

R. v. POZO

SUPREME COURT (Alcantara, A.J.): February 14th, 1996

Road Traffic—wheel clamping—constitutionality of Regulations—Traffic (Immobilisation of Vehicles) (No. 2) Regulations, 1986 providing for penalty following wheel clamping contravene Gibraltar Constitution, s.8, since no provision for challenging legality of clamping and imposition of penalty in court—regulations similar to English regulations required

The defendant was charged with interfering with a wheel clamp which had been placed on his vehicle on a public road and with causing criminal damage to it.

In relation to the first charge, the defendant argued that (a) the Traffic (Immobilisation of Vehicles) (No. 2) Regulations, 1986, which provided for the clamping of vehicles, were *ultra vires* the powers conferred by the Traffic Ordinance; and (b) clamping and the imposition of a “fee” following the clamping of a vehicle was a form of summary punishment from which there was no legal redress, there being no provision in the Regulations to allow an offender to contest before a court the legality of the clamping or the subsequent imposition of the penalty. The Regulations accordingly contravened s.8 of the Constitution, which required that a person charged with a criminal offence be afforded a fair hearing of any charge against him.

The Crown submitted in reply, *inter alia*, that the imposition of a “fee” for the release of a wheel clamp was not a penal sanction under the criminal law, but was an administrative penalty from which there were in any case means of redress, in that an aggrieved person could apply to the Commissioner of Police for a refund of any fee which had been wrongly paid.

Held, ruling that the Regulations were unconstitutional:

The clamping of a vehicle and the subsequent imposition of a fee was clearly a penal sanction used to punish a traffic offence. Because the Regulations did not afford a person facing such a sanction any means of challenging before an independent and impartial court either the validity of an instance of clamping or the subsequent imposition of a penalty, they contravened s.8 of the Constitution and would be struck down. It was desirable that regulations, similar to the English regulations governing the clamping of vehicles, be made to provide for an aggrieved person to take his case to court. The jury would accordingly be directed to bring in a verdict of not guilty on this count (page 216, lines 15–39).

Legislation construed:

Traffic (Immobilisation of Vehicles) (No. 2) Regulations, 1986 (L.N. No. 44 of 1986), reg. 7:

5 “(1) A vehicle to which an immobilisation device has been affixed in accordance with regulation 4 may lawfully be released from such device only by either a police officer, or a person acting under the direction of a police officer.

10 (2) Subject to sub-regulation (1), a vehicle to which an immobilisation device has been fixed under regulation 4 shall be released only on payment by the owner or person having charge of such vehicle of the sum of £25 at the address specified in the notice affixed to the vehicle in accordance with regulation 6.”

15 Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.8: The relevant terms of this section are set out at page 216, lines 19–31.

J. Daswani for the Crown;
J.J. Neish for the defendant.

20 **ALCANTARA, A.J.:** The defendant stands indicted on two counts: (a) interfering with an immobilisation device; and (b) causing damage. The defendant was seen interfering with a clamp which had been placed on his car. He was even arrested without a warrant because he denied having hacksawed the clamp. I do not want to say much more at this stage because counsel for the defence is only seeking to quash the count of
25 interfering with the immobilisation device.

The clamping of motor vehicles on the public highway is a necessary evil. Yet it is vital and a very effective means to control traffic and keep it moving. I say nothing of clamping in private roads or on land which does
30 not come under the umbrella of the Traffic Ordinance. I am aware that there is public discontent about clamps. There should not be if they are used with discretion and circumspection, and always as an aid to reporting and prosecuting a traffic offence.

35 Mr. Neish, counsel for the defence, argues that the Traffic (Immobilisation of Vehicles) (No. 2) Regulations, 1986, as amended, are *ultra vires* for two reasons. First, they exceed the powers which the Traffic Ordinance confers; and, secondly, they offend against the provisions of the Gibraltar Constitution Order. In his skeleton arguments, he says as follows:

40 “The Regulations do not provide for an individual to be afforded a trial if he puts his guilt in issue. Clamping, instead of being an aid to enforcement of the penal provisions of the traffic laws, is in effect a form of summary punishment with the clamber being judge, jury and bailiff and the individual being left with no legal recourse other
45 than costly and, in most cases, unaffordable civil process.”

Mr. Daswani argues that our Regulations reflect similar regulations in England. He submits that clamping is an administrative process and that the individual has a recourse. He can apply to the Commissioner of Police for a refund.

I find nothing in the Regulations giving the Commissioner of Police such powers or constituting him as a tribunal. In the English regulations, there is provision for the appointment of an independent adjudicator. The position in Gibraltar reminds me of a playwright and actor being appointed adjudicator to decide on the merits of a play. Mr. Daswani submits that clamping is not a penal sanction but purely an administrative procedure. In the Regulations the penalty provided is called a “fee,” but whatever its name, it is a punishment under an Ordinance which creates penal liabilities, and which can only arise in cases of a contravention of the Ordinance.

I am of the opinion that counsel for the defence succeeds on both the *ultra vires* and constitutional arguments. If I had to select between them, which I have not, I would opt for unconstitutionality. The relevant subsections of s.8 of the Gibraltar Constitution read as follows:

“(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

...
 (8) Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial. . . .

...
 (12) In this section—
 ‘criminal offence’ means a crime, misdemeanour or contravention under the law of Gibraltar”

I am grateful to both counsel for their help. They have worked hard and in this short ruling I do not do justice to their full arguments. What the Regulations lack is the provision for legal recourse to an independent and impartial authority to test the legality of clamping after payment of the “fee.” I suggest that the English regulations should be followed in all their provisions.

I shall direct the jury to bring a verdict of not guilty on this particular count.

Ruling accordingly.