



**SHERIFF APPEAL COURT**

**[2023] SAC (Crim) 10**  
SAC/2023/000288/AP

Sheriff Principal D C W Pyle  
Sheriff Principal C Dowdalls KC  
Sheriff Principal G A Wade KC

**OPINION OF THE COURT**

delivered by SHERIFF PRINCIPAL G A WADE KC

in

Appeal by Stated Case against Conviction

by

GARY KELLY

Appellant

against

PROCURATOR FISCAL, ABERDEEN

Respondent

**Appellant: Miller; Grant Smith Law Practice Ltd**  
**Respondent: A Cameron KC, AD; Crown Agent**

13 October 2023

**Introduction**

[1] The Civic Government (Scotland) Act 1982 (“the 1982 Act”) sets down certain requirements which require to be complied with by those that serve notice of a proposal to hold a procession in public. It also places obligations on the local authority that processes any notice lodged. By virtue of section 63(1) of the 1982 Act, after consulting with the chief constable, a local authority may make an order imposing conditions on the holding of a

procession in public. Where it issues such an order, the local authority shall deliver, at least two days before the date on which the procession is to be held, a copy of the notice and a statement of written reasons for its decision to the applicant, but that provision applies only where it is reasonably practicable for the local authority to do so: section 63 (3) and section 63 (4) of the 1982 Act.

[2] The question which arises in this appeal is whether the failure by a local authority to issue a notice and a statement of written reasons, as required by section 63(3) and section 63(4), prevents the organiser of the procession being convicted of a breach of section 65(1)(c) of the 1982 Act?

[3] On 17 November 2019 the appellant was charged in the following terms:

“(1) on 17<sup>th</sup> August 2019 at Albyn Place, Aberdeen and elsewhere you GARY JOHN KELLY did hold a procession in public otherwise than in accordance with a condition imposed in relation to the procession by an order under Section 63(1) of the aftermentioned Act, namely that you must arrange a Temporary Traffic Regulation Order TTRO and full approved Traffic Management company road closure to be put in place of the route of the procession, for its duration in respect that you did not arrange a Temporary Regulation Order or full approved Traffic Management company road closure to be put in place in over the route of the procession for its duration;

CONTRARY to the Civic Government (Scotland) Act 1982 Section 65(1)(c)

(2) on 17<sup>th</sup> August 2019 at Albyn Place, Aberdeen and elsewhere you GARY JOHN KELLY did hold a procession in public otherwise than in accordance with a condition imposed in relation to the procession by an order under Section 63(1) of the aftermentioned Act, namely that you should have in place Public Liability Insurance should any legal action or otherwise be forthcoming following an incident during this event in respect that you did not have in place Public Liability Insurance;

CONTRARY to the Civic Government (Scotland) Act 1982 Section 65(1)(c).”

[4] The charges are hardly a paragon of good draftsmanship. However no issue was taken and the matter proceeded to trial in March 2023. Upon the conclusion of the Crown case on 10 March 2023, counsel for the appellant made a submission of no case to answer in

terms of section 160 of the Criminal Procedure (Scotland) Act 1995. Having heard submissions from counsel for the appellant and the Crown, the sheriff adjourned the trial until 21 April 2023. On 21 April 2023 the sheriff rejected the submission of no case to answer. The appellant thereafter elected not to lead any evidence. The sheriff, after considering the evidence, convicted the appellant of both charges.

### **The stated case**

[5] The sheriff in his stated case posed five questions:

- i. Was there sufficient evidence to entitle me to find that Mr Mackay was present when the Order and conditions were issued by the Council on 14 August 2018 (as recorded in finding in fact 17)?
- ii. Was there sufficient evidence to entitle me to find that the appellant became aware following the meeting of the Council on 14 August 2019 that the notification for the procession had been approved and that the Order and conditions had been pronounced (as recorded in finding in fact 18)?
- iii. Was there sufficient evidence to entitle me to find that the appellant was aware of the terms and conditions 4 and 9 specified in the Order more than two days before the procession took place (as recorded in finding in fact 25)?
- iv. Did I err in repelling the submission made in terms of section 160 of the Criminal Procedure (Scotland) Act 1995?
- v. On the evidence and on a proper interpretation of the Civic Government (Scotland) Act 1982, was I entitled to convict the appellant?

