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“Interactive Communication” and driving – does it matter whether it is a mobile or camera? Director of Public Prosecutions v Ramsey Barreto [2019] EWHC 2044 (Admin)

Barreto [2019] EWHC 2044 (Admin) was an appeal by way of case stated following the quashing of the defendant’s conviction at Isleworth Crown Court for using a handheld mobile-phone device whilst driving contrary to Section 41D of the Road Traffic Act 1988 and Regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986.

Section 41D holds that

> A person who contravenes or fails to comply with a construction and use requirement—
> …
> (b) as to not driving or supervising the driving of a motor vehicle while using a hand-held mobile telephone or other hand-held interactive communication device…

The relevant parts of regulation 110 were 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 …which performs an interactive communication function by transmitting and receiving data.
>
> …
>
> (6) For the purposes of this regulation–
>
> …
>
> (c) “interactive communication function” includes the following:
>
> (i) sending or receiving oral or written messages;
>
> …
>
> (iii) sending or receiving still or moving images; and
>
> …

Barreto (B) was observed by a police officer holding his mobile-phone at the driver’s window to film an accident on the opposite carriageway. He was stopped and the mobile-phone found on his lap with the video function running. He accepted he was filming and apologised but at trial (and on appeal) claimed his son had been filming after he had passed the phone to him. This was rejected by the Magistrates and the Crown Court who found, as a matter of fact, B had been filming.

B's appeal was that he was not performing an "interactive communication function" (hereafter ICF) within the meaning of regulation 110(6)(c). The Crown Court agreed and quashed the conviction. In reaching this conclusion the judge was persuaded by a similar ruling in Harrow Crown Court in September 2018 (R v Nader Eldarf, unreported) that held the using a mobile-phone to listen to music did not fall within regulation 110 when the defendant touched the phone to change tracks.

The DPP appealed and the question for the court was whether handling of the phone constituted an ICF when video recording the accident.

Held, dismissing the appeal, the meaning of the word 'using' in s.41D and Regulation 110 is restricted to the purposes mentioned in the regulations, namely as a hand-held mobile-phone or as an interactive communication device (hereafter ICD). It would not be "use" of a mobile-phone or ICD if the person using it was not using it for those purposes. So here, B's use of the handheld mobile device as a camera was not use of the handheld mobile device for an ICF. The court stated that "[t]he use of the non-communication functions does not bring the device within the definition of paragraph 1(b)" (Para.34)

In reaching its conclusion the court took note of paragraph 6(a) of the 1986 Regulations which states:

> 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.

The court held this did not define what a hand-held device was, but deemed what one is in law. The court noted there was no definition of 'hand-held' within the statutory scheme however paragraph 6(a) had the effect of treating such devices 'by reference not to the way they are designed but to the purpose for which they are being used' (Para.41). The court held this reinforced their view that the statutory framework had 'use' firmly in mind rather than design.

The court concluded the statutory framework does not prohibit all use of mobile-phones whilst driving. It merely prohibits the use of mobile-phones and hand-held devices that are used for calls or interactive communications.

Obiter, the court refused to be drawn on the full extent of the non-exhaustive definitions of ICF under regulation 6(c) but did offer some guidance that suggests they will be interpreted widely. In particular it suggested that 'sending or receiving oral or written messages' (6(c)(i))

was not limited to the 'nanosecond' (para.46) of transmission but could include the process of writing, editing and reading.

The court also offered advice to officers faced with similar conduct in future, stating that such behaviour provides

> cogent evidence of careless driving, and possibly 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. (Para.51)

Commentary

Context

Using a mobile-phone undoubtedly distracts drivers, regardless whether the driver is using the mobile-phone or driving hands-free (Strayer, D.L. and Cooper, J.M., 2015. *Driven to distraction*. Human factors, 57(8), p.1343-1347). It is also one of the 'fatal four' (Transport Select Committee, 2016), and is a priority for enforcement in road traffic policing (NPCC, 2016). Mobile-phone use accounted for 2% of all fatal accidents in 2017 (33 deaths) and approximately 1% of all serious injury accidents (90 serious injuries). Although reckless / careless driving, of which mobile-phone use falls under, accounted for 26% of all fatalities and 16% of serious injuries.

