



Neutral Citation Number: [2020] EWHC 1656 (Admin)

Case No: CO/487/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2020

Before :

LORD JUSTICE FLAUX
MRS JUSTICE ELISABETH LAING

Between :

WYCOMBE DISTRICT COUNCIL
- and -
ALEX SNOWBALL

Appellant

Respondent

MISS KULJIT BHOGAL

(instructed by **BUCKINGHAMSHIRE COUNCIL LEGAL SERVICES** for the **Appellant**
MR ALEX SNOWBALL the **Respondent** appearing in person

Hearing dates: 16 June 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII. The date and time for hand-down is deemed to be 10:30am on 29 June 2020.

Introduction

1. This is the judgment of the Court.
2. It is the Appellant's case that on 20 December 2018, the Respondent failed without reasonable excuse to comply with a requirement from a Constable to surrender a can which the Constable reasonably believed to be alcohol, or a container of alcohol, and that by doing so, he committed an offence.
3. On 20 December 2018, the Respondent was issued with a fixed penalty notice ('FPN') under section 68 of Anti-social Behaviour Crime and Policing Act 2014 ('the Act'), for breaching a Public Spaces Protection Order ('PSPO').
4. The Respondent did not pay the sum required by the FPN. He was charged with an offence contrary to section 63(6) of the Act. The Respondent was summonsed before High Wycombe Magistrates' Court. At his summary trial on 17 December 2019, the Respondent pleaded not guilty. District Judge (Magistrates' Court) Dodds ('the DJ') dismissed the information.
5. This is an appeal by way of case stated from the DJ's decision. The Appellant asks the Court to find the matter proved, or, if not, to remit the case to the Magistrates' Court with appropriate directions.
6. At the remote hearing, the Appellant was represented by Ms Bhogal. The Respondent represented himself. He was helped by his father, whom he described as his 'Mackenzie Friend'. We thank the parties for their written and oral submissions.

The facts

7. The DJ found the following facts in the case stated dated 31 January 2020. On 20 December 2018 a PSPO was in force. This prohibited any person from consuming alcohol, or from having an open container for alcohol in a restricted area. On that date, the Respondent was in the restricted area. He was holding an open can labelled 'Foster's Lager'. He was seen drinking from the can.
8. Police Constables Price and Cummins saw the Respondent holding, and drinking from, the container. At the time, Police Constable Cummins reasonably believed the container the Respondent was holding had alcohol in it, because of the Foster's label, and because the Respondent refused to surrender the container, or to explain what was in it.
9. Police Constable Cummins warned the Respondent that he reasonably believed that the Respondent was drinking alcohol, and had a container for alcohol, and that this was prohibited by the PSPO. He asked the Respondent to give him the container. The Respondent refused. Police Constable Cummins warned the Respondent that he would be issued with a FPN if he continued to refuse to surrender the container since this refusal was an offence. The Respondent continued to refuse to surrender the container.
10. Police Constable Cummins continued reasonably to believe that the container held by the Respondent had alcohol in it because of the label, and because the Respondent refused to give him the container, or to explain what was in it.
11. Police Constable Cummins then issued the Respondent with a FPN. The DJ made no findings about the terms of the FPN. There was a copy in the Appellant's bundle, but it was illegible.

12. After the hearing we asked the parties whether they could send us a clearer copy. The Respondent helpfully sent us a PDF of a scan of the FPN. It is still somewhat difficult to read. Doing the best we can, we think it says:

‘Had in your possession a container of suspected alcohol which was a can of FOSTER’s which is believed to have contained alcohol. You have refused to hand it over when requested by PC 2353 CUMMINS. You were informed it was an offence not to but carried on possessing it and drunk from it.’