[6] Both counsel for the appellant and the advocate depute were in agreement that the first three questions should be answered in the affirmative. The parties diverged on questions (iv) and (v).

### **Facts**

[7] The relevant proven facts in so far as based on the evidence led during the prosecution case, are as follows:

- i. The appellant is a political organiser with the group All Under One Banner (“AUOB”).
- ii. AUOB supports the cause of Scottish independence.
- iii. On 17 August 2019 a public procession took place in the city of Aberdeen at Albyn Place and other locations which had been organised by the appellant under the auspices of AUOB.
- iv. Around 10,000 people attended the procession.
- v. Aberdeen City Council had authorised the procession to take place by way of an order made on 14 August 2019 in terms of section 63(1) of the Civic Government (Scotland) Act 1982 (“the Order”).
- vi. The appellant was named as the organiser of the procession in the Order.
- vii. From around May 2019 and through to August 2019 the appellant acted as the organiser of the procession and was the principal liaison with Aberdeen City Council in relation to the same.
- viii. The appellant initiated a formal notification process on 30 July 2019 by submitting a notice and risk assessment to Aberdeen City Council which notified it of an intention to hold a procession in public on 17 August 2019.

- ix. The Order itself together with the conditions attached to the same was voted upon and pronounced by the licensing sub-committee of Aberdeen City Council at a public meeting which took place on 14 August 2019.
- x. The appellant was aware prior to the meeting that his notification would be placed before the sub-committee for a decision at the meeting.
- xi. At the meeting on 14 August 2019 the appellant was represented by Mr Neil Mackay.
- xii. At the meeting Mr Mackay confirmed that he was representing the appellant and the same was recorded in the minutes.
- xiii. Mr Mackay was present when the Order and conditions were issued.
- xiv. The appellant became aware following the meeting that the notification had been approved and that the Order and conditions had been pronounced.
- xv. The Order was issued with a series of nine conditions. These conditions were made under section 63(1) of the 1982 Act.
- xvi. Condition 4 required that the appellant must arrange for a Temporary Traffic Regulation Order (TTRO) and full approved Traffic Management company road closure to be in place over the route of the procession, for its duration.
- xvii. Condition 9 required that the appellant should put in place public liability insurance should any legal action or otherwise be forthcoming following an incident during the event.
- xviii. Neither before nor during the procession was there in place a TTRO or an approved traffic management company road closure over the route of the procession which had been arranged by the appellant. Because the appellant

had not made this arrangement, the Council arranged to put in place a TTRO for the purposes of the procession.

- xix. Neither before nor during the procession was there in place any policy of public liability insurance covering the procession. The procession proceeded without public liability insurance.
- xx. The procession proceeded in a manner which did not comply with conditions 4 and 9 specified in the Order made by the Council under section 63 (1) of the 1982 Act.
- xxi. The appellant was aware of the terms of conditions 4 and 9 specified in the Order more than two days before the procession took place.

[8] No finding in fact was made that Aberdeen City Council had complied with its obligations under section 63 (3) and section 63 (4) of the 1982 Act. The Crown had led no evidence to prove compliance, hence its absence. The sheriff's finding in facts are to the effect that the appellant was advised verbally by Mr Mackay of the terms of the Order and that position was accepted by counsel for the appellant.

### **Legislation**

[9] The following provisions of the 1982 Act were referred to:

**“63.— Functions of regional and islands councils in relation to processions**

(1) The local authority may, after consulting the chief constable ... in respect of a procession notice of which has been given or falls to be treated as having been given ... make an order—

- (i) prohibiting the holding of the procession; or
- (ii) imposing conditions on the holding of it.

...

