Neutral Citation Number: [2021] EWHC 3056 (Admin)

Case No: CO/1891/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/11/2021

Before:

THE LORD BURNETT OF MALDON
LORD CHIEF JUSTICE OF ENGLAND AND WALES
and
MR JUSTICE GARNHAM

- -

Between:

ZACHARY BROWN	**Appellant**
- and -	
CROWN PROSECUTION SERVICE	**Respondent**

- -
- -

Tom Wainwright (instructed by **ITN Solicitors**) for the **Appellant**
James Boyd (instructed by **The Crown Prosecution Service**) for the **Respondent**

Hearing date: 3 November 2021

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Approved Judgment

Lord Burnett of Maldon CJ:

1. On 19 March 2021 the appellant was convicted of wilfully obstructing, without lawful authority or excuse, the free passage along The Bridge, a bridleway, on the HS2 site off Denham Court Drive in Buckinghamshire, contrary to section 137 of the Highways Act 1980 ("the 1980 Act"). That provides:

> "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he is guilty of an offence and liable to a fine not exceeding [level 3 on the standard scale]."

2. He was given a conditional discharge and ordered to pay the victim surcharge and prosecution costs. This is his appeal by way of case stated against that conviction.

3. At trial the appellant's legal representatives argued that the construction vehicle he in fact obstructed when he lay down across the bridleway was possibly committing an offence contrary to section 34(1)(b) of the Road Traffic Act 1988 ("the 1988 Act") which prohibits the use of mechanically propelled vehicles on footpaths, bridleways and restricted byways without 'lawful authority'. Pedestrians, and no doubt horses, could navigate around the appellant but not a vehicle. The case advanced on behalf of the appellant was that the prosecution had to prove, as an ingredient of the offence, that the vehicle in fact obstructed was using the highway (the bridleway) lawfully. District Judge Dodds concluded that the prosecution did not have to prove that a lawful user of the highway was in fact obstructed.

4. The judge rejected a submission of no case to answer founded on that legal argument.

5. The appellant gave evidence that he was opposed to the HS2 project because of the damage he considered it caused to the environment and that he intended to prevent 'an environmental crime'. There was no suggestion that he obstructed the bridleway because he apprehended a breach of section 34 of the 1988 Act nor was it suggested that the appellant was aware of the provision. No "justification" defences were advanced on behalf of the appellant that would entitle a member of the public to intervene to prevent a crime. Indeed, the fact that as part of a large construction project a vehicle is being driven on a footpath or bridleway would not without more ground a reasonable suspicion that an offence is being committed contrary to section 34. It would be unlikely in the extreme that the permission of the landowner over whose land the highway runs would not be sought, not least because without it the landowner could bring the project to a halt, or at least substantially inconvenience it, at great cost. It would not be for a member of the public to seek to interrogate a driver or others involved in the project, to demand proof of lawful user. That would clearly be unreasonable.

6. The request to state a case under Part 35 of the Criminal Procedure Rules was founded squarely on the argument around section 34 of the 1988 Act and that:

> "the prosecution had not proved an essential element of the case i.e that the defendant had obstructed someone who has a right to use the footpath [to] pass and repass. A key element of the offence is that the defendant caused an obstruction to a road

> user who had the right to use it. The prosecution failed to adduce any evidence that the vehicle in question had lawful authority to cross the bridge. In the absence of any such evidence the District Judge should have dismissed the case at the close of the prosecution case..."

7. The judge stated the case requested by the appellant and asked five questions for the opinion of the High Court:

> "1. Was I correct to rule that whether the vehicle which had been obstructed by the Appellant was lawfully entitled to use the bridleway in question was not an essential element of the offence?
>
> 2. Was I correct to rule that the Crown was not required to prove that the conduct of driving the vehicle on the bridleway was lawful?
>
> 3. If the answers to (1) and (2) are no was the vehicle lawfully using the bridleway in any event in the context of the HS2 project?
>
> 4. Was I correct to reject the submission of no case to answer?
>
> 5. Was I correct to refuse the Respondent's application to adjourn?"

8. The last question does not arise. The prosecution unsuccessfully sought an adjournment at the start of the trial to adduce evidence about the circumstances in which the vehicle was being used. There is no cross appeal or suggestion that the judge's exercise of his discretion to refuse an adjournment was unlawful.

9. In a skeleton argument filed on behalf of the appellant Mr Wainwright, who did not appear below, disavowed the argument that it was necessary for the prosecution to prove that a lawful user of the highway was in fact obstructed. He maintained that position before us and was right to do so. The language of section 137 does not require the prosecution to prove that anyone was actually obstructed, still less that a lawful user of the highway was obstructed. That was confirmed in *Nagy v. Weston* [1965] 1 WLR 280 which concerned section 121(1) of the Highways Act 1959, the legislative predecessor to section 137(1) of the 1980 Act. Lord Parker CJ at para [80] said there must be proof that the user in question was an unreasonable user. The reasonableness of the user amounting to an obstruction will depend on all the circumstances, including "the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and, of course, whether it does in fact cause an actual obstruction as opposed to a potential obstruction"**.** The Divisional Court in *DPP v. Ziegler* [2020] QB 253 confirmed at para [69] that this statement of law remains authoritative in the context of section 137(1) of the 1980. This formulation places the question whether there was in fact an obstruction squarely in the evaluation of reasonable user, rather than a free-standing ingredient of the offence.

