HOUSE OF LORDS

Rudd v. DTI (1987) 2AER553

Rudd (AP) (Respondent) V Secretary of State for trade and Industry (Appellant)

Lord Bridge of Harwich

My Lords.
I have had the advantage of reading the speech by my noble and learned friend Lord Goff of Chieveley. I agree with it and for the reasons he gives I would dismiss the appeal.

Lord Brandon of Oakbrook

My Lords
I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Goff of Chieveley. I agree with it and for the reasons which he gives I would answer both paragraph (a) and paragraph (b) of the certified question in the negative and dismiss the appeal.

Lord Mackay of Clashfern

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Lord Ackner

My Lords
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Lord Goff of Chieveley

My Lords
The defendant, Jeffrey Michael Rudd, ran what is usually called a pirate radio station. He was caught; and on 13 February 1985 he appeared before the Liverpool City Magistrates Court and pleaded guilty to two charges of using apparatus for wireless telegraphy except under and in accordance with a licence in that behalf, contrary to section 1(1) of the Wireless Telegraphy Act 1949. He was fined £50 for each offence, and was ordered to pay costs in the sum of £40. However, for the purposes of the present appeal, the important feature of the case is that a forfeiture order was made pursuant to section 14(3) of the Act of 1949. The items ordered to be forfeited were 19 in number; they included such things as cassette decks, a transmitter, a power supply board and a SWR meter. They also however included five items, which have been the subject matter of an appeal by the respondent. These are:

(xiii) 116 L.P.'s plus one short L.P.

(xiv) 119 7" Records
(xv) 74 7" Records
(xviii) 70 Cassettes
(xix) 2 Goodman Speakers

The defendant appealed to the Crown Court at Liverpool in order to challenge the forfeiture order. He complained generally that the equipment which had been forfeited was generally used by him for his own enjoyment; that they were the only means by which he could realistically hope to obtain any employment; and that some of them were virtually irreplaceable. He therefore submitted that the forfeiture order was excessive and harsh in all circumstances. He also however submitted that it was beyond the power of the magistrate, under section 14(3) of the Act of 1949, to order forfeiture of the items (xiii), (xiv), (xv), (xviii) and (xix), on the ground that those items did not constitute apparatus for wireless telegraphy within the meaning of those words as used in Section 14(3). The Crown Court rejected both arguments, and dismissed the appeal (save that the defendant was allowed to retain certain records as being unique), but stated the following question for the opinion of the High Court:

> "The question for the opinion of the high court is whether, upon the above mentioned statements of fact, the Crown Court were correct in holding that the word 'apparatus' in the Wireless Telegraphy Act 1949 included those items set out at sub paragraph 3(xiii); 3(xiv); 3(xviii); and 3(xix) hereof, and that they therefore had the pwer to order forfeiture thereof; and if not, the High Court is respctfully requested to make such order as the case may require or to remit the matter to the Crown Court with the opinion of the High Court thereon."

The defendants appeal was heard by a Divisional Court (Glidewell L.J. and Schiemann J.) on 14 April 1986. The leading judgement was delivered by Schiemann J. The defendants appeal was dismissed as far as item (xix) (two Goodman speakers) was concerned; but was allowed as regards items (xiii), (xiv) and (xviii), on the basis that those items did not constitute apparatus within Section 14(3) of the Act. The Court refused leave to appeal to this house, but certified the following question of law as being of general public importance:

> "Where an offence is committed under Section 1(1) of the Wireless Telegraphy Act 1949 involving the illicit broadcast of recorded music does the court have power under section 14(3) of the Act to order forfeiture of
> (a) the particular disc or tape which is being played at the time when the offence is being detected and
> (b) other discs or tapes which are available at the broadcasting station to be so broadcast?

It is against that decision that the appellant, the Secretary of State for Industry, now appeals by leave of your Lordships' House. It is, we are told, important for the department to know whether, as a matter of law, items such as records and cassettes seized at pirate radio stations are liable to forfeiture under section 14(3) of the Act, because these are often the most valuable items at such stations ant their forfeiture is therefore considered likely to constitute an effective deterrent against this form of illegal activity.

In order to consider this question, it is necessary to set out certain relevant provisions of the Act of 1949. Section 1(1) of the Act provides:

> "No person shall establish or use any station for wireless telegraphy or install or use any apparatus for wireless telegraphy except under the authority of a licence in that behalf granted by the Secretary of State, and any person who establishes or uses any station for wireless telegraphy except under and in accordance with such a licence shall be guilty of an offence under this Act:
> Provided that the Secretary of State may by regulations exempt from the provisions of this subsection the establishment, installation or use of stations for wireless telegraphy or wireless telegraphy apparatus of such classes or descriptions as may be specified by the

regulations, either absolutely or subject to such terms, provisions and limitations as may be so specified."

