Neutral Citation Number: [2018] EWHC 428 (Admin)

Case No: CO/3667/2018

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2019

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

Scott Richardson	**Appellant**
- and -	
Director of Public Prosecutions	**Respondent**

- -
- -

Marianna Pasteris (instructed by **SBS Solicitors**) for the **Appellant**
Brett Weaver (instructed by the **Crown Prosecution Service**) for the **Respondent**

Hearing dates: **14 February 2019**

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Approved Judgment

The Honourable Mr Justice Julian Knowles:

Introduction

1. This is an appeal by way of case stated by Scott Richardson, the Appellant, against the decision of the Bedfordshire Justices, sitting at Luton Magistrates Court, on 16 April 2018 convicting him of an offence of being in charge of a motor vehicle whilst unfit through drink, contrary to s 4(2) of the Road Traffic Act 1988 (RTA 1988). I grant any necessary extension of time including for the lodging of the Appellant's Notice.

2. Sections 4(1)(2)(3) of the RTA 1988 (as amended) provide as follows:

> "Driving, or being in charge, when under influence of drink or drugs
>
> (1) A person who, when driving or attempting to drive a mechanically propelled vehicle on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.
>
> (2) Without prejudice to subsection (1) above, a person who, when in charge of a mechanically propelled vehicle which is on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.
>
> (3) For the purposes of subsection (2) above, a person shall be deemed not to have been in charge of a mechanically propelled vehicle if he proves that at the material time the circumstances were such that there was no likelihood of his driving it so long as he remained unfit to drive through drink or drugs."

3. The issue on this appeal is whether the magistrates were entitled to find on the evidence that the Appellant was in control of his vehicle in a 'public place' within the meaning of s 4(2).

The facts

4. The facts taken from the stated case are as follows.

5. On 25 October 2017 the Appellant was charged with the s 4(2) offence. It was alleged that on 24 October 2017 at Dunstable he was in charge of mechanically propelled vehicle, namely a white LDV Maxus van BD57 AVG on a public place, namely Bell Car Park, Leighton Buzzard, whilst unfit to drive through drink.

6. In due course he pleaded not guilty. The issues identified were (a) whether the car park was a public place; and (b) whether he intended to drive (see the defence in s 4(3)). There is now no issue about the second of these issues and this appeal solely concerns the question of whether the car park was a public place.

7. At the conclusion of the prosecution case the defence made a submission of no case to answer on the basis the prosecution had not adduced sufficient evidence for any

reasonable tribunal properly directed to conclude that the relevant location was a 'road or other public place' within the meaning of s 4(2).

8. The justices rejected the submission and held that there was sufficient evidence on which they could convict.

9. They said they had viewed photographs of the car park, which showed there were two entrances/exits, neither of which had any barrier.

10. They said there were several different parking signs within the same car park. At one entrance there was a sign for 'Enhance Aesthetics – For all your Facial and Dental Cosmetic Needs – Patient parking to rear'. At the other entrance was a sign on the side of the building outside the car park 'PRIVATE PROPERTY – Strictly No Unauthorised Parking' placed under a large sign for 'ECL Howard Watson Smith'. Copies of the photographs are annexed to the written stated case. There are a number of other relevant signs within the car park which I will discuss later.

11. They said that they had heard evidence from Ms Rebecca Davies who worked at the The Lancer pub as a member of bar staff. She said that the Appellant worked at the pub on Friday and Saturday as security. The day in question was not the weekend and the Appellant had not worked. Although not stated, inferentially, they found that the Appellant had been drinking in the pub. Ms Davies had unsuccessfully tried to take his car keys because he had said two or three times that he wanted to end it all and crash into his girlfriend's house. He was in the car park for about an hour and a half before she called the police. During that time she went to him three times.

12. Paragraph 11 of the written case states: 'He was parked in the car park'.

13. The Appellant said at interview that he intended to sleep in his vehicle.

14. At [13] of the stated case the justices said:

> "We found a case to answer as the Appellant was parked in the car park as a member of the public and there was no barrier to entry at either end of the car park, so no restriction to access by the public. There were numerous different signs in relation to parking in the car park."

15. The Appellant gave evidence that he worked as security at the pub but had not worked on the day in question. He said he had parked in the car park as an employee of the pub. He lived in his van. His statement about crashing his car had not been genuine but had been emotional. He was not going to drive over the alcohol limit and was going to work the following day at 8am. He disagreed with the expert that he would not have been fit to drive until 11am the following morning.

16. Paragraph 15 of the stated case records the justices' reasons for convicting the Appellant:

> "The Respondent (sic) was subsequently convicted. We found that the car park in question was a public place. The car park

> has no physical restriction to access. There were a number of different signs for different parking spaces. The Appellant was parked as a member of the public as he was not working at the time. We were not satisfied on the balance of probabilities that the Appellant had no intention to drive whilst over the alcohol limit. He stated in evidence that he intended to go to work at 8:00 hrs the following morning. The Expert report concluded that the Appellant would not be fit to drive until 11:00 hrs the following day which is some three hours after the Appellant stated he would drive."