Section 41D was inserted into the Road Traffic Act 1988 by the Road Safety Act 2006 and made driving whilst using a mobile-phone (or ICD) an endorseable offence. Previously the construction and use regulations had prohibited mobile-phone use while driving, under regulation 110, but only subject to a £30 fine and no licence endorsements.

There was little discussion in parliament about the technical fineries of *use* of a mobile-phone versus other uses for the device. In fairness policy makers were dealing with a situation radically different to today's world of smartphone technology. The first I-phone (the phone that kick-started the smart technology revolution) was released in 2007, nearly two years after the Road Safety Act 2006. At the time the reference to "interactive communication function" was aimed at palm-held computers rather than the now ubiquitous smartphone.

The Decision

The decision in Barreto narrows the offence to include only *'use as'* a mobile-phone or ICD rather than *'use of'*. The narrow reading of the statute is at odds with the decision in Smith v Procurator Fiscal [2017] SAC (Crim) 16 where the Scottish Sherriff Appeal Court took a wider

approach to interpreting ‘interactive communicative device’. Smith held that the prosecutor did not have to present proof that the device was capable of carrying out an ICF, since they are in everyday use, ‘a witness recognises a mobile-phone when he or she sees one’ (Para.9). It is also interesting to contrast the approach in Barreto to drunk driving in DPP v Kay [1999] R.T.R. 109 where the Divisional Court held that “parliament enacted the provisions in the Act of 1988 in their present form precisely to avoid motorists who were over the permitted limit escaping responsibility on technicalities” (para.123). Barreto makes that more likely in cases involving disputes over what function the device is performing at the time of any alleged offence.

The court’s claim that regulation 6(a) inevitably leads to a conclusion that use *as* is where the bite of the offence lies is hard to accept. Regulation 6(a) merely describes what is meant by the term ‘hand-held’. It does not suggest that the ‘hand-held’ must be used as a mobile-phone or ICD at all times, indeed that clearly could not be the case since the regulation envisages intermittent use by the phrase ‘at some point’. Barreto holds, wrongly in the authors opinion, that there must be a temporal overlap between use ‘at some point’ and the activity in question.

The court’s obiter statement on sending messages somewhat contradicts its finding. The court states that sending and receiving messages, under regulation 6(c)(i), is not limited to the “nanosecond of transmission” (Para.46). The court continues

> 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. (Para.46)

The court fails to state why this is not the case for video and still image transmission. There is no recognised hierarchy of interactive communication functions under regulation 100(6)(c), so there is no reason why this obiter should not apply to all ICFs. If that were the case then video recording and photography should fall within the ambit since they can be transmitted later to other users, streaming sites and social media. Indeed it is an integral part of transmission since the sender needs something to send (as in messaging), in this case the footage. The court has created an artificial distinction between messages in the case 110(6)(c)(i) and sending or receiving still or video images in regulation 110(6)(C)(iii). The latter is seemingly limited to transmission whereas the former is not. Both are risky activities whilst driving and there seems no coherent rational why they should be treated differently.

Following Barreto it seems the only situation in which B would be guilty of using a hand-held mobile as a camera is if they were to live stream/broadcast the footage. Which will make it

difficult and cumbersome to enforce this offence for officers unless there is evidence on the device or social media.

What now for mobile-phone enforcement?

This decision will undoubtedly cause consternation to road policing teams and undermines recent enforcement campaigns aimed at capturing and punishing those handling a mobile-phone whilst driving. Operation Top Deck (which uses PCSOs to film drivers from the top level of a double decker bus and take enforcement action), Operation Snap (which encourages drivers to submit dash cam footage of mobile-phone users) and Operation Tramline (which deploys police driven HGV's to capture mobile-phone users from a high vantage point) are all suspect following the Barreto decision, at least as regards s. 41D(b). Whereas previously the police had good evidence of *using* a mobile-phone, now they have no evidence of drivers using their phone *as a* mobile-phone (or ICD). A rethink is needed with these campaigns if they are to continue.

