



SUPREME COURT COSTS OFFICE
CLIFFORD'S INN, FETTER LANE
LONDON, EC4A 1DQ
Telephone No: 020-7947-6468
Fax No: 020-7947-6247
DX: 44454 STRAND

X42

4 July June 2005

Dear Sir

APPEAL FROM DETERMINATION UNDER THE LEGAL AID IN CRIMINAL AND CARE PROCEEDINGS (COSTS) REGULATIONS 1989/COSTS IN CRIMINAL CASES (GENERAL) REGULATIONS 1986/CRIMINAL DEFENCE SERVICE (FUNDING ORDER) 2001

BLACKFRIARS CROWN COURT

REGINA -V- RIGELSFORD

CASE NO: T20030173

CENTRAL TAXING TEAM CASE: YES

COURT REF:

SCCO REF: 289/04

DATE OF REASONS: 13/10/04

DATE OF NOTICE OF APPEAL: 01/11/04

APPLICANT: COUNSEL
Miss L S
DX
London/Chancery Lane

The appeal has been dismissed for the reasons set out below.

C CAMPBELL
COSTS JUDGE

REASONS FOR DECISION

The issue that arises in this appeal is whether the Determining Officer was correct to disallow £65,183.38 in respect of fees claimed by the appellant, Miss L S, relating to her consideration of pictorial exhibits, as part of the Graduated Fee Calculation.

Miss S had acted for Adrian Rigelsford, who was committed from West London Magistrates Court on 4th April 2003 for trial at the Crown Court at Blackfriars. The sole charge was one of theft, namely that between pt January 1994 and 10th July 2002, he had stolen a large quantity of photographs belonging to Associated Newspapers ("the Daily Mail"). Following a 13 day trial, which commenced on 11th May 2004, Rigelsford was found guilty and sentenced to 18 months' imprisonment.

Miss S's claim for costs was submitted for determination as a Graduated Fee claim. No issue turns upon her claim for a basic fee and enhancements (including length of trial uplift, refreshers etc) save for the charge for pages of prosecution evidence. Likewise, there is no issue about counsel's miscellaneous fees (conferences, duration of taped evidence etc). Those fees were passed for payment on 27th July 2004 and were allowed in the sum of £7903.64, which was increased upon redetermination by £2582.37, including VAT.

The sole issue which arises on this appeal is whether the Determining Officer was correct to reduce counsel's claim for pages of prosecution evidence (sought in the sum of £69,977.04) by £65,183.38.

In his written reasons dated 13th October 2004, the Determining Officer said this:

"In submitting Graduated Fees, the advocate claims that the prosecution pages of evidence amount to 33,702 pages. The breakdown of this was:

<i>Statement bundle</i>	<i>40</i>
<i>Documentary exhibits</i>	<i>307</i>
<i>Recovered photographic exhibit</i>	<i>33,357</i>

In support of this claim, the advocate states that:

"The Crown's case against Mr Rigelsford was that he stole in excess of 60,000 photographs from Associated Newspapers. These photographs he went on to sell at two specialist shops in London. By the time the theft was discovered, a number of photographs had already been sold on. However, the library recovered a great many. Evidence in support of the number of photographs that were recovered was included in the committal documents.

Their evidence, together with the seized photographs, was the evidence which the Crown relied on to prosecute Adrian Rigelsford. That being the case, it cannot be said that the photographs referred to within their statements represented unused material. Unused material is material which does not form part of the Crown's case. This was not the position here. The photographs were in every sense of the word "used" material... All the seized photographs were available for viewing at Associated Newspapers. The only reason that they were not actually brought to Court was because the sheer volume of photographs made that exercise impractical. The defence made two visits to Associated Newspapers. "

The Determining Officer then took issue with counsel's submissions. In his view, the committal bundle contained the following:

Statement bundle	40 pages
Exhibits	1393 pages
TOTAL	1433 pages

Out of the 1393 pages of exhibits served by the Crown, pages 118 to 204 contained 1,000 thumbnail photographs, and pages 216 to 217, 218 to 219, 370 to 461 and 473 to 475, photographs stated to be examples of the 33,357 photographic exhibits recovered.