- (3) A local authority shall—
- (a) where notice of a proposal to hold a procession has been given or falls to be treated as having been given in accordance with section 62(1) or (1A) above of this Act, deliver at least 2 days before the date when, in terms of the notice, the procession is to be held, to the person who gave the notice—
- (i) where they have made an order under subsection (1) above, a copy of it and a written statement of the reasons for it;
- (ii) where they decide not to make an order under subsection (1) above or to revoke an order already made under subsection (1) or (1A) above, notification of that fact;
- (iii) where they have, under subsection (1A) above, varied such an order, a copy of the order as varied and a written statement of the reasons for the variation; and
- (b) where they have made an order under subsection (1) or (1A) above in relation to a proposal to hold a procession, make such arrangements as will ensure that persons who might take or are taking part in that procession are made aware of the fact that the order has been made and of its effect; and
- (c) where they have revoked an order made under subsection (1) or (1A) above in relation to a proposal to hold a procession, make such arrangements as will ensure that persons who might take or are taking part in that procession are made aware of the fact that the order has been revoked.
- (4) The local authority shall comply with subsection (3) above—
- (a) as early as possible;
- (b) only insofar as it is reasonably practicable for them to do so.
- ...
- (8) The considerations to which the local authority shall have regard when deciding whether to prohibit the holding of a procession or impose conditions on it under this section shall include—
- (a) the likely effect of the holding of the procession in relation to—
- (i) public safety;

- (ii) public order;
  - (iii) damage to property;
  - (iv) disruption of the life of the community;
- (b) the extent to which the containment of risks arising from the procession would (whether by itself or in combination with any other circumstances) place an excessive burden on the police;
- (c) where the person proposing to hold the procession has previously held one in the area of the authority or the persons likely to take part in the procession, or some of them, are the same persons as took part in one previously held in that area, or some of them —
- (i) whether the previous procession was held in breach of a prohibition under this section on its being held or of a condition so imposed on the holding of it;
  - (ii) whether any guidance or code of conduct issued by the authority as to the holding of the previous procession or as to the holding of processions generally was followed; and
  - (iii) the effect of the previous procession in relation to the matters mentioned in sub-paragraphs (i) to (iv) of paragraph (a) above and in paragraph (b) above.

...

#### **65.— Offences and enforcement**

- (1) Subject to subsection (3) below, a person who holds a procession in public—

...

- (c) otherwise than in accordance with a condition imposed by an order under section 63(1) or (1A) or 64(6)(a)(ii) of this Act in relation to the procession;

shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 4 on the standard scale or to imprisonment for a period not exceeding 3 months or to both.”

**Submissions for the appellant**

[10] Before us, counsel for the appellant submitted that the sheriff erred (i) in his refusal of the no case to answer submission made under section 160 of the Criminal Procedure (Scotland) Act 1995 and (ii) his decision to convict the appellant of both charges. No evidence had been led by the procurator fiscal depute to prove that Aberdeen City Council had issued a copy of the Order along with a written statement of reasons to the appellant. There was therefore no evidence of compliance with section 63(3) of the 1982 Act. No evidence had been led by the procurator fiscal depute to prove that it was not reasonably practicable for Aberdeen City Council to issue a copy of the Order along with the written statement of reasons, as required by section 63(4) of the 1982 Act. As a consequence, it was not open to the sheriff to hold that the appellant was in breach of section 65(1)(c) on both charges stated in the complaint.

[11] Counsel's interpretation of section 65 (1)(c) was that there were three requirements for the *actus reus*. Firstly, it was a requirement that a legally valid order (including any conditions) was issued by a local authority, in this instance Aberdeen City Council, for a procession in public to be held (per section 63(1)). Secondly, a procession required to be subsequently held. Thirdly, the procession had to have proceeded otherwise than in accordance with the legally valid order. The legal validity of an order issued under section 63(1) falls to be determined by reference to section 63(3) and section 63(4). Counsel noted that at section 63(3) Parliament had used the word "shall". Elsewhere in the 1982 Act the word "may" had been used. As a consequence, section 63(3) was a mandatory requirement imposed on a local authority.

[12] The court had asked both parties to be addressed on the decision of the House of Lords in *R v Soneji* [2006] 1 AC 340. Counsel submitted that *R v Soneji* required a purposive

reading to be undertaken of a statutory provision. The wording and tenor of section 63(3) and section 63 (4) in conjunction with section 65(1)(c) meant that the *actus reus* is that an individual can only be convicted where there has been a failure to comply with a validly issued order.

[13] Counsel accepted that, given no challenge was made to the findings in fact, the appellant did know of the conditions in the Order; however, counsel submitted that a breach of section 65(1)(c) did not require proof of *mens rea*. The terms of section 65(1)(c) made that clear. It was a strict responsibility offence.

