Neutral Citation Number: [2020] EWCA Crim 796

Case No: 201802662 B2

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT GUILDFORD
HIS HONOUR JUDGE JONATHAN BLACK
T20170182/0442

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2020

Before:

LADY JUSTICE NICOLA DAVIES DBE
MRS JUSTICE McGOWAN DBE
and
MR JUSTICE LINDEN

- -

Between:

STUART CHARLES INKSTER	**Appellant**
- and -	
REGINA	**Respondent**

- -
- -

Caroline Moonan for the **Appellant**
William Saunders (instructed by **Crown Prosecution Service**) for the **Respondent**

Hearing date: 5 June 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII, if appropriate, and/or publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10am on Wednesday 24 June 2020.

Lady Justice Nicola Davies:

1. On 8 May 2018 in the Crown Court at Guildford the appellant pleaded guilty to three counts of breach of a non-molestation order and was sentenced by HHJ Black on each count to a concurrent conditional discharge for a period of six months. He appeals against conviction by leave of the single judge, who also granted an extension of time.

2. 8 May 2018 was the date set for the trial of the appellant on a four-count indictment for breaches of a non-molestation order. The appellant was unrepresented. Present in court was counsel instructed by the court under section 38 of the Youth Justice and Criminal Evidence Act 1999 for the purpose of cross-examination of the complainant. Prior to the jury being sworn the judge addressed the appellant in open court as to the not guilty pleas he had entered. Counsel, who was listening to the exchange, offered to "act as a wise ear" and to speak to the appellant during the luncheon adjournment. This was done. In the afternoon the appellant applied to change the pleas he had entered, the counts on the indictment were put to the appellant who entered guilty pleas to counts 1, 2 and 4 on the indictment, count 3 was left to lie on the file.

3. The primary ground in this appeal is that the appellant's decision to change his pleas, taken over the luncheon adjournment, was not a voluntary choice. The pressure placed upon the appellant by the judge, which was the result of incorrect advice given by the judge, resulted in the appellant having no choice but to plead guilty. His freedom of choice having been so narrowed or removed, the pleas of guilty which the appellant subsequently entered are a nullity and should be set aside.

Facts

4. The appellant and the complainant, MI, were married and had two children. Following their divorce there were proceedings in the Family Court. On 4 January 2017 a district judge imposed upon the appellant a non-molestation order which included at clause 3 the following prohibition:

> "The Respondent must not telephone, text, email or otherwise contact or attempt to contact the Applicant (including via social networking websites or other forms of electronic messaging). All communications in respect of child arrangements for the children will be by email or text message only and will be sent via the Paternal Uncle, Michael Inkster, or the Maternal Grandmother, Margaret Amos, or via some other third party that the parents agree."

5. On the same date the complainant MI signed an undertaking promising:

> "To respond to any email or text message sent by Michael Inkster, Margaret Amos or any third party agreed between the parties, on behalf of the Respondent and in relation to arrangements in respect of the children only, as soon as possible and in any event within 6 hours at most."

Count 1

6. Towards the end of February 2017 MI received a letter, which the Crown stated came directly from the appellant, in which he alleged "I am writing to you directly which is technically in breach of the non-molestation order but as you have no solicitor again I have no alternative." The content of the letter refers to child maintenance and divorce related financial issues. The Crown's case was that this letter was a breach of the order as it was sent directly to MI rather than through an agreed third party and that it was not about child arrangements.

Count 2

7. On 29 March 2017 the appellant sent a text message to MI in which he stated that Michael Inkster was no longer going to be the middleman between the two of them, he also discussed arrangements for their daughter to see the appellant. The Crown's case was that the text message was a breach of the order as it was sent directly to MI rather than through an agreed third party.

Count 4

8. The appellant sent three text messages to MI on 31 October 2017. On that date their daughter had been with the appellant, she was due to return to MI's home at 19:00. At 19:37 MI rang the appellant asking him to bring their daughter home, he said he was on his way back, the daughter returned at 20:10. Some 45 minutes later the appellant sent the three text messages. The first stated that MI should not phone again with her "aggressive hostility" and that she knew that the daughter was enjoying a Halloween meal with friends from school. The second message related to their daughter having missed two days with the appellant at half term and that those days would have to be made up during the Christmas holidays. The third message referred to the Crown Court hearing and asked MI not to call or harass the appellant again. The Crown contended that the messages were a further breach of the order as they had been sent to MI rather than through an agreed third party.

