Neutral Citation No.[2023] EWHC 1327 (SCCO)

Case No: T20220048

SCCO Reference: SC-2022-CRI-000110

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 10 May 2023

Before:

COSTS JUDGE LEONARD

R
v
R v Ngoc Nguyen Minh

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

Appellant: **Drummond Solicitors Limited**

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

COSTS JUDGE LEONARD

1. This appeal concerns payment due to defence solicitors under the Criminal Legal Aid (Remuneration) Regulations 2013 ("the 2013 Regulations"). Such payments are calculated by reference to the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2 to the 2013 Regulations. The Representation Order in this case was made on 25 January 2022 and the 2013 Regulations apply as in effect on that date.

2. The "graduated fee" due to the Appellant under Schedule 2 is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"). The issue on this appeal is the appropriate PPE count.

3. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, subsections (2)-(5), which explain how, for payment purposes, the number of pages of PPE is to be calculated:

> "(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of Crown 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 Crown documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.
>
> (5) A documentary or pictorial exhibit which—
>
> (a) has been served by the Crown in electronic form; and
>
> (b) has never existed in paper form,
>
> is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances."

4. The PPE count is subject to a maximum figure, which for present purposes is 10,000:

The Background

5. The Appellant represented Ngoc Nguyen Minh ("the Defendant") in proceedings before the Crown Court at Bradford. The Defendant faced two counts of supplying Class A drugs (Cocaine and Diamorphine).

6. On 23 January 2022, police officers from the Organised Crime Team in Bradford attended 31 Clement Street, Bradford, following receipt of intelligence variously described in the papers as relating to human trafficking or illegal drugs at that address. The Defendant answered the door, giving the name of Thang Nguyen. He was the only person present at the address.

7. The Defendant told the police through "Google Translate" that he was the sole occupant of the property, that he had help paying the rent from his brother, and that he was not a victim of trafficking. Officers searched the property and in one of the bedrooms found paraphernalia used in the preparation of drugs, including two blenders containing residue of an off-white powder. The powder was later found to contain traces of diamorphine along with caffeine and paracetamol, both of which are typical cutting agents. The police also found face masks complete with filters, a bin liner holding a quantity of grey powder, a sieve with residue of grey powder, and electronic scales with a residue of white and brown powder.

8. The Defendant told the police that he had no knowledge of the contents of that bedroom and that an unnamed person attended the property to access the room, into which the Defendant was not allowed.

9. The Defendant was arrested. During his arrest, the Defendant flicked a small white knotted piece of plastic away, which was recovered, tested, and found to be a cutting agent.

10. In a further search of the property, more physical evidence of drug dealing was found in other parts of the house. It included two small pieces of knotted white plastic holding cocaine and diamorphine, packed in larger quantities than normally used for street dealing, and large amounts of cutting agents.

11. The Defendant was interviewed on 23 January 2022 and answered "no comment" to all questions. He later set out a defence relying on section 45 of the Modern Slavery Act 2015. He claimed that whilst looking for work, he had been given the 31 Clement Street address by a friend. He had been paid a pittance by unnamed Asian males to clean and remain at the house and had been told by them not to go into the upstairs bedroom where the drug processing equipment had been found. He claimed that he was not willingly involved in any criminal enterprise and that he had not known that the equipment was drug – related until he was arrested.

12. There is no reference to mobile phone use in the Crown's opening note for the trial, but two mobile phones were seized from the Defendant when the police visited 31 Clement St. These were exhibit NR1, a gold iPhone belonging to the Defendant, and NR2, a black mobile phone.

13. The Defendant said that NR2 belonged to his brother. Evidence of NR2's device name, an Apple ID, the user account name and a Facebook Message were relied upon to attribute NR2 to the Defendant. The Prosecution also relied for attribution purposes upon the fact that NR2 was not on NR1's contact list and that there was no substantive evidence of contact between the two telephones, which was not consistent with NR2 belonging to the Defendant's brother.

14. Full telephone download reports were served in respect of both phones and examined by an expert appointed by the Appellant. Evidence relied upon by the Crown included photographs of what appeared to be harvested cannabis stalks and leaves, along with details of a 'stock control list'. Photographs of the Defendant were relied upon for the purposes of attribution. Other evidence relied upon included a Facebook chat between the Defendant and one "Kesser Ali", in which the Defendant confirmed his Facebook username, and a photo of the Defendant with a child who had been peripherally involved in the drug operation.

15. The Prosecution appears to have located one image of what looked like loose white powder resting in plastic. A number of older images appeared to relate to the cultivation of cannabis, which the Prosecution suggested could be linked to a derelict cannabis cultivation site found in the loft of 31 Clement St. These were exhibited together what with what was said to be a shopping list for cannabis cultivation material, but which the Defendant said was nothing more than a shopping list for a recipe, written in Vietnamese.

16. Further images were relied upon as evidence that the Defendant had freedom of movement, a comfortable lifestyle and free socialisation with others at 31 Clement St. This included photographs of a local convenience store and taken during rail travel.

17. Following trial, the Appellant claimed a graduated fee on a PPE count of 10,000. The Determining Officer assessed the PPE at 2,108. this included 45 witness statements, 178 exhibits, 15 pages of forensic reports and 1,870 pages of electronic PPE. The electronic PPE was taken from the telephone download and the Determining Officer included all call, chat, contacts, messaging, notes and location data together with 5% of the image data from each phone.