[14] Counsel moved the court to answer question (iv) in the affirmative and question (v) in the negative.

[15] In response to the advocate depute's submissions, counsel for the appellant noted that section 65 (1)(c) also used the word "order". The use of that term envisaged that a legally valid order had been issued under section 63(1) and in compliance with section 63(3). There was a link therefore between section 63 and section 65 such that there had to be compliance with section 63(3) and section 63(4) to establish a breach of section 65(1)(c).

### **Submissions for the respondent**

[16] The advocate depute moved for the appeal to be refused. The Crown's primary position was that section 65(1)(c) created a strict responsibility offence. There was no need for evidence to be led at trial of (i) compliance by Aberdeen City Council with section 63(3) or (ii) alternatively that it had not been reasonably practicable for Aberdeen City Council to comply with section 63(3): per section 63(4). The sheriff's interpretation of the statute was correct and section 65(1)(c) created a strict responsibility offence. The advocate depute referred the court to *Dickson v Brown* 2014 SLT 126 at paragraphs [32] to [34]. Applying the

reasoning of the High Court of Justiciary in *Dickson* to this appeal, the advocate depute submitted that proof of knowledge of the Order was not required here. That position was confirmed if one contrasted section 65(1)(c) with section 7 of the 1982 Act which addressed offences for breach of licences. Within section 7 Parliament had legislated a defence of reasonable excuse (section 7 (A1)), a defence of due diligence to prevent commission of an offence (section 7(3)) and a requirement for *mens rea* (section 7(4)). In contrast, in section 65(1)(c) Parliament made no provision for any defence. Even if he were wrong in that submission, the sheriff had held that the appellant knew of the conditions in the Order. That had been conceded by counsel for the appellant. If there was a requirement to establish *mens rea* it had been met by the procurator fiscal depute at trial.

[17] When addressing us on *R v Soneji*, the advocate depute accepted that the crucial question was whether Parliament intended total invalidity where there had been non-compliance with a statutory provision such as here. In this appeal, compliance with section 63(3) and section 63(4) was not a relevant consideration. If Parliament had wanted it could have been explicit in the 1982 Act that both of the requirements set down at section 63(3) and section 63(4) had to be fulfilled before an individual could be held to have breached section 65(1)(c). In any event, the advocate depute considered that *R v Soneji* could be distinguished since in that appeal there had been non-compliance with the relevant statutory provision. If the sheriff was correct in his interpretation of section 65(1)(c), as the advocate depute submitted, then the issue of non-compliance with the statutory provision did not arise. Even if the advocate depute's submission was not accepted on that point, he submitted that the use of the word "shall" at section 63(3) was not particularly indicative. More pointedly, if one adopted a purposive approach, it could not be right that the appellant, who accepts he knew of the terms of the Order, could not be convicted for breach

of that same Order on the basis of a failure to lead evidence of compliance with section 63(3), failing which evidence to justify derogation from section 63(3).

[18] The advocate depute submitted that question (iv) be answered in the negative and question (v) in the affirmative.

### **Decision**

[19] Before us there was consensus that Section 65(1)(c) created a strict liability offence. The appeal proceeded on the basis of a concession that the appellant did, as a matter of fact, know that the Order had been granted and that conditions 4 and 9 had been attached to that Order. The position before us was therefore factually different from the position at the time of the submission of no case to answer before the sheriff because it was argued then that no such inference of knowledge could be drawn on the basis of the evidence led by the Crown. The question before us came to be whether the commission of the section 65(1)(c) offence was dependent on the local authority having complied with the formal requirements of section 63(3) which required the delivery of a copy of the Order itself and written reasons for the imposition of any condition attached to the Order to be provided two days prior to the procession taking place. In other words could criminal liability be avoided as a result of a lack of compliance with the formal notification requirements, albeit the appellant knew what the terms of the Order were and knowingly failed to comply with them ?

[20] There is a certain inconsistency in the appellant's position. He clearly did not consider that the lack of formal delivery of the Order presented any obstacle to the procession taking place. However he founds on the want of form to escape liability for failure to adhere to conditions 4 and 9 of the same Order, of which he now concedes he was well aware. His position is predicated on the assertion that the lack of formal validity, or at

the very least a failure to establish that it was not reasonably practicable to comply with the formal requirements, renders the Order defective and therefore incapable of forming the basis of a valid prosecution and conviction.

