



Neutral Citation Number: [2020] EWCA Crim 855

Case No: 201902345 B5

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LEWES
His Honour Judge Rennie
T20157301

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2020

Before :

LORD JUSTICE DINGEMANS, VICE-PRESIDENT OF THE QUEEN'S BENCH
DIVISION
MRS JUSTICE CUTTS
and
HER HONOUR JUDGE KARU, RECORDER OF SOUTHWARK

Between :

Trevor Graham George Pierce
- and -
Regina

Appellant

Respondent

Rebecca Upton (instructed by **Westgarths solicitors**) for the **Appellant**
Sarah Lindop (instructed by **the Crown Prosecution Service**) for the **Respondent**

Hearing dates : 24 June 2020

Approved Judgment

Lord Justice Dingemans:

Introduction

1. This is an appeal against convictions for offences of indecent assault, indecency with a child and attempted rape. It raises an issue about the effect of a deletion after trial of a police caution, which had been admitted into evidence at trial as bad character evidence of the defendant, on the safety of the conviction.
2. The appellant, Trevor Pierce, was convicted on 10 June 2016 in the Crown Court at Lewes following a trial, of five counts of indecent assault, three counts of indecency with a child, and one count of attempted rape. He was sentenced to a total of 9 years and 6 months imprisonment.
3. The victim of the offending, who we will refer to as C, has the benefit of lifelong anonymity pursuant to the provisions of the Sexual Offences (Amendment) Act 1992.

Relevant factual background

4. We have set out the facts briefly to avoid any identification of the victim. Mr Pierce had unsupervised access to C. Between 1996 and 2000 when C was aged about 9 to 13 years, C alleged that Mr Pierce committed various sexual assaults on her and had attempted to rape her. C alleged that after she was about 13 years old, Mr Pierce started sending texts to her mobile phone containing indecent suggestions and images. On one occasion a friend of C (“F”) saw a text and replied to Mr Pierce threatening to report him to the police if he did not stop. C also complained that Mr Pierce made inappropriate comments about her breasts developing as she was growing up.
5. At some stage in 2004 C made complaints about the texts and also stated that Mr Pierce had stroked her leg on an occasion. Relevant persons became aware of the complaints and Mr Pierce was confronted about the texts. One of those persons said to Mr Pierce that there was no point in denying it because the police had the phone (although the police did not have the phone and some time had elapsed since the texts were sent and the phone was not examined) and Mr Pierce was said to have admitted sending texts. C made a witness statement dated 11 November 2004 about the texts and the stroking of her leg.
6. On 23 November 2004 Mr Pierce was arrested and interviewed. Although Mr Pierce was advised of his entitlement to free legal advice he did not obtain representation. In interview Mr Pierce was asked about “obscene and grossly offensive text messages” being sent to C when she was 13, and he said that “all I can say on that matter is I mean I did start texting [C] but not at 13”. Mr Pierce said it had started when he had taken drugs and alcohol saying “I’m sick to the stomach about it but I mean I was just changed person ...”. He was asked how he got into drugs and how he came to know C. He said he had texted C for innocent purposes and then “... I started getting a bit out of hand and saying the wrong things”. When asked what those were he said “Sexually explicit things I suppose I don’t know. In the morning I’d sort of blank it out and say oh no I can’t you know ...”.
7. Mr Pierce was asked whether he was aware that he had sent picture messages and said “No I wasn’t aware but I must have done. I mean I’ve been told I did I don’t know I

really don't know. I mean sometimes it got really blurry you know. I can't deny and I can't say I did". He was asked about when texts had become more sexually explicit and he said that he had been told what was in the texts and said "... I don't know how to put it really I was saying things to her that I shouldn't do and that's it really I mean it's I don't know it's really hard to talk about it". When asked if he had thrown caution to the wind because he had been disinhibited by drugs he said "No it's just ... seemed to have no morals I just seemed to I don't know just doing some things that you wouldn't normally do". Mr Pierce said it felt like it was someone else. It was suggested that the texts had become more suggestive when C was 15 and that he had said "I want to fuck you" he replied "It could be yes I could have said that – I mean how can you recollect texts you sent I mean if she's saying that then I must have done". He was asked about sending the indecent images and he said it was not impossible for him to have done.