9. From the police interview onwards, the appellant accepted sending the letter and the text messages but maintained that he had a reasonable excuse to do so. It was that MI had refused to comply with her signed undertaking. She had repeatedly failed to respond to contact from the uncle or grandmother in relation to child arrangements within the stipulated time or at all and she would not agree to a third party being the point of contact between the appellant and herself. It was the appellant's contention that Margaret Amos was not assisting in the communication between the parties, his brother had had enough and had said he would no longer act as the third party contact. As MI no longer had solicitors acting for her, the appellant stated that he could not write to them in relation to issues which related to financial matters. The appellant's contention was that he had made efforts to comply with the order but was left in the position that he was because of the conduct of MI and that his actions in contacting MI amounted to a reasonable excuse.

10. The appellant represented himself throughout the Crown Court proceedings. In pre-trial correspondence with the CPS and the court he set out the history of the matter and the reasons for his actions. The appellant accepted that what he had done

amounted to a technical breach of the order but maintained that he had a reasonable excuse for his actions and he wanted the case to be tried by a jury.

11. The prosecution opening note for the trial identified the issues for the jury as being two-fold:

    i) did the appellant breach the non-molestation order by sending a letter or text message directly to MI; and

    ii) if he did, whether he had a reasonable excuse for contacting MI directly?

Crown Court hearing 8 May 2018

12. The appellant had made a written application to stay the proceedings on the grounds that they represented an abuse of process of the court. Prior to the jury being sworn, the judge addressed the appellant in open court on the issue of his abuse application. During the course of this exchange the appellant referred to the difficulties he had encountered in attempting to communicate with the complainant and more generally to the history of matters between them.

13. Having listened to the appellant's account, the judge stated:

> "I appreciate what you're saying and I appreciate that the points you're trying to get across are that you've got a reasonable excuse for doing what you did. But that's now a jury issue. Only the jury can make that decision, not me."

The appellant accepted that there was a technical breach and said:

> "… it's a technical breach, not criminal offence …"

The judge responded:

> "If it is a technical breach – how can I put this? – you really shouldn't be pleading not guilty. Because a technical breach is still a breach. … I am sympathetic to your position and, believe me, I am not trying to put any pressure on you. What I don't want to do is embark on a five-day hearing at the end of which you are faced with the same disappointment that I have just given you."

14. The appellant told the judge that the trial had to go ahead, he was doing it for his daughter. The judge correctly observed that he was not a family judge. The judge told the appellant that he could have a trial by jury and stated:

> "But the moment you tell me that this was a technical breach, I've really got to have a conversation with you as to what the purpose is of this trial."

To which the appellant responded:

> "I don't quite understand the complexity of – the very complexity of it, um, but my interpretation of reasonable excuse is that I have made every effort to comply with this to try and find solutions through the courts, the legal process … through my brother and just through the legal process. We've had so many court hearings. I've tried every avenue and every door has been closed."

Shortly thereafter, the judge stated:

> "Can I ask you this question. Say we have a five-day trial. Say it goes into next week. We have a trial. Jury comes back and finds you guilty. The jury comes back and finds you not guilty. How does that assist you?"

The appellant replied:

> "It clears – it clears my name, my integrity, my – I mean, it clears my name, my integrity, my efforts to try and be a part of my daughter's life. …"

15. It was shortly after that exchange that counsel intervened and said:

> "Your Honour, I am hearing what your Honour is saying and I wonder if the matter can just be put back for a few minutes. And I know I'm only here (inaudible) but I wonder if I could also act as a bit of a wise ear. And if I may have a few moments just to have ---"

Counsel's offer was accepted by the judge, who said:

> "Mr Inkster, I am more than happy to bring a jury in and have a trial, but I think if you have a word with Mr Whiteford. There are things that can be done in this court, there are things that can't be done, and I think you're probably expecting too much of me. I'm sure Mr Whiteford can give you some advice. Take that advice. Deal with it as you wish.
>
> I'm just going to ask prosecuting counsel, are there any combinations of pleas that would be acceptable?"

Prosecuting counsel informed the court that she was always willing to listen.

16. Immediately prior to the court adjourning the judge spoke to the appellant and said:

> "Mr Inkster, I would suggest you go and have a conversation with Mr Whiteford. I don't want to put you under any pressure whatsoever, but have that conversation, come back at 2 o'clock and tell me what your position is. Thank you."