Section 14 of the Act is concerned with penalties and proceedings. Section 14(3) (as amended by the Telecommunications Act 1984) provides:

"Where a person is convicted of

(a) an offence under this Act consisting in any contravention of any of the provisions of Part 1 of this Act in relation to any station for wireless telegraphy or any wireless telegraphy apparatus or in the use of any apparatus for the purpose of interfering with any wireless telegraphy: or

(b) any offence under section 12A of this Act; or

(c) any offence under this Act which is an offence under section 7 of the Wireless Telegraphy Act 1967 (whether as originally enacted or as substituted by section 77 of the Telecommunications Act 1984);

The court may, in addition to any other penalty, order all or any of the apparatus of the station. Or (as the case may be) of the apparatus in connection with which the offence was committed, to be forfeited to the Secretary of State.

The power conferred by virtue of paragraphs (a) or (c) above does not apply to wireless telegraphy apparatus not designed or adapted for emission (as opposed to reception)".

Finally, section 19 of the Act, concerned with interpretation, contains the following relevant provision:

"(1) In this Act, except where the context otherwise requires, the expression 'wireless telegraphy' means the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electromagnetic energy of a frequency not exceeding three million megacycles a second, being energy which either-

(a) serves for the conveying of messages, sound or visual images (whethrer the messages, sound or images are received by any person or not), or for the actuation or control of machinery or apparatus; or

(b) is used in connection with the determination of position, bearing or distance, for the gaining of information as to the presence, absence, position or motion of any object or any objects of any class.

And references to stations for wireless telegraphy and apparatus for wireless telegraphy or wireless telegraphy apparatus shall be construed as references to stations and apparatus for the emitting or receiving as aforesaid of such electro-magnetic energy as aforesaid".

Three points were taken by Miss Goddard on behalf of the Secretary of State. First, it was submitted that, on a true construction of section 14(3), any apparatus in connection with the offence was committed was liable to forfeiture, whether or not such apparatus was wireless telegraphy apparatus; and that the items in question all constituted such apparatus. I can, I feel, deal with that submission briefly. It is plain that the words "the apparatus of the station" and "the apparatus in connection with which the offence was committed" in the closing part of the subsection refer back to the offences specified in (a), (b) and (c) of the subsection. So far as (a) is concerned, the former expression refers back to an offence in relation to any station for wireless telegraphy, and the latter refers back to offences in relation to any wireless telegraphy apparatus or the use of any apparatus for the purpose of interfering with any wireless telegraphy. The offences in the present case were offences in relation to wireless telegraphy apparatus; it follows that, to be liable to forfeiture, the apparatus in connection with which the offences were committed must be wireless telegraphy apparatus. For these reasons, it is impossible to conclude that, in the present case, apparatus other than wireless telegraphy apparatus was liable to be forfeited.

Miss Goddard's second submission was the Divisional Court erred in holding that the records and cassettes were not wireless telegraphy apparatus within the meaning of those words as used in the Act. This submission raised two questions:

(1) Whether a cassette or record actually in use at the relevant time constituted apparatus for wireless telegraphy within section 1(1) or wireless telegraphy apparatus within section 14(3); and
(2) If so, whether cassettes or records not actually in use but available for use at the station at the relevant time constituted apparatus in connection with which the offence was committed, such offence being that the respondent did, contrary to section 1(1), use apparatus for wireless telegraphy without the requisite licence.

