



In The Supreme Court of Bermuda

APPELLATE JURISDICTION
2012: CRIMINAL APPEAL NO: 20

CATHERINE FARNWORTH

Appellant

-v-

REGINA

Respondent

JUDGMENT (In Court)

Date of Hearing: June 29, 2012
Date of Judgment: July 20, 2012

Mrs. Lauren Sadler-Best and Mr. Kyle Masters, Trott & Duncan, for the Appellant

Mr. Garrett Byrne, Office of the Director of Public Prosecutions, for the Respondent

Introductory

1. By a Notice of Appeal filed on April 20, 2012, the Appellant appealed against her conviction by the Magistrates' Court on March 28, 2012 (Worshipful Archibald Warner, Senior Magistrate) of using a hand-held device while riding a motorcycle contrary to regulation 44 of the Motor Car (Construction, Equipment and Use) Regulations 1952. An extension of time was granted to permit the appeal to proceed, despite a delay of 11 days which was satisfactorily explained.
2. The Notice of Appeal raised two substantive grounds of appeal:

- (a) the device in question (an iPod) was not a hand-held device; and
 - (b) the actions of the Appellant did not constitute prohibited use of a hand-held device.
3. At the hearing of the appeal, the Appellant sought leave, in the alternative, to appeal the sentence and, in particular, the imposition of the maximum (7) number of demerit points for a first offence. The Respondent did not oppose the application for permission to challenge the sentence as well as the conviction.
 4. The present appeal raises what appears to be the first challenge to the prohibition on using hand-held devices while driving or riding, which prohibition came into force with effect from June 30, 2010.
 5. At the conclusion of the hearing, despite the fact that the Appellant’s counsel appeared to rely solely on the first limb of her appeal, I requested the Respondent’s counsel to seek to obtain and furnish to the Court the Bill and Explanatory Memorandum to shed light on the legislative intent as regards the scope of the term “use”. This was, it now seems obvious, a misconceived request because regulation 44 was introduced as subsidiary and not primary legislation.
 6. However, it seemed to me having heard argument that the device in question was fairly clearly a hand-held device and that the only question which raised potentially serious doubts was whether all forms of use of such devices were prohibited by the regulation.

The relevant offence

7. Regulation 44 provides as follows:

“Hand-held mobile telephones and other hand-held devices

44. (1)No person shall drive, or cause or allow any other person to drive, a motor car on a road if he is using—

(a)a hand-held mobile telephone;

(b)a hand-held device that can perform an interactive communication function by transmitting or receiving data, other than a two-way radio; or

(c)a hand-held electronic entertainment device that can produce music or gaming systems (wireless and non-wireless).

(2)A person does not contravene a provision of this regulation if, at the time of the alleged contravention—

(a)he is using the mobile telephone or other device to call the police, fire, ambulance or other emergency service;

(b) he is acting in response to a genuine emergency; and

(c) it is unsafe or impracticable for him to cease driving in order to make or receive the call.

(3) For the purposes of this regulation—

(a) a mobile telephone or device referred to in regulation 44(1) is to be treated as hand-held if it is, or needs to be, held in the hand at some point in order to operate it;

(b) '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;

(c) 'two-way radio' means any wireless telegraphy apparatus which is designed or adapted for the purpose of transmitting or receiving spoken messages.

8. This regulation by its terms prohibits driving a motor car on the road if the driver “*is using*” a “*hand-held device*”, and defines the offending devices so as to include “*a hand-held electronic entertainment device that can produce music*”. An exception is made in the case of communicating with the emergency services in circumstances in which it would be unsafe to stop to make the call. It was not disputed that “motor car” in regulation 44 includes a “motor cycle”.

The decision in the court below

9. The evidence in the Court below was not in controversy. The Prosecution called one witness, Sergeant Paynter, who testified that he stopped the Appellant on Front Street riding a scooter with a cord running from her ears and attached to her jacket pocket. Under cross-examination he admitted that she did not appear to be distracted and did not touch the device with her hand while riding.
10. The Appellant herself gave evidence and testified that she turned on the iPod and attached it to her jacket before leaving home. Under cross-examination, she admitted that she was listening to the iPod whilst riding and that to turn it off she would have had to hold the device.

