does not contemplate an exception for “poser-assisted bicycle”.

51. While there is some merit to the argument that Justice Shelley’s decision reflects some intermingling of the terms “motor-assisted bicycle” and “power-assisted bicycle” as found in the *HTA*, I do accept that her decision assists me in determining whether – as in the circumstances of this case – a “power-assisted bicycle” with its pedals detached but available ceases to be a “power-assisted bicycle”. Her view is certainly persuasive but similarly neither binding on me nor determinative of the case before me.
52. In support of the Prosecutor’s view that a plain reading of the definition for “power-assisted bicycles” requires that the pedals be attached at the time it is being operated, it relies on the dictionary definition of the word “affix”.
53. In regard to that analysis, I acknowledge that there is a second definition in the *HTA*, “motor-assisted bicycle”, which, as HW Macphail determined, uses specific words to require that the pedals be affixed “at all times”, which wording is not found in the definition for “power-assisted bicycle”. Does this mean, as may be read from HW Macphail’s decision, that the pedals not being attached does not change the fundamental character of the vehicle, and that such a “defective or incomplete E-bike” does not become, by default, a motor vehicle?
54. To assist in determining the Legislator’s intent when adopting this legislation, I invited submissions with regard to the French language version of the statute, which uses the phrase “est équipée de pédales” which may suggest simply being equipped with, in sense of being provisioned with. The Prosecutor, in response to the Court’s inquiries, satisfies me that the differences between the English and French language versions of the statute do not in fact change the import of the legislation. There are numerous uses of the word “equipped with” in both the English and French language versions of the statute that indicate that the intent is for the equipment to be physically attached.
55. That said, there is nothing in the legislative provision that leads me to conclude that the Legislators’ intent was to create an offence resulting in a minimum fine of five thousand dollars when the vehicle is, to use HW Macphail’s words, “defective or incomplete”. I believe that a conclusion more in keeping with the direction in *R. v. Vanberlo* makes more sense.
56. Finally, in respect of the Prosecution’s argument that the vehicle was no longer “capable of being propelled solely by muscular power”, I would say this is analogous to saying that a pole vaulter without a pole is no longer “capable of pole vaulting”. There are numerous

other examples or analogies that I could fashion, however, I believe it is clear, particularly in the circumstances of this case, that the vehicle was “capable of being propelled solely by muscular power”, by simply re-attaching the pedals which were readily available. Removing those pedals does not diminish the capability of the vehicle to function as designed but for momentarily.

57. I am also mindful that Mr. Pizzacalla’s evidence could be read as going to a justification by way of officially induced error. Even though he did not expressly raise this argument, I believe I am obligated to give it consideration, particularly in view of the fact that Mr. Pizzacalla is a self-represented defendant.
58. In that regard, I am assisted by a decision of Justice Radley-Walters in *R. v. Kulbacki*, issued recently in the Ontario Court of Justice, in this case again dealing with *Criminal Code* charges. In that case, Justice Radley-Walters considered the defence of officially induced error as it relates to a power-assisted bicycle. Justice Radley-Walters reviews the four steps to considering whether a defence of officially induced error can apply. One of those steps involves an inquiry into whether the source of the information which led to an error was an appropriate official. Since the defence was not formally put before the Court, and, correspondingly, no effort was made to qualify Mr. Mogenson as an appropriate official who could have misled Mr. Pizzacalla as to the need for insurance and/or registration, I find that any defence in this nature could not have succeeded on the evidence before me.
59. I find that the defendant has established, on a balance of probabilities, that the vehicle he was operating on the date, time and location as alleged was a power-assisted bicycle (albeit defective or incomplete), and as such, falls within a class of vehicles excepted from the definition of “motor vehicle”, and, as such, was not required to be registered or insured. It qualifies as such since it was “equipped with pedals” and was “capable being propelled solely by muscular power”.

Issued at City of St. Catharines, Ontario, 30 January, 2013

Donald Dudar
Justice of the Peace

His Worship Donald Dudar
Justice of the Peace