17. It is therefore clear that the three findings of fact which underpinned the decision to convict the Appellant were that:

    a. The car park had no physical restrictions on access;

    b. There were a number of different signs for different parking spaces;

    c. The Appellant was parked as a member of the public as he was not working at the time.

18. The question stated for the opinion of this Court is:

> "Had the prosecution brought sufficient evidence for a reasonable tribunal properly directed to conclude that the relevant location was a public place ?"

Submissions

19. The parties' submissions can be summarised as follows.

20. On behalf of the Appellant, Ms Pasteris submits that there was insufficient evidence on which the justices could properly have convicted the Appellant. She submitted that the absence of barriers was not of itself enough to demonstrate that the car park was a public place. There was no evidence adduced showing that the car park was, in fact, used by members of the public. As to the Appellant parking there whilst not at work, she said the fact he was a pub employee put him in a special class of people, as opposed to being a member of the public at large. But even if this is wrong, the Appellant's use that night was not sufficient to show that the car park was used by members of the public or that any such use was tolerated and hence lawful. She relied in particular on *Spence* [1999] RTR 353 and *R v Director of Public Prosecutions ex parte Taussik*, Unreported, 7 June 2000, [2000] WL 87745

21. On behalf of the Respondent, Mr Weaver submits that the justices were entitled to reach the conclusion they did and that there was sufficient evidence. He said that the nature of the car park was one which, although it purported to be private, the general public had access to at the material time and therefore it was a public place within s 4(2) of the RTA 1988. It was one which was used by a number of different premises and entry to it was not confined to any distinct class of the public. The Court was entitled from the photographs to infer that the public did use the car park. Further, the Appellant's own use as a member of the public proved its nature as a public place.

22. In the course of argument I was also referred to *Director of Public Prosecutions v Vivier* [1991] 4 All ER 18; *May v Director of Public Prosecutions* [2005] EWHC 1280 (Admin); *R (Lewis) v Director of Public Prosecutions* [2004] EWHC 3081 (Admin); and *Filmer v Director of Public Prosecutions* [2007] RTR 28.

Discussion

23. There is no statutory definition of 'public place' in the RTA 1988, however that term has to be construed *ejusdem generis* with 'road' (which is defined in s 192(1) as 'any highway or other road to which the public has access'). Hence, the words 'public place' are to be construed as representing a place to which the public has access: *Spence*, supra, p354; *Vivier*, supra, pp19-20.

24. The question whether a place is public or private is largely a matter of fact and degree, and where a determination is challenged on appeal to this Court the question is whether, on the facts found, the justices were entitled to come to their conclusion. That question properly is one of law, as was said by Lord MacDermott LCJ in the Northern Ireland Court of Appeal in *Montgomery v Loney* [1959] NI 171, 186, approved in *Vivier*, supra, p21.

> "Generally, the decision will be a matter of fact and degree, but whether the material for consideration suffices to support one view or the other is a matter of law."

25. In *May*, supra, [4], Laws LJ set out the following propositions as accurately summarising the relevant legal principles:

    a. The burden of proving that a particular location is a 'public place' rests on the Crown to prove beyond reasonable doubt;

    b. There must be evidence that the public actually utilised premises before a court can conclude that they are a 'public place'. It is not sufficient to say that the public could have access if they were so inclined: *Spence*, supra.

    c. Premises will be private where they are entered for reasons beneficial to the occupier: *Vivier*, supra, p24d, or where they are visited for business purposes: *Harrison v Hill* 1932 JC 13, 16;

    d. However, even business premises will be 'public' if the location is a public service, a railway station, a hospital or other public utility: *ex parte Taussik*, supra, [20]. This will include a pub car park during licensed hours: *R v Waters* (1963) 47 Cr App R 149,154;

    e. A distinction is to be made where premises are occupied by a large number of people - even if there has been a condition of entry for those people, the premises will be a 'public place': *Planton v Director of Public Prosecutions* [2002] RTR 9, [17] (explaining *Vivier*, supra). This is because a potentially large number of individuals need to be caught or protected by the umbrella of the legislation.

26. In connection with (b), it is important to make clear that the public's use of the place in question must be lawful. In other words, the public must have express or implied

permission to access it. This was said expressly in the Scottish case of *Harrison v Hill*, supra, p16, where the Lord Justice General, in considering whether an ordinary farm road between a public highway and a farmhouse was a road to which the public has access said:

> "I think that, when the statute speaks of 'the public' in this connexion, what is meant is the public generally, and not the special class of members of the public who have occasion for business or social purposes to go to the farmhouse or to any part of the farm itself; were it otherwise, the definition might just as well have included all private roads as well as all public highways.
>
> I think also that, when the statute speaks of the public having 'access' to the road, what is meant is neither (at one extreme) that the public has a positive right of its own to access, nor (at the other extreme) that there exists no physical obstruction, of greater or less impenetrability, against physical access by the public; but that the public actually and legally enjoys access to it. It is, I think, a certain state of use or possession that is pointed to. There must be, as [a] matter of fact, walking or driving by the public on the road, and such walking or driving must be lawfully performed — that is to say, must be permitted or allowed, either expressly or implicitly, by the person or persons to whom the road belongs."