13. The DJ found that the Respondent ‘then showed to Police Constable Cummins by pouring out the liquid in the container and claimed that the container did not contain alcohol but contained an orange drink akin to orangeade’. Police Constable Cummins told the Respondent that the offence had still been committed. The contents of the container were never analysed.
14. At that point, Police Constable Cummins no longer reasonably believed that the container had had alcohol in it. He accepted that the orange liquid poured out by the Respondent was not alcohol.
15. The Respondent accepted that he had been deliberately awkward with the police because of his grievances against the authorities. In his evidence he admitted that he deliberately set out to give the police reasonable grounds for thinking that he was drinking alcohol in breach of the order.
16. The Appellant’s skeleton argument explains that the PSPO in this case was made under section 59 of the Act on 1 February 2017 and varied on 22 August 2018. There was a copy before the DJ. It is at pages 43-48 of the Appellant’s bundle of documents. It has not been challenged in accordance with the procedure in section 66 of the Act (see further, below). The effect of the PSPO was that, with exceptions which are irrelevant for present purposes, anyone who consumed alcohol in the prohibited area, or had an open container for alcohol, committed an offence.
17. Although the DJ made no finding about this, there was, according to section 68(10) of the Act (see further, below), evidence before him that the Respondent did not pay the FPN in this case. At pages 40-42 in the Appellant’s bundle of documents there is an exhibit sheet and exhibit, dated 9 January 2019. This is described as a ‘Chief Finance Officer’s Certificate pursuant to section 63 and section 68(10) of [the Act]’. It is signed by M David Skinner. The Respondent did not suggest to us that he had paid the FPN.

The arguments before the DJ

18. The Appellant argued that the offence was made out because when Police Constable Cummins issued the FPN all the relevant ingredients of the offence were made out. Police Cummins reasonably believed that there was alcohol in the container.
19. The Respondent argued that ‘Police Constable Cummins’ reasonable belief was a continuing process’ and that after he had issued the FPN ‘the Respondent then showed Police Constable Cummins that there was no alcohol in the container and that the requirement to surrender the container fell away and that the Respondent was not guilty of the offence’.
20. Neither party referred the DJ to any case law.

The DJ's reasoning

21. The DJ held that 'Police Constable Cummins' reasonable belief that the container held by the Respondent was a continuing process'. After Police Constable Cummins issued the FPN, the Respondent showed that there was no alcohol in the container. Police Constable Cummins then no longer reasonably believed that the container had alcohol in it.
22. The requirement to surrender the container then fell away. The situation was akin to a defendant being issued with a parking ticket and it then being discovered that there had not been a parking offence and that the ticket had been issued in error.
23. While the Respondent was guilty of awkward and obstructive behaviour in not showing the Police Officer on request that there was no alcohol in the container, 'however he then did so demonstrate'.

The questions for the High Court

24. The DJ posed two questions.
 - i. Was the offence complete when Police Constable Cummins had issued the FPN, given the finding that at that time he reasonably believed that container which the Respondent was holding had alcohol in it?
 - ii. Did the DJ err in law in holding that the offence was not then complete, that the reasonable belief of Police Constable Cummins was a continuing process so that the Respondent could 'belatedly' show that there was in fact no alcohol in the container, 'enabling me to dismiss the offence'?

The grounds of appeal

25. There are three grounds of appeal.
 1. The point at which the court should ask whether the PSPO has been breached is the time at which the FPN is issued, and not afterwards. The Respondent had ample opportunity to show that the container had no alcohol in it. At any point before the issue of the FPN, he could have told the officers what was in the can, or poured out its contents and shown the officers what was in it. The Respondent chose not to, until after the officers issued the FPN. The Respondent submits that the section 63 offence had been committed by that stage, too. The DJ erred in comparing this case with the issue of a parking ticket. The PSPO was lawfully made
 2. The Appellant does not have to show, either in order to issue a FPN, or to show that a section 63 offence has been committed, that alcohol was present or consumed. What is required, instead, is that the officer has a reasonable belief that the Respondent had a container with alcohol in it from which he was, or had been, consuming alcohol, or from which he intended to consume alcohol. Although the DJ made no finding to this effect, the Appellant's case is that the Respondent had a second unopened can in his pocket.

