



SHERIFF APPEAL COURT

**[2017] SAC (Crim) 16
SAC/2017/000400/AP**

Sheriff Principal D C W Pyle
Sheriff N Ross
Sheriff K Maciver

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D C W PYLE

in

APPEAL BY STATED CASE

by

SCOTT SMITH

Appellant

against

PROCURATOR FISCAL, GLASGOW

Respondent

**Appellant: A Ogg (sol adv); Paterson Bell Solicitors
Respondent: J Farquharson, AD; Crown Agent**

26 September 2017

- [1] This is an appeal against conviction from the Justice of the Peace in Glasgow.
- [2] The charge was that the appellant drove a motor vehicle when using a mobile phone, contrary to the Road Vehicles (Construction and Use) Regulations 1986, Regulation 110(1)(a) and the Road Traffic Act 1988, section 41D(b).
- [3] Section 41D of the 1988 Act is in the following terms:

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

- (a) as to not driving a motor vehicle in a position which does not give proper control or a full view of the road and traffic ahead, or not causing or permitting the driving of a motor vehicle by another person in such a position, or
 - (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, or not causing or permitting the driving of a motor vehicle by another person using such a telephone or other device,
- is guilty of an offence.”

[4] Regulation 110 of the 1986 Regulations is in the following terms:

“(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).

(2) No person shall cause or permit any other person to drive a motor vehicle on a road while that other person is using—

- (a) a hand-held mobile telephone; or
- (b) a hand-held device of a kind specified in paragraph (4).

(3) No person shall supervise a holder of a provisional licence if the person supervising is using—

- (a) a hand-held mobile telephone; or
- (b) a hand-held device of a kind specified in paragraph (4),

at a time when the provisional licence holder is driving a motor vehicle on a road.

(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.

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

- (a) he is using the telephone or other device to call the police, fire, ambulance or other emergency service on 112 or 999;

- (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 the call (or, in the case of an alleged contravention of paragraph (3)(b), for the provisional licence holder to cease driving while the call was being made).
- (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;
 - (b) a person supervises the holder of a provisional licence if he does so pursuant to a condition imposed on that licence holder prescribed under section 97(3)(a) of the Road Traffic Act 1988 (grant of provisional licence);
 - (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;
 - (d) ‘two-way radio’ means any wireless telegraphy apparatus which is designed or adapted—
 - (i) for the purpose of transmitting and receiving spoken messages; and
 - (ii) to operate on any frequency other than 880 MHz to 915 MHz, 925 MHz to 960 MHz, 1710 MHz to 1785 MHz, 1805 MHz to 1880 MHz, 1900 MHz to 1980 MHz or 2110 MHz to 2170 MHz; and
 - (e) ‘wireless telegraphy’ has the same meaning as in section 19(1) of the Wireless Telegraphy Act 1949.”

[5] The evidence was in short compass. Two police constables were on uniformed mobile patrol in a large 4 by 4 vehicle with an elevated seating position. They saw the appellant in a Ford Transit van driving in the opposite direction. The vehicles were about a metre apart. The

police vehicle was stationary, while the van was travelling at between 15 and 20mph. The appellant, they said, was holding a black mobile phone in his right hand at steering wheel height, level with the window and, according to one constable, appeared to be using the mobile phone by operating it with his thumb. The second constable described the appellant as having his head down looking at the screen on the mobile phone and his thumb pressing buttons on the screen. The justice repelled a submission of no case to answer.

[6] The solicitor-advocate for the appellant submitted that the no case to answer submission ought to have been sustained. In short, it was insufficient that the sum of the evidence was that two police witnesses said that they saw what they claimed was a mobile phone. Regulation 110 required that the Crown prove that the appellant not only had a mobile phone but also that it could make or receive a call or one or more of the other functions specified in regulation 110(6)(c). That could be achieved only by seizure and examination of the mobile phone. If regulation 110(6) could not be satisfied at the locus, if for example the seized mobile phone was locked, it would require to be retained by the police for forensic examination.

[7] In our opinion, the appellant's submission misunderstands the nature of the law of evidence and misconstrues the regulation.

[8] First, there is no obligation on the Crown to produce any article which is referred to in an indictment or complaint. The proper practice might be to produce the article where there is no practical difficulty in doing so, but the true question is whether the real evidence was essential for proving the case against the accused (*Maciver v Mackenzie* 1942 JC 51 (at p54); *McKellar v Normand* 1992 SCCR 393 (at p394). That rule was applied to a mobile phone in (*PF, Glasgow v McClumpha*, unreported, 30 March 2010), in which the court added that the essential question was whether the accused was prejudiced by the absence of the mobile phone as a

production. That case differs from the present one only on the facts in that in the former there was no dispute that the accused had a mobile phone in her possession. In the present case the appellant's position was that he was holding a black notebook, not a mobile phone. He said that he had no need for a mobile phone while driving as the van was equipped with a hands free system and that he did not have his own mobile phone on the day in question (although he did not say that to the constables at the locus). *Ex hypothesi* that there was no mobile phone, it follows that the appellant's preparations for trial were not prejudiced. The court in *Caldwell v PF* [2013] HCJAC XJ901/12 had no difficulty in accepting (i) that a witness recognises a mobile phone when he or she sees one, (ii) a mobile phone is "hand held" if it appears to be so, and (iii) a mobile phone ipso facto carries out an "interactive communication function" for the purposes of regulation 110(6)(a).

[9] Secondly, as was submitted by the advocate depute, the evidence of the police constables would have been no more even if they had in some way examined the mobile phone which they said was being held by the appellant. They were not experts on mobile phone devices and their functions. Such an examination would have added nothing to their evidence. The regulation does not require expert evidence to be led in order to prove that the device falls within the statutory definition.

[10] Thirdly, a hand held mobile phone is an everyday appliance which is in common use. It is an object familiar to the public and police officers alike. A court will be entitled to accept, without the need for further evidence, that a witness can recognise a hand held mobile phone, within the meaning of regulation 110, upon seeing it, and that a mobile phone is capable for the purposes of regulation 110(6)(c) of carrying out an "interactive communication function".

[11] We should add that the solicitor advocate produced for us a copy of the stated case in *PF v Brocklebank* , a decision from Cupar Justice of the Peace Court (undated). We did not find it to be of assistance.

[12] We answer both questions in the stated case in the affirmative and refuse the appeal.