



Neutral Citation No. [2022] EWHC 1775 (SCCO)

Case No: T20210174

SCCO Reference: SC-2022-CRI-000034

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30 June 2022

Before:

COSTS JUDGE LEONARD

REGINA

v

BARZEY

**Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration)
Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations
1986**

Appellant: **Lloyds PR (Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors of a graduated fee, as determined under Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. The matter in issue is whether payment should be made for a Guilty Plea or for a Cracked Trial.
2. Cracked Trials and Guilty Pleas are defined, for the purposes of the 2013 Regulations, at Schedule 2 Paragraph 1(1):

“...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 the assisted person 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;

“guilty plea” means a case on indictment which—

(a) is disposed of without a trial because the assisted person pleaded guilty to one or more counts; and

(b) is not a cracked trial...”

Case History

3. The Appellant represented Demme Barzey (“the Defendant”) in the Crown Court at St Albans.
4. The Defendant was charged with offences concerning in the supply of class A drugs. On 1 May 2021 he was produced for a first appearance at St Albans Magistrates Court and his case was sent to the Crown Court.

5. A first Plea and Trial Preparation Hearing (“PTPH”) to place on 1 June 2021 was adjourned to 3 June 2021 without any plea being entered. This and further PTPHs on 3 June, 11 June and 14 June 2021 were all adjourned, apparently due to a lack of readiness on the part of the Crown. At the PTPH on 11 June 2021, HHJ Michael Simon fixed a trial for 4 January 2002 with a 3–4 day time estimate.
6. The Defendant did not attend a hearing scheduled for arraignment on 27 July 2021. The court set a further hearing for arraignment on 3 August 2021, the Judge confirming that the matter was still proceeding towards the scheduled trial date to start on 4 January 2022, the Crown being ready to proceed on that date.
7. On 3 August 2021 the Defendant attended court, and having had the opportunity to consider the evidence against him and provide instructions, he entered guilty pleas. The matter was put over for sentencing with the parties to agree a basis of plea.
8. The Appellant claimed the graduated fee appropriate to a cracked trial. The Determining Officer took the view that the Defendant entered a guilty plea at the first hearing at which a plea was taken or at which there had been the opportunity for arraignment. The trial listing had in the Determining Officer’s view been put in place as an administrative matter prior to arraignment and prior to the defendant’s provision of instructions, and that at that point there had been no active anticipation of or trial preparation. The appropriate fee payable was, accordingly, for a guilty plea.

Submissions

9. The Appellant says that the Determining Officer has overlooked subparagraph (b) within the definition of a cracked trial, and in wrongly treating the listing of a trial date as a merely administrative matter, has not correctly applied the provisions of the 2013 Regulations. Those Regulations state that where a case is listed for trial without a plea and case management hearing taking place, a cracked trial fee is due. That is what happened.
10. Further, the Regulations confer a discretion on the Determining Officer to consider all procedural and factual scenarios of the case. The Determining Officer has not properly exercised that discretion so as to assess the claim under the 2013 Regulations in a just and reasonable manner.
11. Both the Crown and the Defence, in what was effectively trial preparation, prepared detailed analyses of the telephone evidence served by the Crown. Gaps in continuity were identified by the Defence and remedied by the Crown. It was this exercise that allowed the Defendant to decide to enter a guilty plea. In those circumstances it is appropriate for a cracked trial fee to be paid.
12. Ms Weisman for the Lord Chancellor submits that the Determining Officer’s position is correct and that the correct fee payable is for a guilty plea.
13. This matter cannot be deemed a cracked trial case under paragraph 1(1)(a), which envisages circumstances in which a defendant enters a not guilty plea at the first opportunity to plead, but the matter does not proceed to trial because either he or she

later changes that plea to one of guilty, or the Prosecution indicates an intention not to proceed. This clearly does not apply on the facts of the instant case.

