Neutral Citation No. [2023] EWHC 1532 (SCCO)

Case No: T20227160

SCCO Reference: SC-2022-CRI-000120

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 9 June 2023

Before:

COSTS JUDGE ROWLEY

R
v
MAJEED KHAN

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

Appellant: Kate Batty (Counsel)

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Kate Batty of counsel against the decision of the determining officer to calculate the fee to be paid based on there being a guilty plea rather than a cracked trial under the Advocates Graduated Fee Scheme as set out in the Criminal Legal Aid (Remuneration) Regulations 2013.

2. A cracked trial is defined in the Regulations in the following terms:

> "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;

3. A guilty plea fee may be based on the obvious description of a case being disposed of by the defendant pleading guilty. But it also means any case on indictment which is not a cracked trial. Therefore, in a case such as this one, where there was never any suggestion that the defendant pleaded guilty, a "guilty plea" fee may still be payable. The short question is whether the facts of this case bring counsel within the definition of a cracked trial.

4. Counsel was instructed on behalf of Majeed Khan who faced an indictment containing two counts of wounding contrary to sections 18 and 20 of the Offences Against the Person Act 1861. There was an ineffective bail application on 19 May 2022 and the first substantive hearing was on 25 May 2022 at the PTPH.

5. According to the court log, the prosecuting counsel applied for the defendant not to be arraigned in this case because there was to be a hearsay application. The trial was listed for 2 August 2022 and the judge then addressed the advocates saying that the hearsay application had to be "properly argued" and gave directions for a skeleton

argument by the Crown and a defence response. The application was to be heard on 13 July 2022 with a time estimate of two hours.

6. In support of her appeal, the appellant has obtained a copy of the PTPH Judicial Orders form seemingly competed by HHJ Mansell KC. That form supports the court log and in answer to the question of whether pleas were entered or any reason if there was no arraignment, the form states "Not arraigned as app to dismiss may be made depending on hearsay application". In respect of that application, a note is made which states "This is critical – must be proper skeleton argument and admissibility of the hearsay account of victim/sister supported by evidence as to why they are not prepared to make statements".

7. At the hearing on 13 July 2022, the Crown's application began at 12:02 and was dismissed by 12:16. The judge said to the Crown's counsel that the police officer's pocket notebook was the only piece of evidence towards these offences and, having heard the Crown's further submissions, said:

> "I do not need to hear anything from the defence. This application does not have any foundation – I do not feel the interests of justice are deployed either. The Crown have not sought to see if she is in fear – she is just reluctant. I am against the prosecution and do not allow this application."

8. Immediately after this ruling, the defendant was arraigned in respect of both counts where he pleaded not guilty. The prosecution responded by offering no evidence and the judge formally found the defendant not guilty on both counts.

9. In her written reasons, the determining officer considered the definition of cracked trial as set out above. She dismissed any possibility of the defendant falling within limb (b) because of the hearing on 13 July. She then considered limb (a) in the following terms:

> "To fit within limb (a) of the cracked trial definition the case must fit within a(i)(ii)(aa) or a(i)(ii)(bb). According to the evidence provided to the determining officer, the defendant entered pleas to two charges on 8 June 2022 and the prosecution offered no evidence on the remaining two counts. This was the first hearing at which pleas were entered by the defendant/the prosecution indicated their intention not to proceed to trial and accordingly the case does not fall within a(i)(ii)(aa) since there was no count to which the defendant entered a guilty plea having entered another plea previously at another hearing – and it does not fall within a(i)(ii)(bb) since the prosecution gave no earlier indication of any intention to proceed with a count.
>
> Accordingly, the circumstances of the case must, the determining officer submits, fall squarely within the definition of a case defined as being a "guilty plea" for fee calculation purposes as the case was disposed of without a trial and it is

> not, as detailed above, a cracked trial. A guilty plea fee has been correctly paid."

10. Although the determining of officer has sought to apply the intricately worded definition to the facts of this case, I cannot help but note that his description of the facts appears to have come from a different case. The quotation in the preceding paragraph refers to a hearing on 8 June 2022 which does not apply to this case and, seemingly, a four count indictment. I have seen the indictment in this case and there are only two counts and to which the court log records that on 13 July not guilty pleas were entered in respect of both. I do not know why the determining officer's submissions in respect of this case appear to be in error given that the remainder of the reasons clearly apply to this case.

11. Indeed, the description of counsel's submissions appears to be very much in line with counsel's appeal notice. (Counsel has asked for this case to be determined without a hearing and so I am relying upon the written documentation.) Counsel's description is that at the PTPH hearing, although no formal plea was entered, the defence of "accident" was given to the judge and this clearly indicated an intention to plead not guilty.

12. Given the difficulty of following the determining officer's reasoning in this case, I need to consider for myself whether counsel has satisfied the definition of a cracked trial. Subparagraph (a) itself is satisfied in that when first pleading to the counts, a plea of not guilty was entered. Subparagraph (a)(i) is also satisfied because the case did not proceed to trial as the prosecution offered no evidence.