Nothing said in the Supreme Court in *Zeigler* [2021] 3 WLR 179 questioned that conclusion. *Nagy* was cited with approval.

10. It follows that the judge was correct to reject the submission of no case to answer on the basis advanced before him. In short, the answer to question 1, 2 and 4 in the case stated are "yes".

11. Mr Wainwright argued that was not the end of the matter. In a careful and measured argument, he submitted that the issue of the proportionality of the appellant's actions, for the purposes of the exercise of his rights under articles 10 (free speech) and 11 (freedom of assembly) of the European Convention on Human Rights ("the Convention"), were raised before the judge. He submitted that the judge should have concluded that it was reasonable for the appellant to obstruct the bridleway in the way he did in support of his right to protest against the HS2 project.

12. The judge accepted in the case stated that the purpose of the appellant's actions was to manifest his opposition to the project but nowhere in the case is there a discussion of proportionality.

13. The case stated does not suggest that the argument to dismiss the summons at the close of the prosecution case rested on a submission that the appellant's actions were so obviously justified under the Convention that there was no need for him to give evidence. That would be a bold submission but there is no hint in the application to state a case that such an argument was advanced. There is no complaint in that application that the judge was wrong as a matter of law to convict the appellant because the prosecution had failed to prove that the obstruction was without lawful excuse, on proportionality grounds. Such arguments would anyway be better made in an appeal against conviction to the Crown Court. Be that as it may, the case stated contains no question, nor sets out the factual findings, that raise the issue of proportionality in this appeal.

14. Mr Wainwright realistically recognised that this might be the case. He developed a second submission which invited us to adjourn the appeal and remit the matter to the judge to amend the case stated. He relied upon section 28A(2) of the Senior Courts Act 1981:

> "**28A Proceedings on case stated by magistrates' court or Crown Court.**
>
> (1) This section applies where a case is stated for the opinion of the High Court—
>
> (a) by a magistrates' court under section 111 of the Magistrates' Courts Act 1980; or
>
> (b) by the Crown Court under section 28(1) of this Act.
>
> (2) The High Court may, if it thinks fit, cause the case to be sent back for amendment and, where it does so, the case shall be amended accordingly.

(3) …

(4) …"

15. Mr Wainwright submitted that the section imports a wide discretion. The appellant at least has an argument, having regard to the Convention rights he submits are engaged in this case, that on whatever evidence was accepted by the judge he should not have been convicted. Proportionality arguments were advanced but rejected by the judge at the end of the proceedings in the Magistrates' Court. The appellant should be able to raise these arguments now and this court should require the judge to state the factual and evaluative findings he made on proportionality.

16. We do not consider that the power to ask a Magistrates' Court to amend a case stated for the opinion of the High Court is designed to enable an appellant to advance an appeal which is entirely different from that earlier sought in an application for a case and thereby avoid time limits and difficulties caused by having to choose a single route of appeal, either to the High Court by way of case stated on a point of law or to the Crown Court for a rehearing. No authority was cited in support of this argument and we are aware of none that supports so wide an application of the power. On the contrary, such cases of which we are aware suggest that the power should be used where there is a deficiency in the case stated which needs to be remedied before the High Court can deal properly with the issues raised by the appellant on the case. Examples include:

i) *JL v. Gloucestershire Magistrates' Court* [2017] EWHC 2841 (Admin) at [2] and [3] where the case stated introduced a "material shift" in the basis for the magistrates' decision to convict the appellant, falling outside their "leeway … to amplify their reasons" and not constituting a "fair and accurate record";

ii) *Estates & Agency Holdings Ltd v. Westminster Magistrates' Court* [2012] EWHC 4637 (Admin) where the case stated was deficient because it did not properly reflect the issues of law raised by the appellant;

iii) By contrast, in *Hemming v. Birmingham City Council* [2015] EWHC 1472 (Admin) the court refused to exercise its power under section 28A(2) when the applicant contended that the case stated did not adequately reflect the submissions made. Wilkie J concluded that the reasoning of the judge was "not deficient such as would require it to be sent back for amending" [57].

17. In this case those representing the appellant followed the procedure set out in Part 35 of the Criminal Procedure Rules. They identified the errors of law on which the appellant wished to mount an appeal in the High Court. They identified the questions which they wished the judge to ask the High Court. Those questions emerged as questions 1, 2 and 4 in the case stated (para [7] above). We have indicated that question 5 concerning the adjournment does not arise. Question 3 is conditional upon the judge having misconstrued section 137 of the 1980 Act which he did not do.

18. We decline to adjourn the appeal and to remit the matter to the judge for the case stated to be amended. In those circumstances this appeal falls to be dismissed.

Mr Justice Garnham:

19. I agree.