14. Paragraph 1(1)(b), the provision upon which the Appellant relies, envisages circumstances in which the case is listed for trial without a hearing at which the defendant enters a plea ever taking place. It is of course accepted that a trial date was fixed prior to the defendant entering a guilty plea, but paragraph 1(1)(b) provides that a case will be a cracked trial where the matter is listed for trial without a hearing at which the assisted person enters a plea, not where the matter is listed for trial before a hearing at which a plea is entered. The two scenarios are not identical. The former satisfies the definition of the cracked trial while the latter (which is the case here) does not.
15. Ms Weisman in that respect relies upon the judgments of the Senior Costs Judge (then Master Gordon-Saker) in *R v Rahman* (SCCO 198/13, 17 December 2013) in which, considering a similar definition of “cracked trial” in the Criminal Defence Service (Funding) Order 2007, he found that where a plea and case management hearing takes place at which the relevant defendant pleads guilty, “the case is (not) a cracked trial, even if a trial had been listed at an earlier preliminary hearing”.
16. I have added the word “not” in brackets to my quotation from Master Gordon-Saker’s judgment, because it is evidently missing in the original, in which he dismissed an appeal against a Determining Officer’s decision to pay a guilty plea fee rather than a cracked trial fee.
17. Ms Weisman also relies upon the judgment of Costs Judge Brown in *R v Lamin* (SCCO ref: 175/19). She submits that the wording of the regulation is intended to draw a clear distinction between those cases in which the prosecution and/or defence clearly and procedurally demonstrate an intention to proceed to trial, but later change course (a cracked trial); and those cases in which a guilty plea may be entered at a relatively late stage, because disclosure is limited, instructions are unclear, and options are left open (a guilty plea).
18. This matter, she says, clearly falls into the latter category, as demonstrated by the fact that credit for an “early” guilty plea was preserved until a relatively late stage in proceedings when the evidence had been served and considered. Cases where the defendant pleads guilty at the very earliest opportunity, and prior to significant service of evidence, are comparatively rare, and the Respondent submits that the interpretation of “guilty plea” is not intended to be limited in the way contended for by the Appellant.

Conclusions

19. In the course of preparing this judgment, I found that I had in fact addressed the central issue in this case before, in the case of *R v Malik* (SCCO SC-2019-CRI-000136, 5 June 2020). The facts of *R v Malik* were rather different but, as in this case, I had to consider the appropriate interpretation of the words “... the case is listed for trial without a hearing at which the assisted person enters a plea”. For ease of reference I will repeat here the conclusions I set out in *R v Malik*:

“... there are two situations in which a cracked trial fee will be due under Schedule 2 to the 2013 Regulations. The first requires, before any other condition is met, that 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...

The second is that a case is listed for trial without a hearing at which the assisted person enters a plea. This could be read in one of two ways: that there is no hearing at which the assisted person enters a plea, or that there is such a hearing, but the case is listed for trial before it takes place.

It seems to me that the first interpretation must be the correct one. The word “without” indicates that the provision is meant to apply where there is no such hearing. If the 2013 Regulations were intended to provide for a cracked trial fee where a case is listed for trial before, rather than without, a hearing at which the assisted person enters a plea, they would say so. They do not.

That is in my view consistent with the conclusions of Master Gordon-Saker and with the evident intention behind the cracked trial provisions of the 2013 Regulations and their predecessors, which is to provide for a cracked trial fee where a case proceeds toward (but does not reach) trial either on the basis of a not guilty plea, or without any discrete hearing at which a plea can be entered.”

20. I am unable to accept the Appellant’s submission to the effect that the 2013 Regulations confer a discretion upon the Determining Officer. On the normal principle that the rules are to be interpreted mechanistically, a cracked trial fee will be paid if the definition of a cracked trial is met, and not otherwise. There is no discretion in that respect. For that reason, whether it is legitimate to describe the listing of the trial as “administrative” seems to me to be beside the point. The question is whether, by reference to the definition in the regulations, there has been a cracked trial.
21. For the reasons I give in *R v Malik* (and in line with the conclusions reached by both the Senior Costs Judge and Costs Judge Brown) it seems to me this case does not meet the definition of a cracked trial. Accordingly, a guilty plea fee is payable and this appeal must be dismissed.