8. When asked about stroking her leg Mr Pierce answered "No I wouldn't no ..." saying that even though he was taking drugs he would have remembered if he had done anything like that. When summarising Mr Pierce's account the interviewing officer stated that Mr Pierce had no recollection of the stroking incident but stated "you believe that you have sent messages to [C]" over the last few years to which Mr Pierce replied "it was only recently that they got out of hand" and in relation to the pictures Mr Pierce said that one of them he had either downloaded or it had been sent to him by one of his mates.
9. Mr Pierce then accepted a caution on 1 April 2005. The Formal adult caution report gave Mr Pierce's details and under "The Circumstances of the Offence(s)" there was a sub-heading "Brief details: (including Act and Section)". There was then typed into the form: "The circumstances of the offence" were given as "Send communication/article of an indecent/offensive nature contrary to section 1(1)(b) and (4) of the Malicious Communications Act 1988." The offence under section 1(1)(b) of the Malicious Communications Act requires the sending to another person, an electronic communication which is in whole or in part of an indecent or grossly offensive nature, and that one of the purposes of sending the communication was to cause distress or anxiety to the recipient. The details set out on the caution form continued: "On or between 16th February 2002 and 24 August 2004 at Brighton in the County of Sussex sent to [C] electronic communications, namely suggestive and offensive text messages and photo messages of an obscene nature". Mr Pierce signed under this typing "I voluntarily admit the offence and I agree to a police adult caution".
10. Subsequently on 30 September 2013 C made a full disclosure of Mr Pierce's indecent assault, indecency with a child and attempted rape. She explained her failure to report full details of Mr Pierce's offending in 2004 because she said there were two male police officers and her aunt present and she felt intimidated.
11. Mr Pierce, who had subsequently moved to Northern Ireland, was arrested and prosecuted in respect of the allegations.

The respective cases

12. The prosecution case was that Mr Pierce had developed a sexual interest in C and that he had committed the assaults and acts of indecency as alleged. The texts were relied

on to show his sexual interest in her and to show that C had reported some of the matters done to her by Mr Pierce, but that she had not at that time felt able to report all of the matters. The comments about the development of C's breasts showed his sexual interest in C. When matters had moved on in her life she was able to report the whole of the offending. C, her friend F, and other persons to whom C had complained about Mr Pierce's actions, gave evidence.

13. The defence case was Mr Pierce had never assaulted C or committed any acts of indecency as alleged. C had felt upset at something which is why she had made the false complaints about the texts in 2004, but she had even then never made any complaints about the assaults or indecency because they were not true. If they had been true C would have complained about those matters when making her statement to the police in November 2004. Mr Pierce accepted that he had commented about the development of C's breasts but that was just making comments and winding up the children. He had never had any sexual interest in C.

The trial

14. The trial took place in the Crown Court at Lewes. At trial, as on this appeal, prosecuting counsel was Ms Lindop and defence counsel was Ms Upton. We are very grateful to them both for their written and oral submissions.
15. At trial, the parties agreed that the fact of Mr Pierce's caution should be admitted in evidence. It seems, from the directions given by the judge, that it was agreed to be admitted so that the jury would have a full picture of Mr Pierce's character.
16. Mr Pierce gave evidence at the trial. He was asked by Ms Upton about the caution and said he had been told by someone that the police had pulled out the text messages. He said he admitted sending the messages "because I was convinced – if I'm not worth it – I was in a bad place at the time. I was taking a lot of drugs." He said that the allegation about touching C's leg was put to him but he denied it saying he would have remembered that, even though he was taking drugs. The judge asked him about the sending of photos and Mr Pierce replied that he had not sent them. The Judge then said "... a caution means a defendant has accepted that he did do the things alleged but you will consider his evidence which is now that he did not do it, so make of that what you will". In answer to further questions by Ms Upton Mr Pierce said that he had agreed to the caution because "I wanted it all out of the way and I wanted to get on with my life.
17. Mr Pierce was cross-examined about why he would not have remembered sending texts but would have remembered touching C's leg. Mr Pierce said that he had admitted the caution to get it out of the way and that he had been convinced that he had done it by those who had spoken to him about it. When it was put to him that he had accepted and admitted sending messages and a photo he replied "Yes I know ... I just explained to you, I wanted that case out of my life and I wanted to get on ...".

The summing up and conviction

18. The judge gave the jury the relevant directions on law and the facts. So far as the caution is concerned the judge directed the jury as follows:

“On another topic you were told about the fact that Mr Pierce received a police caution in 2005 in respect of one or more texts and images of a sexual nature that he sent to the complainant’s phone. Both sides agreed that you should be given this information so that you could have a fuller understanding of the relationship and background events. You’ve also been given details of convictions he has and, indeed, another caution. The only reason you’ve been told about those convictions and the other caution is so that you can have a full picture of his character, both the good and the bad, so that the defence can make the point that they have made on his behalf that he has never, that caution aside, been convicted of a sexual offence. You must not in any way assume that Mr Pierce is guilty of these present alleged offences merely because of those earlier matters to which I have referred. It is simply evidence that you will take into account, alongside all of the other evidence you have been given in this trial in deciding whether the prosecution have made you sure of guilt.”