11. The Learned Senior Magistrate, in his carefully reasoned Judgment, stated in material part as follows:

“...Section [sic] 44(1)(c) of the Regulations relates to this type of device in issue. I find that an Ipod is prohibited and captured by this section.

Section 44(3)(a) is instructive in that it describes and attempts to limit under what circumstances a device is to be treated as hand-held. Thus it is a question of fact for me, based on the evidence, to decide whether the Ipod in question was a hand-held device for the purpose of this Regulation....

The evidence is that Defendant switched on the device. (The inference is that she used her hand to switch the device on.) Moreover her evidence is that she was ‘listening’ to the music whilst riding. What if she needed to switch off the device? What if she needed to change ‘tracks’ of music whilst listening and riding? To accomplish these acts the Defendant would need to operate the device by holding it in her hand. Thus I find inferentially that the Ipod is a device which needs to be held in the hand at some point to be operated. I note that the Mischief that the Regulations is aimed at is the distraction of motorists caused by the using of hand-held devices.

The further question is whether the Defendant was ‘using’ this hand-held device. ‘Using’ is not defined in the Regulations. Included in the ordinary usage/definition of use in the Oxford Reference Dictionary is ‘to avail oneself of’. The Defendant’s evidence is that she was listening to music on her Ipod as she rode. I find that in the circumstances she was availing herself of the music from the Ipod—a hand-held device and thus ‘using it’....”

The arguments on appeal

12. Mrs. Sadler-Best essentially reiterated the main thrust of the Appellant’s case at trial. Broadly, the argument was that because it was possible for the device to be used whilst riding without holding it, the device did not as a matter of fact qualify as a hand-held device. It was submitted:

“5. In order to fall foul of the Regulations, a defendant must:

- (a) be riding a motorcycle;*
- (b) using a device which produces music or gaming systems; and*
- (c) the device must be held or need to be held in the hand of the defendant in order to operate it...*

7. The Appellant’s argument is that the Crown failed to prove the third element listed above. The narrow question raised by this appeal is the question of the interpretation of the definition of a ‘hand-held device in the context of the Regulations. The appellant’s position is simple; in order for

the Magistrate to properly find that the device was hand-held, he first had to find that the device either was or need to be held in the hand in order to operate it. There was no evidence upon which that conclusion could be made making the conviction on that basis unsafe...

13. From the outset, I found this argument difficult to accept. It was based on the premise that what constituted a hand-held device was not static but fluid in nature, changing according to what a driver or rider happened to be doing with the device at the time of the alleged offence. If the iPod was being manipulated whilst riding, it did qualify as a hand-held device; if not, as occurred in the Appellant's case, it was not a prohibited device. The logic underlying this approach was not entirely flawed; it focused attention on the obvious legislative intent to cure the mischief rightly identified by the Learned Senior Magistrate: "*the distraction of motorists caused by the using of hand-held devices*".
14. However, to my mind it is much more natural in terms of legislative construction to assume that the definition of a device is passive and static and that the concept of prohibited use of such device is active and fluid. What constitutes a prohibited or unlicensed firearm is essentially static, for instance; unlawful possession of a firearm may manifest itself in a variety of factual ways.
15. Mr. Byrne's 'Case for the Respondent' appeared unsurprisingly to assume that the Appellant was contending that she was not using the device at the material time as the concept of use was dealt with far more extensively than the meaning of "hand-held device". As to the latter concept, he submitted concisely as follows:

"49. The term 'hand held' merely denotes that it is a portable device that can fit into the hand and can be operated by hand. The fact that the Appellant in this case did not actually touch the iPod with her hands during the course of the journey does not stop it from being a 'hand-held' device.

50. However, the Regulation itself provides a definition, as set out above. All that is required is that the device be held in the hand, or that it is necessary for it to be held in the hand, at some point, in order to operate it. In this case, it was held in the Appellant's hand both before and after her journey. There was no requirement on the Crown to prove that the Appellant held it in her hand during the course of the journey. As the Learned Magistrate correctly stated, in effect, if the appellant wished to operate it during the journey, it would have been necessary for her to have it held in her hand."