The Determining Officer then said this:

"I do not dispute that the Crown relied on the entire 33,357 photographic evidence recovered, but they only served photos in 05/45, 05/46, 05/47, 05/1-43 and 101 and PN17 [reference to the exhibits] as representative of the photographs recovered. These were samples served on the Court, defence and copied to the jury. "

The Determining Officer then continued:

"Having due reference to the above, I came to the conclusion that the appropriate pages of evidence in the case is 1393 evidence bundle and 40 pages of statement bundle which amounts to 1433 pages. These I have subsequently allowed I cannot accede to advocate's submission that the remaining 32,059 photographs not copied for the jury or served on defence form part of the pages of evidence in this case. "

The Graduated Fee Scheme Guidance A2 (1.2) states that;

"Any documentation provided outside the committal bundle or without a written notice of additional evidence should not be included in the page count"

1.3 states that:

"Pages of evidence for payment or for deciding if a case forms part of the Scheme is defined as the committal documents (or similar for transfer and sent up cases) including records of interview, photos or schedules or financial data, plus any documents included in the notice of additional evidence"

The Determining Officer took the view that photographs which had been recovered and inspected by counsel at the Daily Mail's library, but which were not contained in the committal bundle, could not be regarded as "pages of evidence for payment". They were not copied for the jury or the Judge, still less were they served under any notice of additional evidence.

At the hearing of the appeal, Miss S appeared before me. She submitted that the photographs recovered from the two specialist shops formed part of the committal documents. Accordingly, they did not constitute unused material (viz material that does not form part of the prosecution case) because the indictment related to the full 33,357 photographs. Had the photographs not been so numerous, they would have been scheduled and copied for the defence. Nonetheless, they all formed part of the exhibits in the case (indeed both the front and the back of the photographs were relevant as the latter contained important identifying marks) and accordingly they fell to be calculated as pictorial exhibits within the Graduated Fee Scheme calculation.

Miss S referred to the statements of the witnesses - a Mr Shepherd, Torrington, Newby and Masheter. These all made direct reference to the photographs recovered from the two shops and exhibit DS/44 showed the boxes at the library in which the recovered photographs were stored. This exhibit effectively had the photographs annexed to it, albeit that because of their number, these photographs were not actually copied for the defence (or for the jury). In these circumstances, it had been necessary for counsel to make two visits to the library to inspect the photographs, it being impractical to transport them to the Court because of their volume. On both inspections, Miss S had viewed a representative number. Had the documents been copied, she would have been paid. The fact that they were not copied should not be determinative.

Miss S also drew an analogy with the situation which would pertain in a case involving the downloading of indecent images, which would not be served on the defence owing to their sensitive nature. In such a case, it could not be argued that because they were not formally served (in the sense of being copied and included in the committal bundle) that they were not included within the committal documents. In such a case, the defence would have to attend at a Police Station to view them. Here, it had been necessary for counsel to visit the Daily Mail's library. The analogy between the two cases was clear and justified the allowance

she had claimed, calculated in accordance with the page count under the Graduated Fee Scheme.

In reaching my decision in this case, I have noted it is common ground that counsel's fees fall within the Graduated Fee Scheme, albeit that there have been subsequent amendments, so far as the page count is concerned.

If the appeal is allowed, counsel will receive an additional £65,183.38 based upon a page by page calculation for material which, on her own frank admission, she did not view in its entirety. Instead, she had satisfied herself with a viewing of what she termed "a representative number". In other words, she will be paid in the region of ten times the amount allowed in respect of her basic fee, length of trial uplift etc for considering material on her two visits to the Daily Mail library, when she reviewed only a "representative" sample of the photographs.