[21] We are of the view that the appellant is essentially trying to have his cake and eat it. Either the Order sanctioning the procession was invalid for want of form, in which case the procession should not have taken place at all, or the lack of formal compliance did not vitiate the order and the latitude envisaged in section 63(4) enables departure from the terms of section 63(1) and (3).

[22] Section 63(1) is permissive. It allows local authorities to make or refuse to make Orders regulating the holding of processions and if appropriate to make such Orders subject to certain conditions. There is no doubt that the local authority in this case made such an Order on the 14 August 2019. The Order itself formed Crown Production 7.

[23] Section 63(3) is then simply concerned with what the local authority should do to bring the conditions in such an Order to the attention of the holder of the parade. The requirement, expressed in mandatory terms, is simply to deliver a copy of the Order and the written reasons for the local authority's decision to the holder of the parade. It is not clear from the wording of the subsection what the word "deliver" is intended to convey or how such delivery is to be effected.

[24] As the sheriff identifies at paragraph 10 of the stated case the Order itself together with the associated conditions was voted upon and pronounced by the licensing subcommittee of Aberdeen City Council at the public meeting on the 14 August 2019. The precise terms of the Order as pronounced publicly pursuant to the convenor's motion were

"That the Sub Committee grant permission for the public procession subject to the nine conditions recommended by Police Scotland in their response, but with condition 4 amended to read 'The organiser must arrange a Temporary Traffic

Regulation Order (TTRO) and full approved Traffic Management company road closure to be in place over the route of the procession for its duration’.”

This public pronouncement of the terms of the Order was also spoken to by Mr Munro. It is accepted that the appellant was represented at the meeting by his proxy Mr Neil Mackay and the minutes record that he spoke in support of the proposal.

[25] Section 63(4)(b) of the 1982 Act inherently recognises that there are cases where the order and any conditions attached would not be delivered in the manner specified in section 63(3) or indeed at all. The requirements in section 63(3) are stated to apply only where it is reasonably practicable for compliance to be effected. It is not expressed as an exemption to the general requirement. It is therefore clear to us that delivery of the Order or written reasons cannot be essential to either the validity of the Order made or the commission of the section 65(1) offence.

[26] In order for the appellant to succeed we would have to be persuaded that a contravention of section 65(1) is dependent on a strict construction of the notification requirements of section 63(3) or evidence that compliance with those provisions was not reasonably practicable. In other words it is the contention of the appellant that formal compliance with section 63(3) is only excused where such compliance is not reasonably practicable. That is not what the subsection provides. If one looks at the terms of section 63(4)(b) in particular the provisions regarding delivery of the Order need be complied with “only insofar as it is reasonably practicable for them (the local authority ) to do so.” In our view that would run contrary to any suggestion that the delivery of the Order had any bearing on its validity because it states in terms that the local authority only have to fulfil these requirements if they can. The formal requirements contained in section 63(3) are

substantially diluted by section 63(4) to the point that even within that section itself it is clear that an Order is not vitiated for want of delivery of a formal written document.

[27] Before the sheriff and before us it was conceded that if one looks only to the terms of section 65(1)(c) then there would be a sufficiency of evidence to convict the appellant but the appellant's position is that section 65(1) cannot be read alone and has to be read under reference to section 63(3) and 63(4).

[28] The fallacy of that proposition lies in the patent acceptance by the appellant that the Order was sufficient authority to allow the parade to proceed at all. In other words strict compliance with section 63(3) is not required for the appellant's purposes but it is for the respondent's.

[29] We were not persuaded by the advocate depute's submission that section 65(1)(c) can be read entirely independently from section 63. There is a clear reference to that section and to the requirement for the existence of an Order before the strict liability offence can be created. However we do not consider that to be of any moment in the question before us.

[30] The appellant's proposition proceeds on the basis that before someone can be convicted of the section 65(1) (c) offence the Crown require to prove as part of the *facta probanda* that the holder of the parade was notified of the conditions in a manner compliant with section 63(3) irrespective of whether they have actual knowledge of the conditions of the order or not. This is so even although Parliament clearly envisaged that there would be circumstances in which the provisions of section 63(3) would not be complied with.