19. Later the judge reminded the jury about Mr Pierce’s evidence that he had admitted matters because he was in a very bad place at the time, and accepted the caution as he wanted it out of the way. He also reminded the jury that Mr Pierce said he had admitted matters because he had been convinced by the others that he had done it.

20. The judge also reminded the jury of the point made on behalf of Mr Pierce when considering the issue of the delay in reporting the allegations and the fact of the report made in 2004. The judge summarised it as follows:

“You will, I know, want to bear in mind the point made by Miss Upton that the current allegations were not made to the police in 2004 when the complaint about the texts and photos was made and that [C]’s reason for this, namely that there were two male police officers and her aunt present and so she felt intimidated, should be considered in the light of the fact that the statement in 2004 was in fact made to a female police officer.”

21. The jury retired. After a majority direction had been given Mr Pierce was convicted on all counts by a majority of 10 to 2. He was later sentenced.

The deletion of the caution

22. Mr Pierce’s PNC record showed the caution administered on 1 April 2005. It appears that this was recorded as a caution for sending offensive, indecent, obscene and/or menacing messages via public communication to C, contrary to section 127(1(a) of the Communications Act 2003, and not the offence under section 1(1)(b) of the Malicious Communications Act. The offence under the Communication Act 2003 requires the sending of a message by means of a public electronic communications network, which is either grossly offensive or of an indecent, obscene or menacing character. It is not apparent why the caution on the PNC record was for an offence under section 127 of the Communications Act 2003 and not under the Malicious Communications Act 1988, but it might be noted that to prove the offence under the

Communications Act there is no need to prove an intention to cause distress to the recipient, which is a requirement under the Malicious Communications Act.

23. After his conviction Mr Pierce was given advice on appeal. He then obtained pro bono assistance from student law clinics at Northumbria University and Ulster University, Westgarths solicitors and from Ms Upton.
24. An application was made to delete the caution from Mr Pierce's PNC record. This was made on a number of grounds. The first ground was that the Home Office Circular 30/2005 on the Cautioning of Adult Offenders (issued on 14 June 2005) provided that "a caution will not be appropriate where a person does not make a clear and reliable admission of the offence ...". It was pointed out that Mr Pierce had not seen the text messages or photographs, and it was said that he had not made a clear and reliable admission of the offence. It was submitted that his admissions were equivalent to saying "I must have done this if someone tells me that I did it". Reliance was also placed on the absence of any reliable evidence about Mr Pierce's intention for the purposes of the Malicious Communications Act. The point was also made that the caution was recorded on the PNC as being for a different offence than that shown on the caution form.
25. The deletion of the caution was approved and carried out by Sussex police on 6 June 2019. This was nearly three years after the trial.

The appeal and the admission of the caution as fresh evidence

26. Mr Pierce was granted an extension of time and permission to appeal by the full Court on 28 February 2020. The full Court also admitted the deletion of the caution as fresh evidence.
27. Ms Upton on behalf of Mr Pierce submits that if the caution had been deleted there would not have been a bad character application to admit it, and the facts giving rise to the caution would not have been admitted. Even if the underlying facts had been admitted, the jury would have had to assess those facts for themselves, and would not have had the caution being treated as an admission. The caution may have had a critical effect on the jury's analysis and so the verdict is unsafe and should be set aside.
28. Ms Lindop on behalf of the prosecution accepts that if the caution had not been administered by the police it could not have been admitted as a caution, but submits that the underlying facts would have been admitted at trial in any event. These facts contained admissions to sending the texts, and that meant that the issues remained the same for the jury, so that the convictions were safe.

The admissibility of the allegations made in 2004 and Mr Pierce's reaction to them

29. In our judgment even if Mr Pierce had not been formally cautioned by the police, the fact that he was alleged to have sent obscene texts and photos to C, and his reactions when confronted with the allegations, would have been admissible before the jury. First it was common ground that the sending of obscene texts and photos to C would

amount to misconduct being reprehensible conduct for the purposes of sections 98 and 112 of the Criminal Justice Act 2003 (“CJA 2003”).