17. During the adjournment the appellant and counsel met. As to what took place, the appellant's case is that Mr Whiteford, having listened to the judge's words,

understood the judge's view to be that the appellant should plead guilty and the case should not proceed to trial. This was conveyed by Mr Whiteford to the appellant in the meeting. The appellant has waived privilege and Mr Whiteford has helpfully provided a written account of what took place. He noted that the appellant was:

> "… obviously (and understandably) frustrated with the communication difficulties he has experienced in relation to securing contact with his children. He had elected trial by jury in relation to these matters as he feels genuinely wronged by the situation he finds himself in. However, he did accept that he had sent the letters and text messages as alleged. He accepted this in interview with the police and throughout the proceedings. The Issue in this case was did Mr Inkster have a reasonable excuse for contacting [MI]. …
>
> … it became apparent to me while observing the discussions between His Honour Judge Black and Mr Inkster that I may be able to assist by giving Mr Inkster some legal advice. … I can state that Mr Inkster accepted that he had sent the messages and letter. He stated that he had done so because of his frustration in [MI] not responding to him, because [MI] did not have a solicitor and he was finding communication difficult and because [MI] had contacted him first. This was all raised in his police interview.
>
> He went on to say that his brother … was not willing to act as an intermediary anymore and the Grandmother did not reply to any communication. Mr Inkster was obviously a man who was experiencing real problems with having contact with his daughter and the various parties were not being particularly helpful. However, he accepted that the correct way forward was to return the matter to court and not contact [MI] and it was on that basis he pleaded guilty. I gave him advice and he was free not to accept that advice if he disagreed with it and he was free to have had his Jury trial if he so wished.
>
> I note his criticism of myself saying I should have looked at the papers in greater detail, but I overlooked the argument for reasonable excuse based on evidence that Mr Inkster had provided and that Mr Inkster had unreasonable time to seek further advice. Mr Inkster chose to be unrepresented. If he had wished advice he could have sought such advice at any time during the lengthy course of these proceedings but he chose not to. I had read the papers thoroughly in preparation cross examination. …"

We note that nowhere in the letter is it suggested that counsel gave any advice upon the issue of reasonable excuse, nor the likelihood of the defence being accepted by a jury.

18. The parties were recalled to court. The judge recommenced the proceedings with these words:

> "Mr Inkster, if you would stand, please. I suggested to you before lunch that you consider your position. Are you in a position now where you want to apply to change the pleas that you've entered to the four counts on the indictment?"

The appellant replied that he did and the judge instructed the clerk to put the counts to the appellant again. When the clerk of the court put count 1 to the appellant and asked if he pleaded guilty or not guilty the appellant replied "It was sent indirectly by my brother, but I plead guilty". The clerk replied "That's guilty to count 1." No one in court queried the appellant's response to count 1.

The law

19. In *R v Inns* (1974) 60 Cr App R 231 it was held that a plea of guilty made by a defendant after pressure had been put on his counsel by the judge to change from an intended plea of not guilty was not a proper plea and the ensuing trial was a nullity. Lawton LJ, who gave the judgment of the court, at p.233 stated:

> "When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all. All that follows thereafter is, in our judgment, a nullity. It is on that basis that we come to consider what at one time seemed to be a rather difficult point for this court to decide because of the decision of the House of Lords in the case of *DPP v Shannon* (1974) 59 Cr.App.R. 250; [1974) 3 W.L.R. 173."

20. In *R v Nightingale* [2013] EWCA Crim 405; [2013] 2 Cr App R 7 Lord Judge CJ at [10] stated:

> "It is axiomatic in our criminal justice system that a defendant charged with an offence is personally responsible for entering his plea, and that in exercising his personal responsibility he must be free to choose whether to plead guilty or not guilty. … The principle applies whether or not the court or counsel on either side think that the case against the defendant is a weak one or even if it is apparently unanswerable. …"

At [11] and [12] Lord Judge identified the pressures upon any defendant charged with a criminal offence as follows:

> "11. What the principle does not mean and cannot mean is that the defendant, making his decision, must be free from the pressure of the circumstances in which he is forced to make his choice. He has, after all, been charged with a criminal offence. There will be evidence to support the contention that he is guilty. If he is convicted, whether he has pleaded guilty or been found guilty at the conclusion of a trial in which he has