3. Those who enforce PSPOs must be entitled reasonably to conclude that a branded container of alcohol in fact does contain alcohol unless the contrary is shown. Without testing in a laboratory, officers have no way of telling whether a can has alcohol, or a non-alcoholic drink in it. If the DJ's reasoning is right, it will make PSPOs very hard to enforce

The parties' submissions

26. Ms Bhogal made oral submissions in support of the Appellant's grounds of appeal which were consistent with the submissions in her skeleton argument.
27. The Respondent submitted several documents and emails to the Court in the run-up to the hearing. We have read them all. He submitted a skeleton argument in which he asked for the appeal to be struck out. In that document, he said that he was drinking freshly squeezed carrot juice from 'a Heineken can'. He submits that it is not unlawful to consume carrot juice in public place from a Heineken can.
28. In his written and oral submissions he argued that PSPOs were created by Parliament as a means of dealing with anti-social behaviour. He referred us to the Explanatory Notes in support of that argument. The Parliamentary purpose was not served in any way by prosecuting him. He was not engaged in anti-social behaviour. The Appellant's technical argument on the appeal was a way of circumventing Parliament's intention and of causing harm to the Respondent. There was no problem with anti-social drinking in the relevant area at the time.
29. The relevant guidance is that officers should exercise their discretion, and not challenge drinking out of doors if it will not lead to anti-social behaviour (for example, people having a picnic in a park with a bottle of wine). In his case, there was no anti-social behaviour. The incident took nine seconds. He is teetotal, in any event, as Sergeant Hoskin knew. Police Constable Cummins has been to the Respondent's shop 60-80 times, and this was the only time Police Constable Cummins had seen the Respondent outside his shop. The Act is not aimed at the ordinary law-abiding citizen. It did not foresee a situation in which the police would harass a person for days. The police did not investigate whether the can contained alcohol. Police Constable Cummins had every opportunity to investigate whether the bright orange liquid (carrot juice) was alcohol or not, but was not interested. He turned off his body-worn camera.
30. The officers were engaged in stopping people who were going into the Respondent's shop and harassing and upsetting them. That is evidenced by high-quality recordings. The police and the Respondent have been running a long campaign against the Respondent.
31. The Respondent also sent the Court a document headed 'Skeleton argument abuse of process'. In that document, he argued that this case is wholly without merit and could be dismissed on that ground. He made general allegations that the police in this case had an agenda against him. He submitted that this was a case to which the principles set out in the authorities he referred to in that skeleton argument could be applied. The categories of abuse of process are not closed, he contended.
32. In his oral submissions, he told us a good deal about the background. He contended that the local police had, in October and December 2018, organised two disproportionately significant operations aimed at him, his shop, and his customers, under the guise of

enforcing a PSPO which did not require any enforcement measures since there was no, or no significant, anti-social drinking being done in the large area covered by the PSPO. He referred to 30 hours of CCTV footage, which, he said, showed this. He realistically accepted, in his oral submissions, that it was unlikely that we would have had a chance to look at that material, and said that he did not expect us to have.

33. When asked why he had put carrot juice in a can labelled ‘Fosters’, the Respondent described his physical and mental health. He eventually said that he had decided to test whether the police officers were briefed about the PSPO, and whether they could tell if the liquid was alcohol or not. He wanted to expose the police operation. The police were not prepared to deal with the PSPO and were not trained to deal with it. He said that his thesis was supported by the fact that when Police Constable Cummins decided to give him a FPN, they had to wait ten to twelve minutes while a ‘runner’ went to fetch the relevant book of forms from the Appellant’s offices, even though there were 16 police officers in the immediate area. This showed that the police who were supposed to be engaged in enforcing the PSPO were not trained in the necessary procedures.

The legislation

34. Section 59(1) of the Act gives a local authority power to make a PSPO if satisfied on reasonable grounds that the two conditions described in section 59(2) and (3) are met. They are that the activities carried on in a public space in the local authority’s area have had, or are likely to have, a detrimental effect on the quality of life of those in the locality and that that effect is or is likely to be persistent or continuing, such as to be, or to be likely to make, the activities unreasonable, and justifies the restrictions imposed by the notice. Section 59(4) lists the formal requirements of a PSPO. Section 59(5) stipulates that the prohibitions and requirements must be reasonable, and be imposed for listed purposes. Section 5(6) and (7) list further requirements which must be met by PSPOs, and their stipulations. Section 59(8) requires a PSPO to be published.

35. Section 63 of the Act provides

‘63. Consumption of alcohol in breach of prohibition in order

- (1) This section applies where a constable or an authorised person reasonably believes that a person (P) –

(a) is or has been consuming alcohol in breach of a prohibition in a public spaces protection order, or

(b) intends to consume alcohol in circumstances in which doing so would be a breach of a prohibition.

