EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT AUCKLAND

CRI-2017-004-010579
[2018] NZDC 3676

PEI-CHUN HUANG
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing:	28 February 2018
Appearances:	Appellant appears in Person Sergeant M McMurtrie for the Respondent
Judgment:	28 February 2018

ORAL JUDGMENT OF JUDGE H M TAUMAUNU

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[1] Today, I have before me an appeal by Pei-Chun Huang. On 5 September 2017 Mr Huang appeared before Justices of the Peace in the District Court at Auckland and he faced a charge of being a driver of a vehicle on a road he used a mobile phone while driving.

[2] During the course of the defended hearing, the Justices heard evidence from Constable McGill who told the Court in evidence that he was on duty on 31 March 2017 in full police uniform, riding a marked police motorcycle. He was working in the central city and at about 9.28 am was in Symonds Street, Auckland City. He was performing a checkpoint on Symonds Street between Karangahape Road and City Road by the entrance to the Langham Hotel. Amongst other things, he said in evidence that he was a senior constable and had been a police officer for 18 years and had spent 14 years as a road policing officer, so he had considerable experience.

[3] He told the Court that he observed a [car details deleted] motor vehicle, [registration details deleted], heading north-bound on Symonds Street. As that vehicle came towards him, he could see through the window of the vehicle that the driver had what appeared to be a large white cellphone in his left hand to his left ear in conversation. He observed the vehicle probably three or four seconds. As it got directly in front of him, the driver looked over towards the police officer and put his hand down, moving the phone out of view. The officer estimated that it was approximately five metres away from him when the vehicle was directly in front of him. He had a clear view through the passenger's window and there were no other people in the vehicle. He then activated his lights and sirens, indicated for the vehicle to pull over and the vehicle pulled over and the appellant was the driver.

[4] The appellant denied holding the phone to his ear as alleged by the police officer and denied using the phone at all. His evidence was to the effect that the phone remained in the glovebox between the front seat and the passenger seat throughout and at no stage did he pick up the phone and place it to his ear as alleged. Mr Huang cross-examined the police officer and suggested to him on a number of occasions that the police officer was mistaken.

[5] On appeal, Mr Huang has raised a number of different issues and has provided fresh evidence to the Court today. The evidence is in the form of a statement from his mobile phone provider, outlining a number of different aspects to do with the use of his phone at the material time, namely 31 March. In the statement that has been provided to the appeal Court today, it confirms, at least on the face of it, that there were no outgoing or incoming phone calls during the material time that Mr Huang was alleged to have been using his phone and it also confirms that there was no data usage during that particular time either. That is relevant because under cross-examination Mr Huang was asked a series of questions about data usage and it would appear that at the hearing before the Justices, Mr Huang did produce some evidence about the use of the phone but it only related to voice calls and text messages. It did not include any reference to data usage.

[6] Under cross-examination it was put to Mr Huang that his phone was a smartphone that had lots of applications; that the phone was not just able to be used

for voice calls and for text messaging. Mr Huang accepted the suggestion that it was capable of using data but that he did not use the phone at all and maintained that position. It was put to Mr Huang that he had his phone and he was using an app. Mr Huang denied that. It was then put to him that the app would use data and data usage was not recorded on the records that were presented to the Justices of the Peace. Mr Huang said he can ask 2 Degrees to effectively provide that information and it was put to him that they cannot record that. "That's why you've asked for phone calls only." Mr Huang objected and did not accept the proposition put to him and then went on to tell the Court he did not feel guilty, he never got into trouble, he has a clean history and, in essence, he did not commit the offence alleged and the officer was mistaken in his observation.

[7] In reaching the decision that the Justices came to, they said this:

> We have heard the evidence from an experienced officer who for 14 years has been undertaking duties of this type. He would have no reason whatsoever (and he has given his evidence, of course, under oath) to in any way mislead or deceive the Court. His evidence has been very clear. It has been reconfirmed a number of times by questions from yourself and the prosecutor. I must also add that during the course of these proceedings you produced a white mobile phone which seems to confirm that you are certainly the owner of such a device.