Using a mobile-phone whilst driving is a careless activity and evidence from the police operations discussed above should be robust enough to found a conviction for the S.3 offence (careless and inconsiderate driving / driving without due care and attention) with little difficulty. The more difficult cases are those where driver and vehicle are stationary and a picture shows them handling a mobile device. Again in the general run of cases there should be little difficulty proceeding under s.3 as R. (on the application of Planton) v DPP [2001] EWHC Admin 450 holds 'driving' includes stationary vehicles (providing the engine is on). The difficulty will arise in those vehicles with stop start functionality, when that vehicle is at rest the engine cuts out and the question for the police is whether there is any other evidence of driving since the engine may very well not be "on". Here the onus may shift to the defendant to prove that they were not driving, as in drink drive cases (Patterson v Charlton [1985] 2 WLUK 182), although, following Barreto the courts seem to be taking a stricter line with the police as regards evidential requirements.

New Regulations?

This area of law is in need of review which, as was pointed out in Barreto, is a matter for parliament. The dangers are apparent however, as stated in Barretto, '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.' (Para.52). In its recent road safety statement (A lifetime of road safety, 2019) the DFT do see mobile-phone use at the wheel as a problem and are currently analysing reasons for such use to help 'decide

what more needs to be done to stop it' (p.28). A clear priority for the DFT, following Barreto, is to review the current law.

The Transport Select Committee report on mobile-phone enforcement (Road safety: driving while using a mobile-phone (HC 2329), Transport Select Committee 12th Report of Session, House of Commons), released just 2 weeks after the Barreto decision, recommends updating the law on hand-held devices to cover all hand-held usage regardless of whether data is being transmitted. This would, in effect, negate the Barreto decision and ensure all hand-held use, for whatever purpose, is covered. The committee further recommend extending the offence to include hands-free use, although it accepts this will be difficult. There is certainly public support for the former with 90% of those surveyed in the British Social Attitudes survey indicating that driving with a mobile-phone was dangerous ((2019) National Travel Attitudes Study: 2019 Wave 1, DFT, London) As regards the latter proposal, to include hands-free use, there is less public support with only 53% claiming it is dangerous.

The fixed Penalty Offence

In B the court point out that the decision was not a green light for using a hand-held device for any function whilst driving. Instead Thirwell LJ claims that this would be 'cogent evidence' of at the least careless, if not dangerous, driving and may result in significantly greater sentences on conviction. It is true that upon conviction s. 3 carries a higher maximum penalty (a level 5 fine as opposed to level 4). In reality the majority of cases will never see court and be dealt with by fixed penalty and in this regard the opposite of what Thirwell LJ claims is true. An FPN under for s.3 carries a £100 fine and 3 points on the licence, whereas under s.41D(b) this is a £200 fine and 6 points (Schedule 1 Paragraph 1 Fixed Penalty Order 2000/2792, for penalty points see s.28 Road Traffic Offenders Act 1988 and Schedule 2. Para. 1 of that act.). In the general run of cases therefore the court are wrong, the majority of punishments will be significantly less not more. The likely impact of B is that police forces will now have to rely on the s.3 offence to issue an FPN instead of s.41D(b), unless there is further evidence of use in line with regulation 110.

Conclusion

Barreto will, in the short-term, make enforcement more difficult and police forces will have to rethink both the charging decision and operational matters. Where Barreto is to be welcomed is that it may be a catalyst for much needed legislative reform in this area. At present the law is inconsistent at best as regards safety rationales, and should be reviewed as a matter of urgency. Undoubtedly police forces are already examining their options and should lobby the

government to take action using the Transport Select Committee's report as impetus to review this complex area of law.

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