

Judgments

Director of Public Prosecutions v Barreto

[2019] EWHC 2044 (Admin)

Queen's Bench Division (Divisional Court)

Thirlwall LJ and Goss J

31 July 2019

Criminal law – Driving offences – Using mobile telephone

Judgment

Mr Louis Mably QC (instructed by **the Crown Prosecution Service**) for the **Appellant**

Ms Jyoti Wood (instructed by **Patterson Law**) for the **Respondent**

JUDGMENT: APPROVED BY THE COURT FOR HANDING DOWN (SUBJECT TO EDITORIAL CORRECTIONS)

THIRLWALL LJ:

1. This is an appeal by way of case stated from a decision of the Crown Court sitting at Isleworth quashing the respondent's conviction for driving a motor vehicle while using a hand-held mobile telephone, contrary to Section 41D of the Road Traffic Act 1988 and Regulation 110 of the **Road Vehicles (Construction and Use) Regulations 1986**. The alleged offence took place on 19th August 2017. The respondent had been convicted after a trial in the Magistrates' Court on 20th July 2018. His appeal was allowed on 15th October 2018.

2. In summary: the respondent was seen filming an accident scene as he drove past it. He was using the camera on his mobile phone to do so. The question in this case is whether the filming constituted a breach of the regulations. It is the appellant's case that the regulation prohibits all use of a mobile phone while driving. It is the respondent's case that the regulations are directed only to the use of phones and other devices for the purposes of interactive communication.

3. The answer to this appeal lies in the interpretation of legislation in the terms that Parliament chose to enact it rather than as it might be assumed to be.

FACTS

4. On 19th August 2017 the respondent was driving his VW Caravelle along Field End Road in Ruislip. A serious accident had taken place. Motorists, including the respondent, were driving past slowly. A police officer observed the respondent holding his phone up to the driver's window for between 10 and 15 seconds. He stopped the respondent, at which point the phone was on his lap in video mode. He admitted what he had done and apologised. At his trial before the magistrates and on appeal he said he had passed the phone to his son and it was he who had filmed the scene. Digital footage taken from the camera was in evidence. In the event the Crown Court, like the Magistrates Court, disbelieved him and concluded that he had taken the film, as the police officer described.

5. At the hearing of the appeal the respondent's representative drew to the attention of the court a decision of the Crown Court in Harrow on an appeal against conviction for an offence under the same provisions in *R v Nader Eldarf* (21st and 23rd September 2018). In that case there was no dispute that the motorist, while driving, had been using his mobile phone to listen to music which was stored in the phone. In evidence he demonstrated how he changed the music tracks on his phone which he held in his hand, using his thumb. The issue was whether that conduct constituted using a mobile phone within the meaning of Regulation 110 and Section 41D. The court ruled that it did not because it did not involve any external communication. The Crown Court sitting at Isleworth adopted the same reasoning in this case and concluded that using a mobile phone to take a photograph or film did not amount to "using" a hand-held mobile telephone or device for the purposes of Section 41D of the Act and Regulation 110 of the regulations. Accordingly, the conviction was quashed.

6. Three questions were put before us by the Crown Court:

"1. Is using a hand-held mobile telephone or device for the purposes of Section 41D of the Act and Regulation 110 of the regulations restricted only to the use of an interactive communication function such as those set out in Regulation 110(6)(c) of the regulations?

2. Is holding a mobile telephone or device whilst driving, in order to take a photograph or a film, capable of amounting to using a hand-held mobile telephone or device for the purposes of Section 41D of the Act and Regulation 110 of the regulations?

3. Were we correct to conclude that the Respondent's conduct did not amount to "using" a hand-held mobile telephone or device for the purposes of Section 41D of the Act and Regulation 110 of the regulations?"

7. For the purposes of this appeal it is necessary only to answer questions 1 and 3.

The statutory framework

8. By operation of Section 41D of the Road Traffic Act 1988 and Regulation 110 of the **Road Vehicles Construction and Use Regulations 1986** it is an offence to drive a motor vehicle while using a hand-held mobile telephone. We are grateful to Mr Mably for his clear exposition of the history of the statutory scheme. The regulations were enacted pursuant to Section 41 of the Road Traffic Act 1972 which gave the Secretary of State power to make regulations as to the use and construction of motor vehicles. Section 42 of the Act made it a criminal offence to contravene a regulation made under Section 41.

9. Amendments made by the Road Safety Act 2006, which came into force on 27 February 2007, included Section 41D which created a specific offence relating to the contravention of the requirements of Regulation 110, itself introduced with effect from 1 December 2003.

10. Section 41D reads:

“A person who contravenes or fails to comply with a construction and use requirement

(b) as to not driving ...while using a hand-held mobile telephone or other hand-held interactive communication device ...

is guilty of an offence.”