[8] The Justices found the charge proven. At paragraph 5 of the Justices decision, they said this:

> You then also produced phone records and were making the point to the Court that they showed that your phone had not been used during this period of time that is being considered in this case. Both the Bench and the prosecutor studied those records and they were incomplete to the extent that while they show outward calls, they did not show a record of any text messages that may or may not have been made or inward calls.

[9] Obviously, the material presented by Mr Huang to this Court on appeal does appear to show outgoing and incoming voice calls. It does appear to show text messages and it does appear to show data usage at all material times. That is highly relevant because the evidence of the police officer that Mr Huang held the phone to his ear would suggest either he was engaging in a voice phone call, either incoming or outgoing, or would appear to suggest that he was engaging in data usage by the use of some type of application requiring data for that purpose. It is unlikely

that he was simply holding his phone to his ear without using the phone in some capacity.

[10] The appeal from the Justices proceeds by way of re-hearing and in this particular case I have conducted the re-hearing by simply hearing oral submissions and also by viewing the fresh evidence that has been filed by Mr Huang. There is no criticism of the Justices' decision as it stands on the evidence that was before the Justices. They were perfectly entitled to reach the decision that they did reach and that is because the law is quite clear about what use of a phone involves and the sergeant today has, in fact, referred me to a decision of Goddard J where simply holding the phone whilst driving was held to be use of the phone but it is important to bear in mind that the defence in this case run by Mr Huang, both at first instance and on this appeal, is simply that he did not hold the phone at all and that the police officer is mistaken.

[11] It is quite clear on the state of the law that an appeal Court may have the benefit of evidence that was not before the Court appealed from when determining an appeal against this type of finding.

[12] It is also necessary to note that although this is not an appeal against conviction, s 375 Criminal Procedure Act 2011 effectively deals with this situation and notes that every reference to a conviction for an offence in relation to an infringement offence is deemed to be a reference to an order that the defendant pay a fine and costs so, effectively, the procedures that are set out at s 232 Criminal Procedure Act apply to this appeal and this is now treated as a first appeal Court hearing to determine the appeal before the Court from the Justices.

[13] At s 232(2), "The first appeal court must allow a first appeal… if satisfied that," at subpara (c) "in any case, a miscarriage of justice has occurred for any reason." At subs (4):

> In subsection (2), **miscarriage of justice** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected…

[14] It is also clearly the current legal position that if the evidence is new or the failure to call it earlier can be overlooked in the interests of justice, and that is the position, in my view, today, where the appellant is self-represented and did not have the benefit of legal representation at the time, and if that evidence is credible and significant enough in conjunction with the evidence at trial that it might lead a reasonable jury, or in this case the presiding judicial officers, to have returned a different verdict, a miscarriage of justice is shown.[1] The appeal Court should then order a new trial under s 233 on the basis that it is for the Court at first instance, not the appeal Court, to determine the import of the new evidence.[2]

[15] That then results today, in my view, in my assessment, that if this evidence that has been presented before the appeal Court was presented before the Justices at first instance, it would have been a reasonable outcome in the circumstances for the charge to have been found not proved because, quite clearly, Mr Huang has told the Court at first instance that he did not act in the way that the police officer claims that he did and he has evidence to prove that there was no usage of that phone during the material time it is alleged that he actually used the phone. That is a matter for the Court at first instance to determine on the evidence to be presented.

[16] It seems to me in the interests of justice to order a retrial and to grant the appeal on that basis and so I will now formally record that the appeal is granted for the reasons given, retrial ordered, registrar to allocate new date before Justices of the Peace and the sentence is quashed.

[17] Mr Huang, you have won your appeal. You will be given a new date for the re-hearing or retrial before JPs by the registry staff. Retrial is now allocated for 27 March at 1.15 pm.

H M Taumaunu
District Court Judge

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[1] *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 – paragraph 103
[2] *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 – paragraph 115