16. Mr. Byrne also greatly assisted the Court with a comparative legislative analysis of similar offences elsewhere and, in particular, how 'use' has been defined. The picture portrayed may be summarised as follows:
 - (a) the United Kingdom only appears to prohibit hand-held mobile phones and other interactive communication devices which "*must be held at some point*

during the course of making or receiving a call or performing any other interactive communication function”¹. ‘Use’ is not defined. iPods or equivalent entertainment devices are not prohibited ;

- (b) in Australia drivers must not “*use a mobile phone that the driver is holding in her hand while the vehicle is moving, or is stationary but not parked*”². Devices such as iPods are not prohibited;
- (c) in British Columbia (and similarly in Ontario, Canada), use of a variety of electronic devices is prohibited. However, hand-held audio devices may be used whilst driving if:
 - (i) the device is not held in the hand;
 - (ii) the device is fixed to the driver’s vehicle or body in such a way as not to obstruct the driver’s vision; and
 - (iii) sound is emitted through the speakers of the vehicle³. (The latter regulation does not appear to contemplate motor cyclists at all. Regulation 7 appears to permit far more liberally the use of communication devices in hands-free mode by motor cyclists and car drivers provided only one touch is required to initiate, accept and end a call. Motorcyclists are permitted to have earplugs in both ears.)

17. This comparative analysis demonstrates that Bermuda’s blanket prohibition on the use of both mobile phones and audio devices whilst driving, even in what might be described as “hands-free mode”, casts a far wider prohibitive net than any of the jurisdictions surveyed. But this in no way undermines the analytical approach to the Bermuda statutory decisions adopted by the Learned Senior Magistrate in the present case and endorsed by the Respondent to the present appeal. As the Respondent’s counsel submitted:

“45. If therefore the iPod was being ‘used’ in a way for which it was designed, that it was switched on and music was being listened to through earphones attached to the ears (as admitted by the Appellant), it was open to the Learned Magistrate to conclude that those facts amounted to ‘use’ within the meaning of the Regulation.”

18. As Mrs. Sadler-Best rightly conceded therefore, the broad approach to “use” adopted in the Bermudian regulations makes it impossible to plausibly argue that a rider listening to her iPod is not ‘using’ the device albeit that she is not manually operating it at the material time.

¹ The Road Vehicles (Construction and Use) (Amendment (No.4) Regulations 2003, UK S.I. 2003 No. 2695, regulation 110(6)(a).

² Australian Road Rules 2008, rule 300(1).

³Use of Electronic Devices While Driving Regulation, B.C. Reg. 308/2009.

19. What the comparative legislative analysis also demonstrates is that the Appellant's instincts as to what sort of use of an iPod was likely to be prohibited, whilst misplaced in the Bermudian context, were broadly consistent with the legislative approach adopted to this topic in larger Commonwealth jurisdictions.

Findings: appeal against conviction

20. For the above reasons, it is impossible to find fault with the Learned Senior Magistrate's Judgment and the appeal against conviction must be dismissed. The use of hand-held devices of any nature whilst driving is strictly prohibited by regulation 44 of the Motor Car (Construction, Equipment and Use) Regulations even where the devices are not being handled whilst the driving is taking place.
21. The use of audio devices such as the iPod involved in the present case do not yet appear to be prohibited at all in Australia or in the United Kingdom and a hands-free mode use of electronic devices appears to be permitted in Canada. Is the Bermudian approach too restrictive of personal freedom or a proportionate response to objectively identifiable public safety concerns? This question does not arise in the present appeal. It might arise in a constitutional complaint that the legislation unduly impairs the freedom to receive information and ideas under section 9 of the Constitution.
22. When construing the provisions of even subsidiary legislation the Court's function is not to question the wisdom of Parliament but to ascertain its presumed legislative intent.

Findings: appeal against sentence

23. No explanation appears on the face of the record as to why the maximum seven demerit points for a first offence were awarded. Mrs. Sadler-Best pointed out that there were no aggravating features in a case where there was no evidence that the Appellant was either distracted or stopped for the quality of her driving. Counsel argued that this aspect of the sentence was excessive. I agree. The Appellant's not guilty plea and appeal has led to a clarification of the law.
24. The penalty of seven demerit points is set aside and substituted with five demerit points.

Dated this 20th day of July, 2012

IAN RC KAWALEY CJ