Neutral Citation No. [2022] EWHC 1540 (SCCO)

Case No: T20217026

SCCO Reference: SC-2021-CRI-000161

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 31 May 2022

Before:

COSTS JUDGE ROWLEY

REGINA
v
BOWDEN

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: JMW Solicitors LLP

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by JMW solicitors LLP against the decision of the determining officer to calculate the fee payable to the solicitors by reference to a cracked trial fee under the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Shaun Bowden who was one of two defendants facing trial on an indictment regarding a conspiracy to supply Class A drugs. There were originally seven other co-conspirators and those seven were described by the judge as the main players. Mr Bowden, and his remaining co-defendant, Christopher Barnes, were said to be at the very bottom of the supply chain and indeed Mr Bowden's defence was that he was a victim of modern day slavery having been coerced by the others.

3. The trial was due to begin on 4 October 2021 but was pushed back owing to problems that the prosecution were having in calling an expert witness. The extent of those problems only became clear to the defence on the morning of 6 October 2021 when the prosecution applied for an adjournment of the trial. It wished to instruct a new expert in place of Mr Litton who had been a serving police officer when he gave his witness statement originally but who had since retired and no longer felt himself able to give evidence in court.

4. The prosecution's application was opposed by both defendant's counsel on the basis that the defendants were ready for trial and there would be a wait for a lengthy period before the Crown was able to put its case forward once more. After 20 minutes of submissions, the judge indicated to the prosecution that he was likely to refuse an application to adjourn. The hearing was then adjourned for 40 minutes whilst the prosecution, who the solicitors say were reluctant to discontinue against the defendants, took further instructions from the CPS. Prior to the adjournment, the prosecution counsel indicated to the judge that it was likely that no evidence would be offered against the defendants. Upon the return into court the judge confirmed his ruling on the refusal to adjourn the trial, the prosecution formally offered no evidence and the defendants were acquitted.

5. The solicitors made a claim for a fee based on a one-day trial and which, under the graduated fee scheme, comes to a little under £90,000. The determining officer considered the case to be a cracked trial and the fee for this case on that basis is a little under £30,000.

6. The Criminal Legal Aid (Remuneration) Regulations 2013 do not define a trial. They do define a "cracked trial" as follows:

> "cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea and—
>
> (i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence; and

(ii) either—

(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea; or

(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which he or she entered a plea, declare an intention of not proceeding with them; or

(b) the case is listed for trial without a hearing at which the assisted person enters a plea;

7. The determining officer's conclusion was that this case fitted squarely within (a)(i) and (a)(ii)(aa) since Mr Bowden pleaded not guilty at the PTPH and then the prosecution offered no evidence.

8. The solicitors say that the case did in fact proceed to trial and therefore the determining officer's application of the regulations is wrong. They rely upon the decision of Spencer J in Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB). At paragraph 96 of his judgment, he gave guidance on the issue of when a trial is to be considered to have commenced:

"(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so, even if the trial comes to an end very soon afterwards, through a change of plea by a Defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).

(4) The trial will not have begun, even if the jury has been sworn (and whether or not the Defendant has been put in charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened, the Defendant pleads guilty (R v Brook, R v Baker & Fowler, R v Sanghera, The Lord Chancellor v Ian Henery Solicitors Ltd (the present appeal)).

(5) A trial will have begun even if no jury has been sworn if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case and the leading of evidence (R v Dean-Smith, R v Bullingham, R v Wembo).

> (6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management, it may well be that the trial has begun in a meaningful sense.
>
> (7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purposes of the Graduated Fee Schemes. It would often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.
>
> (8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so, when it begun, the Judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the Determining Officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment".

9. The solicitors say that there were substantial matters of case management at the trial before the prosecution offered no evidence and consequently the trial had begun in a meaningful sense in accordance with subparagraph (6) of the guidance in Henery above.

10. As is their right, the solicitors have asked for this appeal to be determined without an appeal hearing. Unusually, the solicitors have had the benefit of submissions in a hearing being put before me in any event since Mr Barnes' solicitors have also challenged the determining officer's conclusion (see SC-2022-CRI-000007).

11. I do not propose to reiterate all of my decision in the Barnes appeal. Nevertheless, I now set out paragraphs 20 to 23 of that decision since it deals with the R v Sallah case, on which both appeals have relied. It also provides my conclusion that the application by the prosecution for an adjournment did not amount to meaningful case management in accordance with the Henery guidelines.