11. The relevant part of Regulation 110 reads as follows:

“(1) No person shall drive a motor vehicle on a road if he is using –

(a) a hand-held mobile telephone; or

(b) a hand-held device of a kind specified in paragraph (4)

...

(4) A device referred to in paragraph ...(1)(b)... is a device, other than a two-way radio which performs an interactive communication function by transmitting and receiving data.

...

(6) For the purposes of this Regulation –

(a) a mobile telephone or other device is to be treated as hand-held if it is, or must be, held at some point during the course of making or receiving a call or performing any other interactive communication function;

...

(c) “interactive communication function”, includes the following:

(i) sending or receiving oral or written messages;

(ii) sending or receiving facsimile documents;

(iii) sending or receiving still or moving images; and

(iv) providing access to the internet...”

The Respondent's case

12. Ms Wood, on behalf of the respondent submits that on a true construction of Regulation 110 using a mobile telephone while driving is prohibited [only] if the device is held at some point *during the course of making or receiving a call or performing any other interactive communication function*. It follows that since the respondent was using a different type of function, namely filming, the Crown Court was correct to quash the conviction as the conduct did not fall within the scope of the offence charged.

13. She developed her submission thus:

1. It is arguable that paragraph 1(a) of the regulation is a prohibition on using mobile phones when performing their primary function of telephoning – a ban on using a device for communication, and not merely a blanket ban on any use of a mobile telephone.

2. Hand-held has two possible meanings:

a) something physically held in the hand; and

b) a piece of technology compact and portable enough to be able to be held and used in one or both hands – a description of a type of device.

3. The definition of a hand-held device in 110(1)(b) is provided in paragraph (4) of the regulations (see above).

4. Paragraph 1(b) applies only to hand-held communication devices, not to all hand-held electronic devices.

5. The effect of taking together 110(1) and 110(4) is, she submits, that no person shall drive a motor vehicle on a road if he is using a hand-held mobile telephone or hand-held device...which performs an interactive communication function by transmitting and receiving data. I understand the latter phrase to mean “which is performing an interactive communication...”

14. She further submits that subparagraph 110(6) (a) clarifies and qualifies paragraph (1) by specifying what to treat as “a hand-held mobile telephone” when considering whether use falls foul of paragraph (1).

15. Ms Wood points to and relies on the consultation decision letter of 24th June 2003 from the Department of Transport in respect of its consultation “Mobile Phones and Driving” which preceded the regulations. The passage relied on reads

“We now consider that a more practical approach would be to prohibit the type of activity rather than to try and define different devices. The offence will therefore apply to drivers speaking or listening to a phone call, using a device interactively for accessing any sort of data, which would include the Internet, sending or receiving text messages or other images if it is held in the driver's hand during at least part of the period of its operation.”

16. As to this latter point, although the regulations are imperfectly drafted, they are sufficiently clear for the court to be able to interpret them without external information. In any event whatever else was intended, it was not intended to prohibit drivers from “speaking or listening to a phone call” as the letter suggests. What may have been intended was to prohibit drivers “from conducting a conversation on a mobile phone while holding it.” Be that as it may, we are concerned with what found its way into the legislation, not things which did not.

The Crown Court decision

17. The Crown Court concluded that paragraph 6(a) of Regulation 110 defines, for the purposes of paragraph (1), the function that the mobile telephone must be used to perform (while driving) and while it is held in the hand, namely: “making or receiving a call or performing any other interactive communication function.” Only a use which falls within this definition is prohibited. Further, that the non-exhaustive list at paragraph

6(c) makes clear that an “interactive communication function” involves the external transmission of data to or from the telephone and not merely the operation of an internal function. That latter finding was necessary in light of a submission then being made on behalf of the CPS that a person using a mobile phone to play music was communicating with the phone. That misconceived approach was not pursued before us.

The Appellant's case

18. Mr Mably for the appellant submits that the Crown Court misconstrued Regulation 110 and the conclusion summarised above is wrong in law. Properly construed the regulation prohibits any use of a hand-held mobile telephone whilst driving, and it is not necessary for the prosecution to prove that the telephone was being used to make or receive a call or perform any other interactive communication function at the material time.

19. Applying the words of paragraph 1, without more, the respondent's conduct falls within the scope of the prohibition, he argues. He further submits that paragraph 6(a) is not concerned with imposing a qualification on paragraph (1) as to the function being performed at the time the mobile telephone is being used. It is a deeming provision, the purpose of which is to give the term “hand-held” a clear and extended meaning, not one which circumscribes or qualifies the meaning of “using”.

20. He further submits that the Crown Court's approach leads to an incoherent construction of the term “hand-held”. It would mean that a hand-held mobile telephone, held in a driver's hand while he uses it, is not to be considered hand-held unless it is receiving or transmitting data.