I turn to the first of these two questions. Miss Goddard's argument ran as follows. In a station such as that in use in the present case, there are typically three possible sources of "information" fed into the station. These are (1) sound waves which are detected by a microphone and converted by the microphone into electrical energy; (2) source mechanical variations on the surface of a disc (record) which are detected by a stylus, which produces an electrical signal in direct proportion to those mechanical variations; and (3) magnetically stored information on a tape (cassette) which is detected by the tape head, which in turn produced an electrical signal in direct proportion to that magnetic information. The electrical signals from any of these sources are fed into a mixer unit which usually amplifies the level of the input signal: and, by means of headphones or loudspeakers plugged into the mixer unit, the sound can be monitored by the person running the station. On leaving the mixer unit, the amplified signal is subjected to a process known as modulation, by means of which the audio information is superimposed on a radio frequency signal (know as the carrier signal). Thence the modulated signal passes first to a Standing Wave Radio meter (S.W.R. Meter) and then to the actual aerial from which it is emitted into free space. For the signal which has been so launched into space to be received by the human ear, a reverse process known as demodulation must occur at the receiving station. Now, under section 19(1) of the Act, it is provided that "wireless telegraphy" means the emitting or receiving of electro-magnetic energy of a certain frequency which (inter alia) "serves for the conveying of messages, sound or visual images," and it is further provided that references to "apparatus for wireless telegraphy" or "wireless telegraphy apparatus" shall be construed as references to "apparatus for the emitting or receiving as aforesaid of such electro-magnetic energy as aforesaid." In a sense, it is only the aerial itself which emits the relevant electro-magnetic energy into the ether; but plainly the expression "wireless telegraphy apparatus" is not intended to be limited to the aerial alone. It is intended to embrace the whole apparatus for the emitting of the electro-magnetic energy; and that must include, Miss Goddard submitted, not merely the modulator and transmitter (with its power supply), together with the S.W.R. meter and aerial, but also the mixer unit (together with any monitoring headphones and speakers) and any microphone, disc turntable or tape cassette player connected with the mixer unit, and - which raises the first question now under consideration - any disc or cassette placed on the turntable or in the cassette player from which the information is derived by the stylus or tape head.

The Divisional Court rejected any such argument, on the ground that discs or cassettes did not constitute "apparatus". This approach I do not feel able to accept. Apparatus is no more than equipment prepared for a purpose: in the Oxford English Dictionary, the second meaning given is "The things collectively in which preparation consists; and by which its processes are maintained; equipment, material, machinery; material appendages or arrangements." Consistently with that broad definition, I can see no reason why discs or cassettes should not be described as "apparatus"; this indeed accords with my own understanding of the ordinary use of the word.

But can they be described, when in use in the relevant circumstances, as part of "wireless telegraphy apparatus?" A strong argument can indeed be advanced for the proposition that they can, on the basis that their function is to determine, with the aid of the stylus or tape head, the form of the electrical signal which will be superimposed upon the carrier signal, so that it is the signal so modulated which will be emitted from the aerial. But I have come to the conclusion that this is not correct. I accepted the submission advanced by Mr Leveson, for the defendant, that the function of the stylus and the tape head cannot, for the present purposes, be differentiated from that of a microphone. True it is that, whereas the microphone receives sound waves from for example, a voice or musical instrument and converts them into electrical energy, the stylus and tape head detect information stored in apparatus with which they are in direct contact, i.e. the disc or tape; but that is I consider a definition without any relevant difference. The sound waves in the one case and the disc or tape in the other, provide, so to speak, the raw material which is "read" by the microphone, stylus or tape head, as the case may be, which constitutes the entry point into the apparatus which is the means of transmitting (including conversion for the means of transmitting) the relevant sounds by emitting electro-magnetic energy which serves for the conveying of the sound. In deed, if this were not correct, it would follow (as Mr Levison pointed out) that a distinction would have to be drawn between a disc placed on a disc turntable connected with the mixer unit, and a disc played through a loudspeaker into a microphone connected with the mixer unit.

It follows that, in my opinion, contrary to Miss Goddard's submission, a cassette or record actually in use at the station at the relevant time would not constitute part of the apparatus for wireless telegraphy used without a licence, and so would not form part of the wireless telegraphy apparatus with which the offence was committed and would not be liable for forfeiture under section 14(3).

For that reason alone, the appeal must, in my submission, be dismissed. But even so, since it was a matter of detailed argument before your lordships, I propose to consider briefly the second question, which is whether records or cassettes not actually being played upon a disc turntable or cassette player at the station, could nevertheless be said to form part of the relevant wireless telegraphy apparatus because they were available for use there at the relevant time. Miss Goddard submitted that this question should be answered in the affirmative. She relied in particular upon a decision of a divisional court in D.v.Yates (unreported), 26 March 1984. In that case the appellant had been convicted of an offence contrary to section 1(1) of the Act of 1949, in that she used apparatus for wireless telegraphy, namely a Superstar 360 F.M. C.B. transceiver, without having the necessary licence. It is not in dispute that she owned a set of the type in question, and kept it at her home, and that no licence could be obtained for it. The only question was whether she had "used" the set during the relevant period. It was not proved that she had switched the set on during that period; it was proved only that during the period she kept the set available for operation. The Divisional Court held that the offence had been established by the fact that the set was on the premises available for immediate use at any time. In support of this conclusion, the court relied upon an earlier decision of a Divisional Court in Elliott v. Grey 1960 1 Q.B 367. In that case the owner of a motor car which had broken down and so was incapable of being mechanically propelled, left it in the road outside his house until it could be repaired. In the meantime he suspended his third party insurance on the car. The Divisional Court upheld a conviction by the magistrates of an offence under section 35(1) of the Road Traffic Act 1930, which provided that "it shall not be lawful for any person to use … a motor vehicle on a road" without there being a third party policy in force. Lord Parker C.J., who delivered the judgement of the court, referred at p.371, to the fact that the word "use" in section 35(1) was there used in contradistiction to the word "drive" which had appeared in other