> denied his guilt, he will face the consequences. The very fact of his conviction may have a significant impact on his life and indeed for the lives of members of his family. He will be sentenced—often to a term of imprisonment. Those are all circumstances which always apply for every defendant facing a criminal charge.
>
> 12. In addition to the inevitable pressure created by considerations like these, the defendant will also be advised by his lawyers about his prospects of successfully contesting the charge and the implications for the sentencing decision if the contest is unsuccessful. It is the duty of the advocate at the Crown Court or the magistrates' court to point out to the defendant the possible advantages in sentencing terms of tendering a guilty plea to the charge. So even if the defendant has indicated or instructed his lawyers that he intends to plead not guilty, in his own interests he is entitled to be given, and should receive, realistic, forthright advice on these and similar questions. These necessary forensic pressures add to the pressures which arise from the circumstances in which the defendant inevitably finds himself. Such forensic pressures and clear and unequivocal advice from his lawyers do not deprive the defendant of his freedom to choose whether to plead guilty or not guilty; rather, the provision of realistic advice about his prospects helps to inform his choice."

At [16] and [17] Lord Judge addressed the impact upon a defendant resulting from pressure by a judge as follows:

> "16. In the final analysis, the question is not whether the Judge Advocate here contravened the principles which govern the giving of sentence indications. Of itself that would not be decisive. The question is whether the uninvited indication given by the judge, and its consequent impact on the defendant after considering the advice given to him by his legal advisers on the basis of their professional understanding of the effect of what the judge has said, had created inappropriate additional pressures on the defendant and narrowed the proper ambit of his freedom of choice.
>
> 17. Having reflected on the facts in this case, we conclude that the appellant's freedom of choice was indeed improperly narrowed. Accordingly, the plea of guilty is in effect a nullity. It will be set aside. The conviction based on the plea will be quashed."

21. In *R v Evans* [2009] EWCA Crim 2243 Thomas LJ (as he then was), when considering the effect of incorrect legal advice given to an appellant at a criminal trial, stated at [53]:

> "53. In our view, the correct approach where the appellant seeks to contend that his plea of guilty should be vacated and the proceedings declared a nullity is that set out in *R v Saik* [2004] EWCA Crim 2936, specifically at paragraph 57:
>
> > 'For an appeal against conviction to succeed on the basis that the plea was tendered following erroneous advice it seems to us that the facts must be so strong as to show that the plea of guilty was not a true acknowledgment of guilt. The advice must go to the heart of the plea, so that as in the cases of *Inns* and *Turner* the plea would not be a free plea and what followed would be a nullity'"

Ground 1

22. The guilty pleas on counts 1, 2 and 4 were a nullity as the appellant did not exercise a free choice in pleading guilty, he did not truly acknowledge that he was guilty of the offences, his freedom of choice was narrowed by a combination of pressure from and incorrect advice given by the judge which was compounded by the conversation which the appellant had with counsel.

23. It is accepted that the appellant committed technical breaches of the order however, from the outset the appellant maintained that he was not guilty of the offences because he had a reasonable excuse for his actions. He intended to plead not guilty by reason of a defence of reasonable excuse resulting from the conduct of MI. The judge was aware of the appellant's wish to rely on this defence. It is accepted that the judge said that he did not intend to put any pressure on the appellant to change his pleas but that is what occurred. The advice given by the judge upon the issue of technical breach was not legally correct. The appellant's action represented a breach of the order but if the appellant had a reasonable excuse to breach the order then he was not guilty of the offences and should have maintained the not guilty pleas. The appellant was not given advice by the judge which went to the heart of his plea and therefore it was not a free plea, nor a true acknowledgement of guilt.

24. The appellant was unrepresented and in an unfamiliar environment. At the start of the day the appellant genuinely believed that he had a defence in law. However, his understanding of the judge's interventions was that he did not have a defence and that he should plead guilty. The appellant believed that if he went ahead with the trial on not guilty pleas the judge would be compelled to direct the jury to convict him. The appellant accepted that the judge knew the position in law and that is what the judge was telling him. Further, the judge was asking the appellant what was the point of a trial as neither a guilty nor a not guilty verdict would assist him ([14] above).

25. In the circumstances, the guilty pleas were a nullity and the convictions should be annulled.

26. Three further grounds of appeal were originally relied upon by the appellant which included a ground that the plea entered by the appellant to count 1 was equivocal. Counsel on behalf of the appellant informed the court that if the appellant succeeded upon ground 1, it was unnecessary to pursue the remaining grounds. It was a course

which commended itself to the court. Accordingly, the court proceeded to hear and determine the appeal on ground 1.