21. Finally, he submits that if the interpretation of the regulation reached by the Crown Court is correct it will mean that e.g. drafting emails (with the phone in the hand while driving) with the phone in flight safe mode (i.e. not immediately communicating) would not be a breach of the regulation because drafting an email would not be engaging in an interactive communication function.

22. We are grateful to both counsel for their clear, succinct submissions.

DISCUSSION

Mobile Phone

23. The regulations contain no definition of “mobile phone”. At the time they came into force an increasing number of motorists were holding them while driving to make and receive telephone calls and to send and receive texts. It was to that mischief that the regulations were directed.

24. Most mobile phones also had games functions but it is not apparent that there was at that time any concern about people playing games on their phones while driving. Only a very few phones had cameras and the ability to connect to the internet.

25. 16 years later hand-held mobile phones, whether held in the hand or operated hands-free, can perform multiple electronic functions, including taking photographs, making calculations, downloading and using multiple applications in addition to facilitating many forms of communication using wireless and other networks to connect to the internet. They can also be used to make and receive calls and to send and receive texts.

26. The Oxford English Dictionary definition of mobile phone is “a telephone with access to a cellular radio system so it can be used over a wide area without a physical connection to a network.” The definition of

“smartphone” is “a mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, internet access and an operating system capable of running downloaded apps.” In ordinary conversation the description mobile phone includes a smartphone, like the one used in this case.

27. There is no reason of construction to attribute to the words mobile phone in the regulation a meaning other than the one in every day use. Mobile phone includes smartphone.

Using

28. The respondent was holding his phone to film the accident scene as he drove past. It is current English usage to say “he used his phone to film it” or “he filmed it on his phone”. More precisely one might say that “he filmed it using the camera function in his phone”. Either way he was using his phone. The question for the court is whether this use of the phone comes within the scope of the regulation. To answer it requires an analysis of the statute and the regulation.

29. I begin with the primary legislation set out again for ease of reference: Section 41D reads

“A person who contravenes or fails to comply with a construction and use requirement

(b) as to not driving ...while using a hand-held mobile telephone or *other* hand-held interactive communication device ...

is guilty of an offence” (my italics).

30. The word “other” operates to equate a hand-held mobile phone with a hand-held interactive communication device (rather than any hand-held electronic device).

31. Regulation 110 sets out the construction and use requirement:

“(1) No person shall drive a motor vehicle on a road if he is using –

(a) a hand-held mobile telephone; or

(b) a hand-held device of a kind specified in paragraph (4)”

32. In specifying the kind of device use of which is prohibited by the regulation paragraph 4 uses the language of definition:

“(4) A device referred to in paragraph ... (1)(b)... is a device, other than a two-way radio which performs an interactive communication function by transmitting and receiving data. ”

33. It is plain from the context that “performs” means “is being used/is used to perform”. As a matter of construction it is the use of a device for the performance of an interactive communication function which brings it within the definition of “a device referred to in paragraph (1)(b)”

34. Pagers, the use of which was common at the time the legislation was passed, come within the definition at paragraph 4. More recent devices e.g. iPads and other tablets can “perform an interactive communication function by transmitting and receiving data”. Many of them can be used to make telephone calls through web-based applications. Like many mobile phones, they have software which enables the performance of many functions other than and in addition to interactive communication functions. The use of the non-communication functions does not bring the device within the definition in paragraph (1)(b).

35. Hand-held devices which have no interactive communication function are not included in the definition. Thus, if while driving, a person takes photographs or films on an ordinary digital camera he is not in breach of the regulation. The same applies if he uses a hand-held Satnav. Such conduct may well be cogent evidence of careless or even dangerous driving for which the driver would be liable to prosecution.

36. The same applies to iPads and other tablets; if while driving, a person takes photographs on his iPad, he is not using the iPad to perform an interactive communication function. That is not use of a device within paragraph (1)(b).

37. Accordingly, the meaning of the word “using” in Section 41D and Regulation 110 is restricted in respect of hand-held devices to using the interactive communication function of the device.

38. Given that the mobile phone and interactive communication device are equated in Section 41D there is no reason why use of a mobile phone should be given a wider ambit than use of an interactive communication device. On the contrary, use of a mobile phone or an interactive communication device should be treated consistently.

39. My analysis of the effect of paragraph (4) is reinforced by paragraph (6) which deals with the phrase “hand-held”.

Hand-Held

40. Some time was spent in argument on the meaning of hand-held. It is not defined in the regulation. The dictionary definition of “hand-held” or “handheld” is “designed to be used while held in the hand”.

41. Paragraph 6 reads

“(6) For the purposes of this regulation –

(a) a mobile telephone or other device is to be treated as hand-held if it is, or must be, held at some point during the course of making or receiving a call or performing any other interactive communication function.”

