

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2022] EWHC 502 (Admin)



No. CO/3347/2021

Royal Courts of Justice

Tuesday, 25 January 2022

Before:

LORD JUSTICE WILLIAM DAVIS
and
MR JUSTICE JULIAN KNOWLES

B E T W E E N :

BENDT

Appellant

- and -

CROWN PROSECUTION SERVICE

Respondent

MR PITT (of Counsel) appeared on behalf of the Appellant.

MR M. BISGROVE (of Counsel) appeared on behalf of the Respondent.

J U D G M E N T

LORD JUSTICE WILLIAM DAVIS:

This is the judgment of the court.

Introduction

- 1 This appeal requires further consideration of the circumstances in which the use of a hand-held mobile telephone when driving contravened s.41D of the Road Traffic Act 1988 and Regulation 110 of the Road Vehicles (Construction and Use) Regulations 1986. The appellant appeals by way of case stated from a decision of the Bexley Magistrates' Court on 14 June 2021, convicting him of an offence under that Act and those Regulations.
- 2 The appellant was using his mobile telephone to change the music to which he was listening. The music was being played over the sound system in his car. His mobile telephone was paired with the car sound system via Bluetooth. The issue is whether this was an "interactive communication" as required by the legislation for the offence to be committed.

The facts

- 3 On 21 September 2020, the appellant was driving a BMW car on Trafalgar Square in Central London. A police officer, Police Constable McLaughlin, saw that he was driving erratically. When the BMW was at a set of traffic lights, PC McLaughlin was able to see that the appellant was holding a mobile telephone. The screen of the telephone was illuminated. The appellant's thumb was moving on the screen. PC McLaughlin stopped the BMW car. He spoke to the appellant, who said that he had been changing music. The music was being played through the car's sound system.
- 4 A single question was posed for us by the Magistrates' Court: "On the basis of our findings of fact, were we correct to convict the appellant of an offence under s.41D Road Traffic Act 1988 and Regulation 110 Road Vehicles (Construction and Use) Regulations 1986?"

The legal framework

- 5 Regulation 110 was introduced with effect from 1 December 2003. The relevant parts are 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 paragraphs (1)(b), (2)(b) and (3)(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.”

Section 41D of the Road Traffic Act 1988 was created by amendments to that Act made by the Road Safety Act 2006 and came into force on 27 February 2007. It provides as follows:

“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.”

6 The ambit of the offence under s.41D of the 1988 Act was considered in detail by this court in *Director of Public Prosecutions v Barreto* [2019] EWHC 2044 (Admin). We do not propose to conduct a similarly detailed review of the offence. Even if we were to conclude that *Barreto* was wrongly decided, we would be bound by the decision in that case. Although the respondent to this appeal suggests in his written submissions that the construction of the statutory provisions reached by the court in *Barreto* arguably was too restrictive, it is not submitted, either in writing or orally, that we should address that proposition head-on. Thus, we must proceed on the basis that *Barreto* correctly states the law.

7 As explained in *Barreto*, the offence does not include every use of a mobile telephone whilst driving. Modern mobile telephones have many functions which are internal and which involve no communication with any other device. Use of such functions does not involve any offence because no “interactive communication” is involved. In *Barreto* the motorist was using the video-recording function on his mobile telephone to record the scene of an accident, past which he was driving. On the facts as found, this activity involved no external transmission of data. The court concluded, in consequence, that the motorist had not committed an offence under s.41D. The court noted a submission made by the prosecution before the Crown Court, from where the appeal in *Barreto* had come, that a person simply using a mobile telephone to play music would come within the offence because they would be communicating with the telephone. The submission was not repeated before this court when hearing the appeal and it was described as misconceived.

8 In *Barreto* the court recognised that sending or receiving a message involved only a tiny fraction of a second, during which data was transmitted, and that there was an argument that interactive communication included the drafting or recording of a message or the reading of a message. The issue did not arise on the facts of *Barreto*; nor does it in this case. As the court did not address the point in *Barreto*, nor do we.

The competing submissions

9 The appellant argues that an “interactive communication function” must involve communication with another person. The non-exhaustive list set out at Regulation 110(6)(c) refers to such communication rather than communication between devices. Where the sending or receiving is of an oral or written message, this will be direct communication with another person. Where the telephone is used to access the internet, the communication will be direct. The user of the telephone either will be receiving data, or interactively digesting it, or uploading data to the internet which is then available to be digested by other persons, whether there and then or at some later time.

- 10 The appellant's submission is that the legislative scheme is that it is the user of the mobile telephone who communicates, not the device. Transmission of data in the form of music from the telephone to the user does not amount to an interactive communication function. The fact that the data is transmitted via another piece of hardware cannot change the fundamental nature of the function.
- 11 The respondent submits that an interactive communication function, within the meaning of the legislation, can be achieved when the mobile telephone communicates with another device. That conclusion follows from three separate arguments. First, the normal meaning of the words in Regulation 110(6)(c) does not qualify the word "communication" so as to require a communication to be with another person. By way of example, a text message, which clearly falls within the regulation, to an automated service of the kind used, for instance, by charities to obtain donations, will fall within the regulation but it will not involve communication with another person. Second, the non-exhaustive list in the regulation includes access to the internet. This involves communication with a device, namely a server of some description. Contrary to the submission made by the appellant, it may never involve another person. Third, in June 2018 the regulations were amended to add Regulation 110(5A), the relevant part of which reads as follows:

"A person does not contravene a provision of this regulation if, at the time of the alleged contravention—
(a) that person is using the mobile telephone or other device only to perform a remote controlled parking function of the motor vehicle."