18. The Appellant's case is, in essence, that the Prosecution was over time inconsistent and unclear about the data relied on, so that it was never clear what might be referred to; that the Prosecution finally stated that it relied upon the entirety of the download reports, which for NR2 alone constituted over 30,000 pages; that all of the content of the download reports was relevant, or potentially so; and that the full content of the reports had to be gone through carefully, including location data, cookies, metadata and images.

Case Law

19. PPE appeals concerning electronic evidence have tended to turn upon either or both of two issues. The first is whether evidence which an appellant wishes to include within the PPE count should properly be considered as "served" (broadly, and subject to the observations of Holroyde J referred to below, meaning relied upon by the prosecution).

20. The second (and the issue in this case) is whether served electronic evidence which has never existed in paper form, and which will accordingly only be included within the PPE count if the Determining Officer considers that appropriate, is of sufficient importance to the case against the relevant defendant to justify inclusion within the PPE count.

21. The Appellant relies in written submissions on *R v Furniss* [2015] 1 Costs LR 151 and a number of costs judge decisions from 2014 and 2016, all of which have been superseded and none of which are binding upon me. *R v Furniss* has in the past often been cited as authority for the proposition that all served electronic evidence must be included within the PPE count, but *R v Furniss* has not been regarded as binding by any Costs Judge for years, and it is not consistent with binding authority.

22. I refer in that respect to two decisions of High Court Judges. The first is the judgment of Mrs Justice Nicola Davies DBE (as she then was) in *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB). Davies J concluded that, given the importance to the prosecution in that particular case of text messages, it was incumbent upon the defence team to look at all the underlying data from which the prosecution had extracted the text evidence upon which it relied. The defence needed to test the veracity of text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown, and to check the accuracy of the data finally relied on by the Crown. The underlying data should accordingly (although never formally served) be included within the PPE count.

23. *Hayes* is often quoted as authority for the proposition that if the prosecution relies upon a report extracted from any part of the served electronic evidence, all of it must all be included within the PPE count. That, in my view, is clearly wrong. *Hayes* does mean however that where key prosecution evidence is extracted from a particular category of electronic data, one would generally expect all of the electronic evidence in that category (in *Hayes*, messaging data) to be included.

24. Further, more detailed guidance was offered by Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB). The focus of that judgment was on service, but whilst emphasising that decisions must be case-specific Holroyde J identified, at paragraph 50(viii) of his judgement, a key criterion for the inclusion of served electronic evidence within the PPE count. That was whether it was of central importance to the trial and not merely helpful or even important to the defence.

25. At paragraph 50(vii) (again focusing on service, but in doing so clarifying the correct approach to inclusion in the PPE count) Holroyde J explained that where the prosecution seeks to rely on only part of the data recovered from a particular source, issues may arise as to whether all of the data should be included in the PPE count. The resolution of such issues will 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.

26. He also explained, at paragraph 50(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… This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately."

27. Holroyde J's guidance reflects the fact that the starting point under paragraph 1(5) of Schedule 2 is that served electronic evidence which has never existed in paper form is not included within the PPE count unless the Determining Officer, exercising his or her discretion, finds it appropriate to do so.

28. Holroyde J also mentioned the observations of Costs Judge Gordon-Saker in *R v Jalibaghodelehzi [*2014] 4 Costs L 781, in which (referring to similar provisions in the Criminal Defence Service (Funding) Order 2007) the Costs Judge said, at paragraph 11:

> "The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically "taking into account the nature of the document and any other relevant circumstances". Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper. So in a case where, for example, thousands of pages of raw telephone data have been served and the task of the defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count."

29. I have reviewed both download reports from NR1 and NR 2, with that guidance in mind. As is typical, both reports are in PDF format, and are divided into sections which make it easy to distinguish between, for example, messaging data, which could be very important, and device information or metadata which is of no real evidential value.

30. The Appellant says that it was necessary to go through all this information in detail, but the test for inclusion in the PPE count is not whether it was necessary for the defence team to go through evidence. It is whether it was of central importance to the trial, and the great majority of the telephone download reports for NR1 and NR2 could never have been of central importance to the trial.

31. That aside, I am sorry to say that I am entirely unconvinced that it could have been necessary for a solicitor to trawl in detail through the entire body of download evidence, much of which would be unintelligible to anyone but an expert and most of which, as would have been evident to any experienced defence solicitor from the outset, has no real evidential value.

32. According to the written reasons supplied to the Appellant, the Determining Officer has identified those categories of download data that do contain pertinent evidence (including location data), and in accordance with *Hayes* has included all of the data from each of those categories. I would agree with that approach. If there are any additional categories of data that should be included, I have not identified them and I can obtain no assistance from the Appellant's broad insistence on including all data, however irrelevant.

33. The exception to that overall approach is the images section, in relation to which the Determining Officer has allowed 5% of the total. That approach is in accordance with established practice in this court, as applied for example in the judgment of the Senior Costs Judge in *R v Sereika* SCCO Ref: 168/13 and my own decision in *R v Gyamfi* [2022] EWHC 2550 (SCCO). It reflects the fact that most download report image sections are full of obviously irrelevant data such as emojis or logos that can be skimmed through quickly, which do nothing to put relevant images in context and which do not belong within the PPE count.

34. It would appear that the number of pertinent images in this case was quite limited, and the Determining Officer's allowance of 5% seems reasonable. In any event, as Judge Brown pointed out in *R v Lawrence* (2022) SCCO-2022-CRI-000067, it is incumbent upon the Appellant to demonstrate that some higher allowance should be made and the Appellant's broad case to the effect that all data must be included in the PPE count is, again, of no assistance in that respect.

35. For those reasons, this appeal does not succeed and must be dismissed.