13. The issue is whether subparagraph (a)(ii)(bb) is satisfied in this case. The prosecution did not declare an intention of not proceeding with the counts at the PTPH and so if a plea was entered there, counsel is successful. But, if the plea was not entered until after the hearsay application, then the prosecution clearly declared an intention not to proceed at that same hearing and subparagraph (a)(ii)(bb) is not satisfied.

14. The court log confirms that pleas were not entered at the PTPH. The question is, whether in the circumstances of this case, some form of quasi plea indication to the judge is sufficient to establish that the cracked trial definition has been met. That is not a promising position from which to start and I should clearly be slow in accepting something other than a formal plea could possibly be sufficient.

15. Counsel, in her appeal notice, suggests there is no difference between this case and appearing at a trial where, having made a successful application against the Crown, the Crown decides to offer no evidence. But that is not how the definition is set out and it seems clear to me that a not guilty plea has to be entered at one hearing and the decision not to prosecute be announced at a later hearing or at some intervening point.

16. Counsel also indicates in her appeal notice that the defendant "indicated his not guilty pleas" but could not plead formally at the first hearing because an application regarding the hearsay evidence (and if successful, an application to dismiss) could not be made once that plea had been entered because "the legislation prohibits such an application post arraignment."

17. Unfortunately, Counsel does not indicate the nature of that legislation but given the description in the court log ("Application [by the Prosecution] for defendant not to be arraigned. There will be a Hearsay Application in this matter…") and the approach of the judge regarding that hearsay application being critical, I am inclined to accept the statement regarding legislation from counsel. There would be no purpose, in my view, for an application to be made by the prosecution for the defendant not to be arraigned otherwise. The defendant pleaded not guilty when given an opportunity to do so and I accept that the only reason he did not do so formally at the PTPH was in order to be able to deal with the hearsay evidence at a later date (and which if successful would lead to an application to dismiss the case.)

18. In support of this view, I note that on the CPS website, under the heading "Application to Dismiss" the following can be found:

> "As regards an application to dismiss, the notes [of guidance to the PTPH Form] state that if the parties indicate that there is an issue that prevents arraignment such as a prospective application to dismiss ... the court will expect nevertheless to give directions to a trial date if it is needed but catering by way of a Further Case Management Hearing (FCMH) for the resolution of the issue (CrimPD I. 3A.21). Where there is a possible dismissal application it will not be possible to arraign the defendant at PTPH."

19. This approach was clearly followed at the PTPH here. I also accept counsel's comment that an indication of plea was raised by the judge albeit that the court record does not expressly confirm this. It seems to me that if the court was concerned about the hearsay evidence to the extent that formal directions were given as to skeleton arguments and a hearing, it would be natural for the judge to check with the defence that it was in fact intending to contest the indictment. Otherwise, it would be a wasted use of court time. The implication of the prosecution's application for the defendant not to be arraigned would no doubt lead the judge to assume that a not guilty plea would be entered and so no more than a brief "accident" type comment would be required from defence counsel.

20. Counsel also relies upon an email from the prosecuting counsel dated 7 September 2022. The email confirms that it was very much the Crown's intention to run this case if the application regarding hearsay evidence had succeeded. The Crown treated the alleged offence as a grave matter and consequently counsel was instructed to seek to admit the hearsay evidence (even though it would appear the chances of the application succeeding were questionable). These comments are supported by the court log for the PTPH and the application hearing containing nothing to suggest that the Crown was not going to proceed with this prosecution until the hearsay evidence was ruled inadmissible.

21. It was clear at the PTPH that the defendant intended to challenge the hearsay evidence being proffered by the Crown. The only reason that the defendant did not plead at the PTPH was in order to make the application about the evidence. The essence of the defendant's position was as firm a denial of the indictment as if a formal plea had been made. It seems to me that there is a considerable difference between the

defendant who cannot plead because of legislative or procedural requirements and one who decides not to plead for a myriad of simply tactical considerations.

22. In the circumstances of this case, I take the view that a cracked trial fee ought to be payable. The essence of the fee is to reflect a case that is prepared for trial but resolves before the trial takes place because of a change of mind by either the Crown or the Defence. It is not a case where the defendant pleads guilty as soon as they are brought before the court or the prosecution abandons the case – for which a lower, guilty plea fee is appropriate. In my view, this case undoubtedly falls in the cracked trial fee bracket in terms of preparation.

23. However, there are numerous cases where reference is made to the need for a literal or mechanistic application of the Regulations because there is no equity or discretion in them. Any form of quasi-pleading rather than a recorded pleading on the court log clearly runs a risk of some form of equity or discretion being involved. The fact that there can be no swings to compare with the roundabouts in this situation does not alter the general tenor of the scheme.

24. I have therefore come to the decision, with some regret, that the additional (and successful) work in dealing with the hearsay application – which would effectively be remunerated via the higher, cracked trial fee – cannot be paid in these circumstances because nothing less than a formal plea of not guilty at the PTPH would be sufficient to create the temporal gap required by a cracked trial fee. In this instance, although the prosecution and defendant's stance were set out at the PTPH, this was not done formally in order to comply with the procedural rules, and that proves fatal to counsel's claim (as described at paragraph 13), however meritorious it might otherwise be.

25. Accordingly, this appeal fails.