sections. He considered that "use" was a wider term than "drive" and certainly would include "moving". He also referred, at p.372, to the fact that section 35 appeared in a part of the Act concerned with the protection of third parties. Having regard to these circumstances, he concluded that the word "use" in the subsection meant "have the use of." Indeed, he pointed out that there was nothing in the case before him that the car could not be moved and so for example, it might be at the top of the hill and a little boy could release the break and the car could go careering down the hill.

It is not difficult to understand the reasons why the divisional court in Elliott v. Grey construed section 35(1) of the Road Traffic Act 1930 as it did. But those reasons do not, in my opinion, apply to the case of section 11 of the Wireless Telegraphy Act 1949. **I can for my part see no good reason why the word use in that subsection should not be given any other than its natural and ordinary meaning.** The case of D. V. Yates was noted in (1984) Crim.L.R.430, and beneath the report appears a brief comment by J.C.S. in the following terms:

"If Parliament intended to make it an offence to be in possession of the apparatus with intent to use it, Parliament might have been expected to say so. In a section creating an offence, 'use' should probably be take to mean 'use', in the absence of some compelling reason to the contrary."

I respectfully agree, and I would add this. There may well be circumstances in which, for example, a television set may be available for use in a person's house, and yet he may have no intention to use it and so he may not licence it. Thus he may be about to go away from home at the time when the licence expires and not intent to renew the licence until he returns home. It is difficult to see why in such circumstances he should be convicted for an offence under section 11 on the ground only that the set was available for use and unlicensed. Furthermore there are other sections in the Act in which the word "use" appears, which indicate that the word is used in its ordinary sense when creating offences under the Act in relation to using wireless telegraphy apparatus. Thus section 5 provides that:

"Any person who -

> (b) otherwise and under the authority of Secretary of State or in the course of his duty as a servant of the crown either -
> i) uses any wireless telegraphy apparatus with intent to obtain information as to the contents, sender or addressee of any message (whether sent by means of wireless telegraphy or not) which neither the person using the apparatus nor any person whose behalf he is acting is authorised by the Secretary of State to receive; … shall be guilty of an offence under this Act." (My emphasis).

Again, section 13(1) provides:

> "Any person who uses any apparatus for the purpose of interfering with any wireless telegraphy shall be guilty of an offence under this act." (My emphasis).

In my opinion, both these provisions, having regard to their context, employ the word "uses" in its ordinary sense, and not in the sense of meaning "has available for use". I can see no reason for concluding that the word "use" as employed in relation to the offence created by section 1(1) of the Act should be understood in any different sense. Indeed, to construe the word "use" or "uses" in any of these sections as having the broader meaning "has available for use" would be in conflict with the principle that words in a statute creating a criminal offence should, if ambiguous, be given a narrow rather than a broad construction.

I recognise that this conclusion may create problems for the enforcing authorities in so far as it means that they cannot simply rely upon the fact that the relevant apparatus was available for use. They will, I fear, have to go further and will if necessary have to persuade the court to draw the inference that the apparatus in question was used by the defendant during the relevant period. But I trust and believe that if, for example, a television set in working order is found in the sitting room of a house occupied by the defendant, it will not be difficult for a court to draw the necessary inference in the absence of some credible explanation by the defendant to the effect that it was not being used. For the reasons I have given, I would overrule D. V. Yates and I conclude that the mere fact that cassettes and records are available for use at an unlicensed wireless telegraphy station (even if they were capable of forming part of the relevant wireless telegraphy apparatus) would not of itself render them liable to forfeiture under section 4(3) of the Act of 1949.

For these reasons I would answer the question posed by the Divisional Court in the negative, as regards both paragraph (a) and paragraph (b) of the question, and I would dismiss the appeal with costs.