The respondent's submissions

27. The Crown contends that the appellant is an intelligent and articulate man who chose not to be represented. He understood the court process, engaged with it, he understood the law and was capable of representing himself. The appellant knew and understood that the defence of reasonable excuse was available to him.

28. The judge's interventions have to be viewed in context. The appellant knew that he had a choice and that was not taken away from him. The advice, or lack of it, from counsel is said to prove the point that the appellant made the decision himself. The appellant knew he had a defence of reasonable excuse, he needed no advice to plead guilty.

Discussion and conclusion

29. It is clear from the transcript of 8 May 2018 that the judge had concerns about the proposed five-day trial and the prospect of the appellant being found guilty. We accept that given the judge's knowledge of the history of the matter, he was concerned as to the position in which the appellant found himself and was genuinely trying to assist. Unfortunately, his efforts did not result in the provision of appropriate assistance nor advice. The judge knew of the appellant's intention to rely upon the defence of reasonable excuse but appeared to take no account of it when addressing the appellant. His comments ([13] above) that the admitted technical breach is still a breach and that the appellant should not be pleading not guilty carried with them the clearest judicial indication that the appellant had no defence to the charges and should be pleading guilty. The advice was not correct. A breach of the non-molestation order did not of itself render the appellant guilty of any of the offences with which he was charged. The judge's advice failed to take any account of the defence of reasonable excuse, the words of which are clearly set out in each of the charges. The judge's further comment that he did not want the appellant to embark upon a five-day trial at the end of which he would be faced with "the same disappointment" clearly conveyed the message, which was understood by the appellant to mean, that he would be found guilty of the offences.

30. We are unable to understand the judge's reasoning ([14] above) to the effect that a trial resulting in a guilty or not guilty verdict would not assist the appellant. The appellant correctly replied that a not guilty verdict would clear his name. This was understandably of considerable importance to this appellant, generally, and in the context of the family court proceedings.

31. We accept the respondent's submission that the appellant is an intelligent and articulate man who had an understanding of the court process and engaged with it. That said, he is not a lawyer. He was without legal representation and in an unfamiliar environment. The appellant believed he had a defence but was being told by the trial judge, who he reasonably believed knew and understood the relevant law, that he did not have a defence and should not be pleading not guilty. The difficulty which the appellant was experiencing is captured in his first response set out at [14] above: "I don't quite understand … the very complexity of it, … but my interpretation

of reasonable excuse is that I have made every effort to comply with this to try and find solutions through the courts, the legal process …". Compounding his difficulty was the fact that the judge ignored the defence of reasonable excuse upon which he knew the appellant intended to rely.

32. The judge's view of the appellant's case also appears to have been understood by counsel who intervened with the words "I am hearing what Your Honour is saying". The judge's response to counsel's intervention was to tell the appellant that counsel could give him some advice and advised him to take it. Immediately following which the judge inquired of prosecuting counsel if there were any combination of pleas which would be acceptable.

33. In our judgment, the judge's unsolicited interventions were all of a piece, namely that the appellant should be pleading guilty to the three counts on the indictment as he had no defence. The judge's stated opinion was that if the trial went ahead the real likelihood would be that the appellant would be found guilty and that he should take the advice of counsel, which the judge correctly anticipated would be to similar effect. The approach of counsel, albeit well meaning, served only to compound the errors of the judge.

34. Having carefully considered the transcript of the proceedings we have concluded that the judge's interventions did place pressure upon this unrepresented appellant to plead guilty to the three counts contained in the indictment. We accept that within those judicial interventions no acknowledgement was made of the defence of reasonable excuse. As a result, the appellant wrongly believed that he had no defence to the three counts and would be found guilty. It follows, and we so find, that the guilty pleas which he subsequently entered do not represent a true acknowledgement of guilt.

35. We are satisfied that the judge's uninvited interventions and the consequent impact upon the unrepresented appellant did create inappropriate pressure upon and improperly narrowed the proper ambit of the appellant's freedom of choice. Accordingly, we find that the pleas of guilty entered to counts 1, 2 and 4 are a nullity. We direct that each plea is set aside and the convictions based upon the pleas are annulled.

36. For the reasons stated, the appeal is allowed. The respondent informed the court that it does not seek a further trial.