- (2) The constable or authorised person may require P –

(a) not to consume, in breach of the order, alcohol or anything which the constable or authorised person reasonably believes to be alcohol;

(b) to surrender anything in P’s position which is, or which the constable or authorised person believes to be, alcohol or a container for alcohol.

- (3) A constable or an authorised person who imposes a requirement under subsection (2) must tell P that failing without reasonable excuse to comply with the requirement is an offence.

....

(6) A person who fails without reasonable excuse to comply with a requirement imposed on him or her under subsection (2) commits an offence and is liable on summary conviction to a fine...’

36. Section 67(1) of the Act provides that it is an offence for a person without reasonable excuse to do anything which he is prohibited to do by a PSPO, or to fail to comply with a requirement to which he is subject under a PSPO. Section 67(3) provides that a person does not commit an offence under section 67 by failing to comply ‘with a prohibition or requirement that the local authority did not have power to include in the PSPO.

37. Section 68 of the Act provides:

‘68 Fixed penalty notices

(1) A constable or an authorised person may issue a fixed penalty notice to anyone he or she has reason to believe has committed an offence under section 63 or 67 in relation to a public spaces protection order.

(2) A fixed penalty notice is a notice offering the person to whom it is issued the opportunity of discharging any liability to conviction for the offence by payment of a fixed penalty to a local authority specified in the notice.

(3) The local authority specified under subsection (2) must be the one that made the public spaces protection order.

(4) Where a person is issued with a notice under this section in respect of an offence—

(a) no proceedings may be taken for the offence before the end of the period of 14 days following the date of the notice;

(b) the person may not be convicted of the offence if the person pays the fixed penalty before the end of that period.’

38. Section 68(5) prescribes the formal requirements of a FPN. The penalty must not exceed £100. The FPN may specify two amounts, and that, if the lower amount is paid within a period of less than 14 days, that is the amount of the FPN. Section 68(10) provides that a certificate which purports to have been signed by or on behalf of the local authority’s chief finance officer and which states that the payment was or was not received by the date specified in the FPN is evidence of the facts stated. ‘Authorised person’ and ‘chief finance officer’ are defined in section 68(11).

39. Section 66 provides a procedure by which an ‘interested person’ may challenge the validity of a PSPO. That is an application to the High Court. ‘Interested person’ is defined in section 66(1) as someone who lives in the restricted area, or who regularly works in or visits the area. The Respondent is an ‘interested person’ for this purpose. The PSPO has not been challenged in accordance with the procedure prescribed by section 66. Section 66(7) is a partial ouster clause. It provides that an ‘interested person’ may not challenge the validity of a PSPO, or of a variation of a PSPO, in any legal proceedings other an application under section 66, or under section 67(3), unless he is charged with an offence under section 67(3).

Discussion

40. We are not concerned on this appeal with the background which the Respondent described in his submissions. In particular, we are not concerned with the existence or

otherwise, or the nature, aims, or intensity, of any police operation in the area of the Respondent's shop. The issues in this case are those posed by the DJ in the case stated. Nor are we concerned with the details of the evidence before the DJ. The facts which are primarily relevant to the issues posed by the DJ are those which he succinctly found in the case stated.