42. As Mr Mably rightly submits, the language is that of a deeming provision, unlike the language of paragraph 4 which defines a device. The provision has the effect of treating as hand-held for the purposes of paragraph 1 of the regulation, phones and other devices by reference not to the way they are designed but to the purpose for which they are being used and the way in which they are being used; they are to be treated as hand-held if they are or must be held at some point during the course of making or receiving a call or performing any other interactive communication function.

43. The effect of the deeming provision is to attribute a different meaning to the word hand-held from the dictionary definition in order to achieve the purpose of the legislation namely to prohibit the use while driving of mobile phones and other devices for the purposes of calls and other interactive communication if held at some point. Hands-free use of a hand-held or other device does not come within this provision nor does hand-held use for the performance of a function other than interactive communication.

44. If, as Mr Mably submits, paragraph 1 prohibits any use of any of the electronic functions of a mobile phone (and, it must follow, of any of the electronic functions of a hand-held interactive communication device,

notwithstanding the definition at paragraph 4) there would be no need for the requirement that the phone or other device be held “at some point during the course of making or receiving a call or performing any other interactive communication function.” The provision would achieve its necessary aims if subparagraph (a) read “a mobile telephone or other device is to be treated as hand-held if it is, or must be, held at some point while being used.”

45. A non-exhaustive list of interactive communication functions is set out at Paragraph 6(c) which reads

“interactive communication function”, includes the following:

- (i) sending or receiving oral or written messages;
- (ii) sending or receiving facsimile documents;
- (iii) sending or receiving still or moving images; and
- (iv) providing access to the internet...”

46. Whilst it is not necessary for the purposes of this case to decide this point there is an argument that sending and receiving messages includes the drafting or recording of the messages and the reading of them and not just the nanosecond of the transmitting or receipt of data. Without the data there is nothing to communicate. In the non- digital world interactive communication is not restricted to the posting of the letter, its sorting and its delivery. Without the writing and reading of the letter there is no communication. In the digital sphere each aspect of the drafting, sending and reading/viewing/replying is an intrinsic part of using a device which performs interactive communication as defined. Since these issues do not arise in this case I say no more about them.

CONCLUSION

47. It would have been much better to have drafted legislation which was less cumbersome but its effect is clear. The legislation does not prohibit all use of a mobile phone held while driving. It prohibits driving while using a mobile phone or other device for calls and other interactive communication (and holding it at some stage during that process). I do not accept Mr Mably’s submission that this interpretation is incoherent. On the contrary it coincides with and reflects the purpose of the legislation.

48. It follows that the activity of the respondent did not come within Regulation 110 and the Crown Court was right to quash the conviction.

49. I note that the proforma charge sheet reads “**RC86820 – Use a handheld mobile phone/device while driving a motor vehicle on a road – endorseable offence**” The particulars appear below:

“On 19/08/2017 at Ruislip drove a motor vehicle ... when you were using an interactive communications device namely a handheld mobile device”.

50. The phrase “handheld mobile device” does not appear in the regulations at all. No point was taken about that and there is no good point to take. The wording of the charge cannot assist in the interpretation of the regulation but it is consistent with my view of the regulation that it is the use of the phone or device (while held) for the purpose of a call or other interactive communication that is prohibited, not all use of the phone.

51. It should not be thought that this is a green light for people to make films as they drive. As I have already said, driving while filming events or taking photographs whether with a separate camera or with the camera

on a phone, may be cogent evidence of careless driving, and possibly of dangerous driving. It is criminal conduct which may be prosecuted and on conviction may result in the imposition of penalties significantly more serious than those which flow from breach of the regulations. The same applies to any other use of the phone while driving.

52. Before leaving the case I should add that the question of use of mobile phones is said to be exercising the courts of the Republic of Ireland (where it is an offence to hold a mobile phone while driving) and of Northern Ireland (where the regulation is identical to Regulation 110). We were provided with a consultation document recently issued by the Northern Ireland Department for Infrastructure headed "Use of a mobile phone while driving, Review of Existing Offence and Associated Penalties". The consultation was prompted by a number of factors including what is said to be the "increasingly relaxed attitudes of drivers to the use of a hand-held mobile phone" and the narrow ambit of the legislation in force in that jurisdiction. The observation is made that "[drivers'] desire to stay connected outweighs their concern for their own safety and that of other road users". If this is correct then the result of the desire to stay connected may well be the constant carrying of mobile phones and the use of any of their functions at any time, including while driving. The dangers of this are plain. Whether a review of the regulations is necessary to take account of the myriad current and potentially dangerous uses of a mobile phone or other device while driving is a matter for Parliament, not the courts.

53. I am satisfied that the Crown Court was right to quash the conviction. The answers to questions 1 and 3 are yes and yes respectively and, if my Lord agrees, I would dismiss this appeal.

GOSS J:

I agree.