30. Secondly, even ignoring for these purposes the fact that all parties agreed to the evidence being admissible (which is a relevant gateway pursuant to section 101(1)(a) of the CJA 2003) we consider that the evidence about sending the texts would have been admissible pursuant to two gateways in section 101 of the CJA 2003. Before identifying those two gateways we should explain that we consider that it is fair to ignore the fact that all parties agreed to the admission of the evidence at trial. This is because at the time that the agreement to admit the caution was made the existence of the caution was a fact, and it had not yet been deleted by the police.
31. However the two gateways through which the evidence would have been admissible were as “important explanatory evidence” pursuant to sections 101(1)(c) and 102 of the CJA 2003, and as “relevant to an important matter in issue between the defendant and the prosecution” pursuant to sections 101(1)(d) and 103 of the CJA 2003. This is for the reasons given below.
32. We consider that the sending of the obscene texts and photos by Mr Pierce to C, C’s reporting of that fact to the police in 2004 and Mr Pierce’s reaction to being confronted with the allegations, was “important explanatory evidence”. This is because without its admission, the jury would have found it very difficult or impossible to assess fairly C’s delay in the reporting the sexual assaults in this case. The making of the complaint in 2004 was part of the process by which the complaints were made against Mr Pierce, and it would not have been fair to the prosecution or to C to pretend that the first report made by C was in 2013 and not 2004. It enabled the jury to assess the explanation for the delay in this case by the prosecution, namely that C felt able only to make a partial disclosure in 2004. Further the fact of the report in 2004 was also very relevant to the defence case, namely that the disclosure in 2004 was, even if true, comprehensive of all the wrongdoing committed by Mr Pierce against C, and that there was no good reason for the continuing delay in reporting the sexual assaults. The value of the evidence for understanding the case was substantial, because it was impossible to judge fairly, for both sides, the issues relating to delay without that evidence.
33. Further in our judgment the evidence was also relevant to an important matter in issue between the defendant and the prosecution, namely whether Mr Pierce had a sexual interest in C. The sending of texts to C suggesting that sexual activity should take place between Mr Pierce and C showed a sexual interest in C by Mr Pierce.
34. We can confirm that we do not consider that there would have been any basis for excluding this evidence. For example the reporting of the sending of the texts did not raise satellite issues for trial, because the texts and the reports about them were relevant to the issues of delay as explained above.

Conviction safe

35. In these circumstances we do not consider that the fresh evidence, namely the fact that Sussex police have deleted the caution, renders the conviction of Mr Pierce unsafe. This is because the underlying evidence giving rise to the caution would have been given at trial for the reasons set out above.

36. We note that the issues would have remained exactly as they were before the jury, even without the existence of the caution. C could have given evidence about the receipt of the texts, and C's friend F could have given evidence about seeing one of them and warning Mr Pierce not to send more. Mr Pierce's admissions in interview to sending the texts could have been adduced. Mr Pierce could have given evidence about being confronted with the allegation that he had sent the texts, and why he made admissions in interview. It remained for the jury to determine: whether the texts were sent; whether they showed that Mr Pierce had a sexual interest in C; and whether the texts were comprehensive of all the wrongdoing committed against C. The jury could consider whether the texts were part of the process by which C came to disclose Mr Pierce's offending, or whether the fact that C had complained about the texts in 2004 showed that the offending which was the subject of the counts at trial had not occurred. It is apparent that these issues were all fairly and properly canvassed before the jury and the jury were able to make a fair determination of those issues.
37. Further Mr Pierce was able to give the evidence at trial that he did explaining why he made admissions in interview, namely that he had been told that he had sent the texts and believed it because he was in a bad way because of his drug taking. These were matters for the jury to assess. The formal existence of the caution did not affect that.
38. Finally it is important to note that Sussex police did not make any assessment of the merits of the underlying allegations when deleting the caution. The reasons for deleting the caution were not given, but as noted above the application to delete the caution appeared to rely principally on the bases that it was said that properly analysed there was no admission by Mr Pierce, and it was said that there had been a change in the offence to which the caution related between the Malicious Communications Act and the Communications Act.
39. We accept the fact that accepting a caution for one offence and having another offence recorded the PNC record raises issues about the cautioning process. As to whether there was an admission by Mr Pierce it is right to record that there were parts of his interview where Mr Pierce suggested that he did not have a clear memory of what he had done, but there were other parts where he made unequivocal admissions to sending obscene texts to C. These included: (i) "all I can say on that matter is I mean I did start texting [C] but not at 13"; (ii) he had texted C for innocent purposes and then "... I started getting a bit out of hand and saying the wrong things"; (iii) replying, when asked what those were "Sexually explicit things I suppose I don't know. In the morning I'd sort of blank it out and say oh no I can't you know ..."; (iv) replying, when asked if he had thrown caution to the wind because he had been disinhibited "No it's just ... seemed to have no morals I just seemed to I don't know just doing some things that you wouldn't normally do"; and (v) "it was only recently that they got out of hand". We were told that the transcript of the interview was served as unused material but it was not adduced at trial. It seems likely that this was because, given the caution, it was not necessary to see what Mr Pierce had said in interview. If the caution had been deleted and did not exist, the transcript of the interview would have had to be adduced at trial. In our judgment if the admission of the transcript of the interview had been admitted it would not have assisted Mr Pierce's case in the light of the statements that he made in interview as recorded above.

Conclusion

40. For the detailed reasons set out the appeal against conviction is dismissed.