> "20. In the case of Sallah, the defence counsel served a 10-page skeleton argument dealing with a number of issues of admissibility of the evidence. The prosecution counsel took instructions and decided that there was a risk that two of the prosecution witnesses had been inadvertently influenced in their identifications and as such the prosecution counsel did not feel that their evidence could be advanced. The remaining evidence in that case concerned CCTV footage and the Crown took the view that that was insufficient on which to base the prosecution. Consequently, no evidence was offered.
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> 21. The abandonment of the case in Sallah arose from the adversarial nature of the intended trial and the defence challenging the appropriateness of the evidence expected from the prosecution. If the prosecution had not been persuaded of the strength of the defence argument, then the judge would undoubtedly have had to deal with that matter in the manner contemplated by the cases referred to in Henery.

> 22. By contrast, in this case, the issue was entirely the reluctance of a witness to continue to give evidence having retired from the police force. There was no argument from the defence as to the quality of that evidence. Having heard the judge's comments regarding the possibility of an adjournment, Mr Barnes' counsel (and indeed Mr Bowden's) understandably weighed in to indicate that they were ready for trial and that the case should proceed. It seems to me that those submissions are of a very different order from the arguments put forward in Sallah as to the quality of the prosecution's evidence and as to whether it could be relied upon as a result.
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> 23. The issue is whether the issues of case management involved are substantial? In my view the efforts of the respective parties' counsel in Sallah justified that description, but it seems to me clear that this is not the case here. Shorn of the comments of the defence counsel regarding trial readiness and the length of time before any adjourned case could come on for hearing, the only matter before the court was the prosecution's attempt to adjourn the trial to a later date in order to obtain evidence from a different witness. Such an application to adjourn cannot in my view possibly be sufficient to amount to a substantial case management issue."

12. It is fair to say that the appeal notice in this case argues more strongly than in Barnes that the defendant's arguments caused the prosecution to decide to offer no evidence. It is certainly the case that the vulnerability of Mr Bowden made the prospect of a lengthy wait for a retrial to be less attractive. The ruling of the trial judge specifically refers to psychological issues affecting Mr Bowden which would make a delay particularly hard to bear.

13. In fact, as Mr Bowden's counsel at the trial made clear, the evidence of the reluctant witness, Mr Litton, was irrelevant to Mr Bowden's defence since he accepted the points which Mr Litton could be expected to make.

14. Nevertheless, reading the transcript of the hearing on 6 October 2021, the prosecution counsel made it entirely clear that he did not wish to commence the trial with Mr Litton as his principal witness in relation to the case against Mr Barnes. The prosecution counsel explained to the judge that the prosecution's case needed to be put to both defendants at the same time in order to deal with differing views as to text messages between them and others. As such, if the trial against Mr Barnes could not be brought then it could not be brought against Mr Bowden either.

15. There is nothing in the transcript in my view which suggests that the prosecution took the defence arguments into account when deciding to offer no evidence. Indeed, the prosecution counsel suggested that the modern slavery defence was in fact no more than mitigation. Whether or not that is right, it does suggest that the prosecution counsel was solely concerned with having to call witness who appeared to be intent on destroying his own credibility. Prosecution counsel's reference to the effect of calling a reluctant Mr Litton here on other cases where he was due to give evidence also seems me to be

more likely to bear on the prosecution's approach than the strength of either defendant's arguments in this particular case.

16. The solicitors in this appeal make reference to the fact that the case was fully prepared and, by inference, allowing a cracked trial fee rather than a full trial fee would be to penalise a well-prepared defence. I have no reason to doubt that the defence was fully prepared, but it seems plain to me that in any case where the prosecution decides to offer no evidence and a cracked trial fee is allowed, then the solicitors will feel equally aggrieved. But that is a clear possibility from the wording of the regulations. I do not accept the characterisation of this case as being the successful and robust preparation of a case which resulted in the prosecution being unable to proceed at trial as it is put in the appellant's notice. For the reasons I have given, I consider the prosecution's difficulty to relate to its own witness and not to the submissions or preparation of the defence.

17. Accordingly, I dismiss the appeal against the determining officer's decision to calculate the solicitors fee by reference to a cracked trial fee.

18. Finally, at the end of the application notice is a claim for travelling expenses to be allowed in the sum of £46.50 plus VAT rather than £32.10 plus VAT. The application notice suggests that there is simply an arithmetical error in a reduction that was otherwise properly made.

19. There is no reference to this claim in the written reasons and so it cannot be a ground of appeal as such. However, I do not have a copy of the request for written reasons and so it is possible that this claim was raised as part of that request. If that were so, then a failure to deal with it in the written reasons ought not to be an obstacle to the merits of the appeal being considered.

20. If this issue is still in dispute between the parties, then further submissions by email together with any appropriate documentation will need to be provided to me. Given the modest sums involved, however, I would sincerely hope that it can be resolved without that course of action.