The respondent argues that this amendment would not have been necessary if "interactive communication function" only related to communication with another person. The provision assumes that the user of the mobile telephone is communicating with some function of the vehicle they are driving. The amendment was introduced in order to prevent such a user committing an offence.

Discussion

- 12 We are in no doubt that the submissions made overall by the respondent are correct. In particular, the ordinary and natural meaning of the words in Regulation 110(6)(c) does not require the communication to be with or from another person. As the respondent points out, messages can be sent to or from automated messaging services which involve no human. The proposition that access to the internet will involve at least some indirect communication with another person is misconceived. The internet can, and frequently will, be accessed in order to obtain data from the server without any human involvement, whether direct or indirect. The data on the server may have been placed there at some point by a person, though that will not necessarily be the case. The proposition that this means that access to the internet amounts to indirect communication with another person is not sustainable. So far as the user of the mobile telephone is concerned, they are communicating simply with the database held on the server. There is no communication with another person. In the course of oral argument, Mr Pitt invited a distinction between communication with some external source and communication with something within the car. We consider that this is a distinction of no significance whatsoever. Since the ordinary and natural meaning of the words in the regulation are clear, we should say that we obtain no assistance from consideration of what was said in a consultation issued in 2020 by the Department of Transport, following the decision in *Barreto*. To be fair to Mr Pitt, he does not rely on anything said in the consultation to support his argument. In any event, we observe that the purpose of the consultation was to rehearse the arguments for extending the ambit of the

offence to any use of a mobile telephone. The precise meaning and extent of the legislation, as it stands, was hardly at the centre of the consultation.

- 13 It follows that the core argument of the appellant must fail and “interaction communication function” can involve communication with another device. The respondent, in his written submissions, recognises that a modern mobile telephone may communicate with another device even if the user is using an internal function of the telephone. For example, if a user of a mobile telephone takes a photograph or video and the telephone is set up so that any photograph or video, when taken, automatically is uploaded to an internet server, that will involve the sending of an image. In *Barreto* the court concluded that the legislation prohibited driving “while using a mobile phone or other device for calls and other interactive communication”. The respondent’s submission is that this construction would exclude the use of a mobile telephone when the external communication is incidental to the use being made of the device. It would be different if the user of the telephone were streaming the video as they took it, namely broadcasting it to other devices. Such activity would be caught by the legislation because the purpose of the use of the mobile telephone would be to communicate with another device. We can see the force of the respondent’s submission on this point. However, it is not necessary for us to address it further. The issue of incidental communication with another device does not arise on the facts of this case.
- 14 The secondary argument of the appellant and, to some extent, the argument pressed most strongly by Mr Pitt in oral argument, is that he was doing no more than listening to music which was within his telephone. The fact that he was doing so via the sound system of the car did not alter that fundamental position. As noted by the court in *Barreto*, the proposition that using the telephone to listen to music would be caught by the legislation was misconceived. Mr Pitt argues that the involvement of a Bluetooth device does not materially alter the position. In our view, that proposition is wrong. The sound system of a car is a device. A system in a modern car, of the kind being driven by the appellant, often will be, and in this case was, Bluetooth enabled. That means that another Bluetooth enabled device, most commonly a mobile telephone, can communicate with the sound system. The music data on the mobile telephone will be sent to the car sound system via radio waves. That is an interactive communication. The sound system will then convert the radio waves so that the music can be played over the sound system. Here the appellant was using his mobile telephone for such interactive communication with the sound system of his car. Presumably he could have listened to the music by playing it only on the telephone and the sound coming from the speaker within the telephone, and that would have been akin to the position as obtained in *Barreto*, namely using an internal function of the telephone and no more. But we do not have to reach any conclusion on the point as to whether that would transgress the regulation. The appellant was not simply using an internal function of the telephone. He was using the telephone to communicate with another device and doing so quite deliberately. A Bluetooth connection certainly was not incidental to his use of the telephone. It follows that he was using an “interactive communication function” of his mobile telephone. The communication may or may not have been just one way but one way communication is entirely sufficient. His telephone interacted with the car’s Bluetooth system.

Conclusion

- 15 The consultation in 2020, to which we referred, was responded to by the Government in 2021. According to the press release issued by the Department of Transport, the regulations will be amended. The press release has the headline “Government strengthening existing laws making it illegal to use a hand-held mobile phone while driving under virtually any circumstance.” No amendment of Regulation 110 has yet been introduced so it is not

possible to say how the reach of the legislation will be extended or to identify in which circumstances using a hand-held mobile phone will be permitted. Whether any use of a mobile telephone when driving hereafter will be an offence, is a matter for Parliament when it considers any proposed amendment.

- 16 In this case we are satisfied, for the reasons we have given, that the appellant's use of his mobile telephone led to him committing an offence pursuant to Regulation 110 in its current iteration. The answer to the question posed by the Magistrates' Court is "yes". The appellant was rightly convicted. We dismiss this appeal.
-

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by **Opus 2 International Limited**
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
CACD.ACO@opus2.digital*

This transcript has been approved by the Judge.