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Double think in the High Court: using a mobile phone whilst driving does not necessarily mean "using" it

On 31st July 2019 Lady Justice Thirlwall DBE and Mr Justice Goss handed down the judgment of the High Court on what amounts to "using a hand-held mobile telephone or other hand-held interactive communication device" whilst driving in *DPP v Barreto* [2019] EWHC 2044 (Admin).

Facts

Mr Barreto was driving past the scene of a serious road traffic collision. He was observed by a police officer to be holding his phone up to the driver's window to film the scene as he drove past. He was not live-streaming the video, the footage was simply being recorded on his phone and not being communicated to anybody.

Legislation

The offence with which Mr Barreto was charged is one contrary to section 41D of the Road Traffic Act 1988:

- "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."

The "construction and use requirement" is found in Regulation 110 of the Road Vehicles Construction and Use Regulations 1986 and prohibits the use of a hand-held mobile telephone or device which performs an interactive communication function by transmitting and receiving data. This includes, sending and receiving texts and phone-calls and providing access to the internet.

Park Square Barristers
6 Park Square East
Leeds LS1 2LW

DX number:
26402
Leeds Park Square

T 0113 245 9763
info@psqb.co.uk
parksquarebarristers.co.uk

Decision of the Crown Court

Mr Barreto was convicted by magistrates but succeeded in his appeal against conviction at the Crown Court sitting at Isleworth. The Crown Court, following the reasoning in another decision of the Crown Court in *R v Nader Eldarf* (21st and 23rd September 2018), determined that using a mobile phone to take a photograph or film did not amount to "using" a mobile phone for the purposes of the legislation. *R v Nader Eldarf* concerned a driver who used his mobile phone to change the music to which he was listening; it was held that because that involved no external communication, it did not amount to "using" a mobile phone. The same reasoning was applied to Mr Barreto's case, resulting in his conviction being quashed.

Decision of the High Court

The Crown appealed against the decision of the Crown Court in Barreto. The Crown submitted that the Crown Court had erred in law and that "using" a mobile phone need not be interpreted so narrowly.

The High Court rejected the Crown's submissions and dismissed the appeal.

Thirlwall LJ first considered what the legislation means by "other hand-held interactive communication device", defined as a device which "performs an interactive communication function by transmitting and receiving data." The court interpreted that definition as follows:

"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)""
Crucially for the judge, section 41D makes no distinction between "mobile phone" and "other interactive communication device". Therefore, having determined that to be guilty of an offence in respect of use of an interactive communication device other than a mobile phone requires present use of an *interactive communication*

function, the judge decided that "using" a mobile phone must have the same definition.

Accordingly, given that Mr Barreto was not using his mobile phone for any interactive communication function when filming the accident scene, he was not guilty of an offence under section 41D. Had he been in live-streaming the video to the internet, he would have been guilty.

Comment

Thirlwall LJ accepts "it is current English usage to say "he used his phone to film it" or "he filmed it on his phone"....either way he was using his phone." However, the court looked beyond the ordinary understanding of the word "using" and considered the statutory framework: using a phone does not mean "using" a phone. Regrettably, this requires an element of Doublethink, which should generally be avoided in the interpretation of statutes: if it looks like you're using it and it quacks like you're using it, then you should probably be considered to be "using" it.

More specifically, the judge considered it "plain from the context" that "performs" an interactive communication function means "is being used/is used to perform"; but the judge did not go on to explain *why* it is plain from the context. The use of these definitions in the alternative further complicates matters as "is being used" clearly requires present use, but "is used to perform" might mean "is *typically* used to perform" which might only require the device to be capable of such use. This lack of clarity in the judgment is unfortunate.

The effect of *Barreto*, however, is clear. If someone uses a phone in their hand whilst driving to record video or skip music tracks, they are not guilty of an offence; however, if they are live-streaming the same video, or streaming the music through the internet, they are guilty of an offence. Though the court chose not to decide the point, it follows naturally from the decision that drafting an email without sending it, or reading a lengthy one is not conduct within the ambit of the offence.

On the face of it, this is positive news for defence practitioners, given the Crown will have difficulties in proving that a device was being "used" rather than simply being used. However, non-interactive use of such devices may still cross the threshold for driving without due care and attention or even dangerous driving: the road ahead remains hazardous for those who use their phone at the wheel as well as those who "use" their phone at the wheel.

Joseph Hudson is currently undertaking his pupillage and is in his second sixth. If you would like to book Joseph please contact his clerks:

Francine Kirk on 0113 202 8605
Talia Webster on 0113 213 5207
Patrick Urbina on 0113 213 5250