Neutral Citation No. [2022] EWHC 1784 (SCCO)

Case No: T20207325

SCCO Reference: SC-2021-CRI-000106

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 7th July 2022

Before:

COSTS JUDGE WHALAN

REGINA
v
BAILEY

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

Appellant: JD Solicitors

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £500.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

Costs Judge Mark Whalan

Introduction

1. JD Solicitors ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator's Graduated Fee Scheme ('LGFS').

2. The Appellants challenge the Respondent's decision to reduce the number of pages of prosecution evidence ('PPE') in the claim. The Appellants submitted a claim for 9420 PPE, which included 7900 pages of electronic mobile telephone datum exhibited at DJR1. The Respondent has allowed 2361 PPE, comprising 178 pages of statements, 994 pages of exhibits, 109 pages of transcripts, 6 pages of forensic reports and 1074 pages of electronic evidence. (In the DO's assessment, 87 pages of paper exhibits were discounted as 'duplicates' and 'cover sheets'.) 6826 PPE (7900 pages of electronic datum – 1074) remain in dispute.

Background

3. The Appellants represented Mr Eoin Bailey ('the Defendant') who appeared at Birmingham Crown Court charged with conspiracy to commit murder, GBH and conspiracy to possess a firearm with intent to endanger life. The charges arose out of an incident at about 8am on 22nd February 2020 when a 15-year old teenager was shot at twice, one bullet hitting and causing serious injury to his foot. It was alleged that the Defendant and two co-defendants (Mohammed and Murphy) drove to Hubert Street, where the victim lived and, seeing him walking in the street, the Defendant assaulted and attempted to kill her, while wearing a balaclava and a hooded jacket.

4. The motivation for the shooting was never entirely clear. The evidence against the Defendant comprised CCTV evidence (which included evidence of the incident itself) and DNA evidence recovered from the balaclava, which was found in the car used by the assailants, along with telephone cell site evidence. The co-defendant Mohammed, who was said to be the driver of the car, was arrested quickly, as the police were able to trace the vehicle to a parking space near Mohammed's house. The Defendant and Murphy were traced by investigations into Mohammed. The prosecution used telephone cell site datum recovered from three mobile telephones used by the

defendants. The police used this datum in conjunction with the CCTV evidence to map out where the defendants' phones were throughout 22nd February 2020. Collectively this evidence put the defendants at the scene of the offences and also together at the Defendant's house on an earlier date.

5. The Defendant entered not guilty pleas on 12th June 2020. He was tried but the hearing was unable to conclude because of the onset of the Covid pandemic. He was re-tried in November-December 2021, convicted and sentenced to 12 years' imprisonment.

The Regulations

6. The Representation Order is dated 15th May 2020 and so the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations, as amended') apply.

7. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> "*1. Interpretation*
>
> *…*
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*
>
> *which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.*
>
> *(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.*
>
> *(5) A documentary or pictorial exhibit which –*
>
> *(a) has been served by the prosecution in electronic form; and*
>
> *(b) has never existed in paper form,*

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Case guidance

8. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50):

> "*(i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.*
>
> *(ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.*
>
> *(iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.*
>
> *(iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispense with the need for service of a notice of additional evidence, before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.*
>
> *(v) The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary pre-condition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages could be excluded from the count of PPE merely because the notice had for some reason not reached the court.*

(vi) *In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.*

(vii) *Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore served an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues would depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.*

(viii) *If – regrettably – the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Office (or, on appeal, the Costs Judge) will have to determine it in the light of the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) will be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) will be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.*

(ix) *If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control*

mechanism which ensures the public funds are not expended inappropriately.

(x) If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.

(xi) If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply."

The submissions

9. The Respondent's case is set out in Written Reasons dated 18th March 2022 and in Written Submissions drafted by Mr Rimer, a Senior Lawyer at the Government Legal Department, on 11th March 2022. These submissions exhibit a detailed Schedule. The Appellant's case is set out in Grounds of Appeal, a Note Re Pages of Prosecution Evidence (undated) and in written Representations on the Written Reasons, dated 10th August 2021. Mr Selby, counsel for the Appellant and Mr Rimer attended and made oral submissions at the hearing on 18th March 2022.

10. The Respondent, in summary, submits that the DO included correctly in the PPE count electronic datum relating to calls (172 pages), chats (544 pages) and locations (257 pages). The DO also allowed 100 pages from the images section, representing 5% of the total of approximately 2000 pages, as the Crown had relied on five images extracted from this datum. The DO correctly excluded a (relatively small) number of pages for 'duplicates and cover sheets' and most of the 2000 pages of images and, more importantly, the technical metadata/web data downloaded from the phones which was "*not relevant to the case*". The DO's approach to images was reasonable as notwithstanding the Crown's use of a small number of photographs, most of the images on the phones comprised selfies, photographs of friends, family, children and animals, along with downloaded photographs of celebrities, memes, and images related to CV, films and music.

11. The Appellants, in summary, submit that this was an unusual, even atypical case, in which 'metadata' was relevant specifically. Mr Selby pointed out that during the trial

the prosecution relied on the expert evidence of Mr Daniel Rees, a Digital Forensic Officer, whose evidence confirmed that the metadata was relied on by the prosecution. This was because the datum embedded within the phone files was used to prove not only the dates the relevant files were created, but also the dates when these files were opened and/or modified by the Defendant. The defence, conversely, identified 'corruptions' within the handsets which cast doubt on the accuracy of the datum relied on by the prosecution. Insofar as the telephone datum was used by the Crown to re-construct a picture of the defendants' movements on the day of the offences and before, therefore, an analysis of the metadata was essential for examining the reliability (or otherwise) of this evidence. Turning to the images, the prosecution relied specifically on images downloaded from the phones and so, in these circumstances, it was relevant and reasonable for the defence to review the entirety of the image datum. Mr Selby also argued that the images actually comprised 13,000 items which, although not downloaded as a PDF, equated to more than the 2000 pages cited by the DO.

My analysis and conclusions

12. Clearly this was a case in which images downloaded from the defendants' phones comprised part of the relevant evidence relied on by the prosecution. I agree with Mr Rimer – and, indeed, Mr Selby practically concedes – that whereas some inclusions should be allowed in the PPE count, many of the images contained on the phones were necessarily irrelevant to the prosecution and, in turn, the defence. I also accept Mr Selby's submission that the DO's initial total page count for images may have been a little low, and that the 5% allowance was much too conservative, given the specific usage made by the prosecution to images on the phones. I also accept Mr Selby's submission that this was an atypical case in which the phones' metadata was relevant to the DO's exercise of discretion at para. 1(5) of Schedule 2 to the 2013 Regulations.

13. Cases like this must invoke necessarily a degree of generalisation and the application of a broad brush when assessing the contribution of the electronic datum to the PPE count. Clearly, not all the datum downloaded from the phones should be included as PPE, notwithstanding the submissions to the contrary by the Appellants. I am also satisfied, however, that the DO's analysis resulted in insufficient allowance being made for relevant electronic datum in the PPE count. On my analysis, and doing the best I can, up to 50% of electronic datum should be included as PPE. In allowing this appeal

(in part), therefore, I direct that the Appellant's LGFS claim should be assessed by reference to a PPE count of 5250.

Costs

14. The Appellants' contested appeal has been successful (in part) and I award the costs of £500 (+ any VAT), in addition to the £100 paid to lodge the appeal.

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