[31] The provisions of Part V of the 1982 Act are concerned with the regulation of public processions both as a matter of public law and in the context of creating certain statutory offences. In other words some sections of the Act deal with administrative functions of the

local authority and others serve a different purpose altogether. In our view the various sections of this part of the Act are not mutually interdependent.

[32] For the reasons discussed we reject the proposition that as a matter of statutory interpretation the section 65(1)(c) offence is conditional on compliance with section 63(3). We do not consider that the form of the notification requirements is an essential ingredient of that offence. All that the Crown require to establish are the *facta probanda* which are clear from a straightforward reading of the section namely (i) that a condition has been imposed by an Order made by a local authority, which was clearly the case, (ii) that a procession was held in public, which it was and (iii) that it proceeded otherwise than in accordance with a condition specified in the local authority's order, which is not in dispute.

[33] Nothing in the wording of section 65 itself refers to notification or delivery of the Order containing the conditions and section 63(4) in itself envisages cases where such compliance is not required which could be many and varied. An interpretation of section 65(1)(c) which depended on the various possibilities for noncompliance with section 63(3) would create an uncertainty not present on a straightforward reading of the words used in section 65 itself. The sheriff deals with this at paragraphs 24 and 25 of the stated case and we are in agreement with the approach which he has taken.

[34] Turning to the Crown's *esto* position in our view that a purposive approach should be adopted in relation to the interpretation of the legislation as a whole. The appellant urged upon us a submission that section 63(3) was expressed in mandatory rather than permissive terms by the use of the word "shall". However it is clear that even reading section 63 as a whole the mandatory nature of that provision is undermined by the qualification in section 63(4)(b) to the effect that compliance is only required if reasonably practicable.

[35] It is legitimate to approach this case by looking at the consequences of non-compliance with section 63(3) and ask the question what in the light of those consequences must Parliament be taken to have intended ?

[36] This is the approach which is articulated by Lord Steyn *in R v Soneji* 2006 1 AC (HL) 340 from paragraph 14 upon which this Court asked to be addressed. Following *London & Clyde Estates v Aberdeen District Council* 1980 1 WLR 182 per Lord Hailsham at pages 189-190 and *Wang v Commissioner of Inland revenue* 1994 WLR 1286 per Lord Slynn of Hadley page 1296 the law has evolved and rather than looking at the mandatory/directory distinction in interpretation of the words "shall" or "may" the court must ask whether it was the purpose of the legislation to render an act done invalid in consequence of such non-compliance with a statutory provision. As Lord Carswell observes at paragraph 60 of the same case

"the distinction between mandatory and directory provisions, which was much discussed in judicial decisions over many years, has gone out of fashion and been replaced, as Lord Steyn has said by a different analysis directed to ascertaining what the legislature intended should happen if the provision in question were not fully observed."

[37] It is clear that a purposive approach to the interpretation of such provisions is now to be applied. In this case the purpose behind the provisions of section 63(3) is to ensure, so far as reasonably practicable, that the organisers of processions seek permission to do so and that public safety is addressed. Hence the requirement to make arrangements for temporary traffic management and public liability insurance both of which offer public protection while the procession is allowed to take place thereby balancing the rights of all concerned. This court is inimical to the suggestion that liability for failure to comply with conditions such as these, which are required for good reason, can be avoided by non-compliance with notification requirements which are not required in every case in any event.

[38] This is especially so when the evidence before the sheriff at the point of the no case to answer submission clearly allowed him to draw the inference that the appellant had both imputed knowledge of the conditions via his agent, proxy or representative, Mr McKay to whom they had been communicated and actual knowledge as evidenced by his discussion with the police officer in the course of which he tendered reasons for his failure to comply with conditions. It is even more sharply focussed by the concession before us that the appellant knew of the conditions and all that could possibly be complained of was a want of form in the manner of their intimation to him.

[39] In light of the concessions made we shall answer the first three questions posed in the stated case in the affirmative and in all the circumstances we shall answer question (iv) in the negative and question (v) in the affirmative. The appeal is therefore refused.