27. This passage was cited with approval by the Court of Appeal in *Spence*, supra. Henry LJ then said at pp355-356:

> "The evidence in this case that it was employees, customers and business visitors who used the car led us to the conclusion that those categories of people were a special class (those with business there) as distinct from the members of the general public. (We cite the formulation of the test which we have applied from *Director of Public Prosecutions v Vivier* [1991] RTR 205). There was here no use by members of the public generally. True, there was no physical obstruction to keep the public out, but no evidence of any use – unsurprisingly in our view – other than that special class of those with business there.
>
> In the absence of evidence of any such user, there was no case to go to the jury: see the citation from *Harrison v Hill* above; *Pugh v Knipe* [1972] RTR 286 and *Deacon v AT (A Minor)* [1976] RTR 244. Those cases emphasise that the fact there is neither physical obstruction nor any sign forbidding entry to those with no business there does not itself mean the public have access. There must be evidence that the public utilises that access. In each of those cases, and in this case too, there was no such evidence."

28. In light of the principles set out in these extracts, it is clear that there was insufficient evidence before the justices to enable them to convict the Appellant. The submission that there was no case to answer should have succeeded, and their findings of fact are plainly insufficient to support the conviction. Although he did not concede the appeal, Mr Weaver for the Respondent acknowledged in argument that the findings of fact in the stated case were sparse.

29. The first difficulty faced by the prosecution is made clear by the photographs, which are annexed to the written stated case and therefore something which I can consider. These show an archway entrance to the car park some doors to the left of the public house, which is situated on a terrace. The photographs show that the car park serves a number of businesses. There are a number of different forms of sign in different areas of the car park, all strongly indicating that parking by the public is not permitted. In some areas (and by one of the entrances) there are signs saying 'Private Property Strictly No Unauthorised Parking'. By other parking spaces there are signs saying 'Staff Parking', and by other spaces signs saying 'Private Car Park'. Strikingly, on a wall above two other spaces is a sign saying:

> "Private Car Park
> These 2 spaces are private car park spaces
> Only for the use of our employees.
> If you park here you run the risk of being fined for trespass
> and/or blocked in.
> So, please do not park here at any time."

30. It therefore appears from the photographs that although 'the car park' as referred to in the written case stated was one area with two entrances, which was not further sub-divided by barriers, it in fact appears to comprise several different car parking areas, for use by different groups of persons, at least some of which were unquestionably and explicitly private. There was no finding by the justices as to exactly where the Appellant parked. If he had parked under the sign I have set out above, then there could be little question but that he had parked in a private area. The sign could be hardly more explicit. This deficiency alone means the conviction cannot stand. The Appellant had to be 'in charge' of his vehicle in a public place and given that, in my view, that question depended on exactly where in the car park he had parked, the absence of any evidence or finding about where he parked is fatal to the conviction.

31. A second problem for the prosecution was the absence of evidence of any use by the public, as opposed to members of the public who happened to have business at the premises served by the car park including, for example, those patients visiting 'Enhance Aesthetics'. In the absence of such evidence, there was no case to answer: *Spence*, supra. This case is wholly different from cases such as *May,* supra, which also concerned a car park at commercial premises, namely a Volvo franchise. In that case there were signs inviting members of the general public to enter and to park. That was held to be sufficient. In [9] of his judgment Laws LJ said that in *Spence*, supra:

> "There was no evidence of any reason why any member of the general public should go there as opposed to those having pre-ordained specific business."

32. In my judgment, that aptly describes the position on the present appeal.

33. The third problem faced by the prosecution is the absence of any evidence that even if, contrary to the evidence and the signs in the photographs, the public did in fact use the car park, they had lawful permission to do so either explicitly, implicitly or as the result of tolerance by the owners of the land in question. Again, this absence of evidence and factual finding is fatal to the conviction.

34. I turn to the findings of fact in the reasons given by the justices for convicting the Appellant. As I have said, there were three such findings. Neither separately nor together did they constitute a case to answer nor are they capable of supporting the conviction. The fact that there are no physical barriers is not of itself sufficient to establish that a car park is a public place as *Spence*, supra, makes clear. Also, true it is that the Appellant parked as a member of the public (in the sense that he was not at work at the pub at the time). But as I have said, there was no evidence that he was entitled to do so lawfully because there was no evidence of general tolerated use by the public. The mere fact that the photographs showed cars parked in the car park was not sufficient because they could have belonged to the staff of the businesses served by the car park, who were entitled to park there. And the second reason given the justices, namely, the presence of signs, weighed against the prosecution. That is because, with the exception of the 'Enhance Aesthetics' sign inviting patients to park, all of the other signs made clear in different ways that public parking was not allowed and that the car park was private.

Conclusion

35. For all of these reasons, this appeal succeeds, and the Appellant's conviction is quashed.