As I have said, there were 33,357 photographs, which contained or were believed to contain important information on both front and back. Only a sample of those photographs were copied and the remainder were stored in boxes at the Daily Mail's library. Disregarding, for a moment, the fact that the Graduated Fee Scheme applies in this case, there is to my mind something unsatisfactory about a submission which, if accepted, would result in public funds paying out tens of thousands of pounds to remunerate counsel for a job she did not do in full, namely examining all the photographs in this case. Logically, it cannot be just for counsel to receive such a significant sum for two attendances at the library of uncertain duration to view a sample of the entirety of the photographs.

How does this view square with the Graduated Fee Scheme?

It is clear that the material exhibited to the witness statement as Exhibit DS/45 etc contained samples of the material retained at the library. Had those samples not been typical, in my view the prosecution would have copied as many photographs as were needed to prove its case. That the Crown relied on a selected number is indicative, in my opinion, that only those photographs actually exhibited and copied for the jury truly form part of the committal bundle.

In my judgment, Miss S tacitly agrees with the view that the stored photographs were not relevant because, following her viewing visits, she did not insist that the photographs be copied and put before the jury. On the contrary, she appeared to be content that only those sample photographs actually copied and exhibited to the witness statements in the committal bundle should be put before the jury. In these circumstances, I reject the proposition that, as prosecution counsel put it, it was reasonable to regard "all the 33,357 as exhibits in the case, particularly in view of the importance of the identity marks which were found on the back of the photos". The fact is that neither the Crown, nor counsel for the defence, felt that the photographs in the library were important enough to be inspected in their entirety, still less that they should be included within the bundle of documents put

before the jury. Accordingly, I do not consider that these photographs fall within the definition of "used material" forming part of the committal documentation. Therefore they fall "outside" the page count and the Determining Officer was correct not to make an allowance for them in determining Miss S's fees.

In my judgment, what counsel should have done in this case was to have applied for an allowance for special preparation - plainly it would have been both reasonable and necessary to visit the library in order to view a representative number of the photographs. Such an inspection (as proved to be the case) would have eliminated the need.. for the entirety of the photographs to be read and copied, but counsel would have been remunerated for undertaking this work via an allowance for special preparation.

Counsel referred me to *R v Richter*, a decision of Master Pollard dated 12th May 2004. In that case, the defendant was charged with possessing and taking indecent photographs of children. Prior to the trial date, counsel was served by the prosecution with seven CD ROMS. He had to put these on his own computer so that he could inspect the images. These comprised a total of 65,150. The learned Master's reasons then said this:

"When counsel examined these images, he found that some of the images on the CD ROMS were duplicated. His client had insisted that some of the images were not indecent at all, but again, counsel had to look at the images so that he could advise the client. "

On the morning of the trial, after the work had been completed, he was served with a jury bundle which consisted only of 430 pages. What the prosecution had done was to go through the images and then chosen a limited number, which were to be put before the jury. Had the prosecution indicated at a much earlier stage that this was the course they were going to adopt, there would be no need for counsel to have gone through all seven CD ROMS.

The Determining Officer allowed counsel only his time for the 430 pages in the jury bundle, but on appeal, the Master allowed counsel's claim for 3585 pages of prosecution evidence in full.

In my opinion, *R v Richter* is not on all fours with the facts before me. The effect of Master Pollard's decision was to allow counsel a fee for examining the entirety of the prosecution evidence, albeit that at trial the Crown chose to rely upon a much more limited number. In the present case, not only did the prosecution indicate at an early stage that only a sample of the photographs would be relied upon, but also Miss S did not view every photograph, in contrast to counsel in *R v Richter*, who inspected every image. Therefore, the decision in *R v Richter* does not assist.

It follows, for the reasons I have given, that I consider the Determining Officer reached the correct decision on the material before him and the appeal must therefore be dismissed.

TO: THE TAXING
AUTHORITY Olu Adedeji
Determining Officer
Blackfriars Crown Court
DX400800
Lambeth 3

COPIES TO:
Miss L S
DX London/Chancery Kane