41. Those questions are when the offence was complete, and whether the DJ erred in law in holding that the offence was not complete, at the point when Police Constable Cummins issued the FPN. The offence is described in paragraph 1 of the case stated. It is an offence of failing, without reasonable excuse, to comply with a requirement from a constable to surrender a can which the constable reasonably believed to be alcohol or a container for alcohol, contrary to section 63 of the Act.
42. The DJ found that Police Constable Cummins reasonably believed that the Respondent was consuming alcohol and that he had a container for alcohol and that this was prohibited by the PSPO. Police Constable Cummins asked the Respondent to surrender the container. The Respondent refused. He was warned that he would be issued with a FPN if he continued to refuse to surrender the container, since that refusal was an offence. The Respondent continued to refuse to surrender the container. At that time, Police Constable Cummins continued reasonably to believe that the container held alcohol because of the Foster's label and because the Respondent refused to surrender it or to explain what was in it. Police Constable Cummins then issued the FPN. It was only after that that when the Respondent had shown Police Constable Cummins that the container did not contain alcohol that Police Constable Cummins no longer reasonably believed that the container held alcohol.
43. Section 63(1) applies where a police constable reasonably believes that a person (P, in this case the Respondent) is or has been consuming alcohol in breach of a PSPO or intends to consume alcohol in breach of such a prohibition. On the DJ's findings, section 63(1) applied, because Police Constable Cummins reasonably believed that the Respondent was consuming alcohol in breach of the PSPO. Where section 63(1) applies, a police constable may require P (in this case, the Respondent) to surrender anything in P's possession which is, or which the constable reasonably believes to be alcohol or a container for alcohol (section 63(2)). On the DJ's findings, Police Constable Cummins was permitted to require the Respondent to surrender the can in accordance with section 63(2). A police constable who imposes a requirement under section 63(2) must tell P that failing without reasonable excuse to comply with the requirement is an offence (section 63(3)). On the DJ's findings, Police Constable Cummins did so. A person who fails without reasonable excuse to comply with such a requirement commits an offence (section 63(6)). On the face of the DJ's findings, the Respondent did commit an offence.
44. The answer to the first question posed by the DJ is 'Yes'. All the elements of the offence, as set out in previous paragraph, were present at the point when Police Constable Cummins issued the FPN, and the offence was then complete. We consider that there is nothing in the language of section 63 which displaces the conclusion we have reached in answering the first question posed by the DJ. There is no warrant in section 63 for the suggestion that if, after the offence is complete, P has a change of heart, and decides belatedly to co-operate, by showing that there was no alcohol, the previously complete offence is erased.

45. The language of the section points in the opposite direction. The draftsman has used the phrase ‘reasonably believes’ three times in section 63. This supports our view that Parliament was not concerned with the objective facts, that is, with whether or not P is actually drinking alcohol, or actually has alcohol in his possession, no doubt because, given the likely circumstances of encounters in the street, it might be very difficult to prove whether or not alcohol was present. Instead, Parliament has focussed on the subjective, but nevertheless ‘reasonable’ belief of the constable or authorised person, leaving it to the good sense of the Magistrates to decide whether, in any given case, that person held a reasonable belief, or not.
46. If that is the right approach to the construction of section 67, the DJ erred in law by holding that events after the issuing of the FPN could cast a retrospective light on whether the offence had been committed. The discovery that the Respondent did not have any alcohol in the can labelled ‘Foster’s’ could only be relevant if the prosecution had to show that the can did contain alcohol. But that is not what section 63 requires the prosecution to show. The prosecution only has to show that the constable or authorised person has a reasonable belief about P’s acts. On the DJ’s findings, the prosecution had done that.
47. There was some suggestion in the Respondent’s submissions that the PSPO was not justified. In the light of the terms of section 66(7) and of the fact that the Respondent was not charged with an offence under section 66(3), that is not an issue which the DJ, or we, are permitted to consider.

Conclusion

48. For these reasons, our answers to the questions we set out at paragraph 24, above, are both ‘Yes’.
49. On the DJ’s findings of fact, the only conclusion which was open to him was that the Respondent was guilty of the section 67 offence. We therefore remit this case to the Magistrates’ Court with a direction to convict the Respondent.
50. We were asked to amend the title of the proceedings so as to reflect the fact that, as a result of recent changes in local government, Wycombe District Council has ceased to exist, and been replaced, in its former area, by a unitary authority, Buckinghamshire Council. We were referred to Part 19.4 of the Civil Procedure Rules 1998. Those rules do not, however, apply to an appeal by way of case stated, which is a criminal matter. Part 35 of the Criminal Procedure Rules 2015 deals with appeals to the High Court by case stated. No rule in Part 35 gives the High Court power to amend the name of a party. Rule 5.4, however, requires the court officer to record, for each case, as appropriate, among other things, any appeal ((1)(g)) and the identity of the prosecutor ((1)(i)). We ask the appropriate court officer to consider whether or not he or she should, in the discharge of this duty, correct the record to change the name of the prosecutor from ‘Wycombe District Council’ to ‘Buckinghamshire Council’.