Neutral Citation No. [2023] EWHC 270 (SCCO)

Case No: T20190345, T20200018, T20200106

SCCO Reference: SC-2021-CRI-000055, SC-2021-CRI-000057

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 27th January 2023

Before:

COSTS JUDGE WHALAN

R
v
DOUGLAS PHILIP COX

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

Appellant: Burrell Jenkins Solicitors

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

The appropriate additional payment, to which should be added the £100 x2 paid on appeal, should accordingly be made to the Applicant.

Costs Judge Whalan

Introduction

1. Burrell Jenkins Solicitors ('the Appellants') appeal the decisions of the Determining Officer at the Legal Aid Agency ('the Respondent') in claims under the Litigator's Graduated Fee Scheme ('LGFS') and the Advocate's Graduated Fee Scheme ('AGFS'). The issues for determination are: (i) whether the fee allowed for the hearing on 1st December 2020 should be paid as a trial, as claimed or as a 'cracked trial', as allowed, and (ii) whether the total PPE count should be 2140, as claimed or 553 (or 588) as allowed.

Background

2. The Appellants represent Douglas Cox ('the Defendant') who appeared at Stafford Crown Court on an indictment alleging 4 counts of possessing a controlled Class A drug with intent (diamorphine) and possessing a Class A drug (cocaine). The alleged offences were committed on specific dates, namely 19th September 2018, 26th April 2019 and 10th January 2020. This was a consolidated indictment in which three separate cases were brought together.

3. The Defendant had been arrested repeatedly at his home address and on each occasion the police seized various quantities of cash and drugs. They also seized two mobile phones, the contents of which were downloaded and exhibited as SJD/1 and AW/1.

4. The Defendant was arraigned and pleaded not guilty on various dates, initially on 22nd October 2019. When the consolidated indictment was proffered, he was re-arraigned and pleaded not guilty to all counts. Various trial dates were listed but they were adjourned, either to allow the new cases to catch up, or because of a lack of court time. The final trial date was listed on 1st December 2020.

5. The prosecution, in summary, alleged that the Defendant was a drug dealer, who was selling heroin to clients who contacted him via his mobile phones. The Defendant, in summary, accepted possession of the heroin, but denied intent to supply. He was a drug user (and had been so for many years) and alleged that he bought heroin in bulk

to save costs. He also denied possession of the cocaine, stating that it belonged to another man who was present in the flat when he was arrested on that occasion.

6. On 1st December 2020, the case was called on at 10:33hs and the court sat initially until 11:12hs. During this time, the defence made an application (which had been disclosed to the prosecution in November 2020), to exclude evidence obtained from the Defendant's mobile phones and relied on by the prosecution. This was an important, procedural step, as the prosecution relied on this evidence to demonstrate an intention to supply. Without it, in other words, counts 1, 2 and 4 would likely fail. It was opposed by the Crown and at 10:57 the judge refused the application. The prosecution also made a Bad Character application to admit the Defendant's previous convictions. This was effectively adjourned by the judge, to be re-considered at half-time in the context of an overall assessment of the strength of the prosecution case. There was an additional discussion concerning a Schedule of Phone Evidence produced (in Excel and PDF format) and relied on by the Defence. The Schedule was a 10-page document which purported to summarise about 4000 pages of raw datum. Its format was contentious and discussed with the prosecution, but no judicial determination was sought. The court sat again at 12:38hs, when the Defendant asked to be re-arraigned, pleading guilty to counts 1, 2 and 4, regarding the intent to supply diamorphine. Evidently there had been some negotiation between the prosecution and the defence. Initially the Defendant had offered to plead guilty to possession only, but this was rejected by the Crown. On pleading to counts 1, 2 and 4, the prosecution asked for count 3 to lie on the file. At no stage during this process was a jury empanelled or sworn. The prosecution did not seek confiscation and the Defendant was sentenced to a total of 56 months' imprisonment.

<u>The LGFS and AGFS claims</u>

7. Given the complex procedural background to this case – three separate cases joined in a consolidated indictment – and the time taken to complete the prosecution, the Appellants were obliged effectively to file claims under the LGFS and AGFS. This has led to some confusion and inconsistency with the determination process.

8. In both claims, the Respondent assessed the hearing on 1st December 2020 to be a cracked trial and not a trial. The Appellants have claimed 2140 PPE, which the DO

assessed at 553 in the LGFS claim, but 588 in the AGFS claim. Further, as a result of these appeals, the Respondent concedes an additional 43 PPE in the LGFS claim, subject to a new, overriding submission that none of the electronic datum should be allowed in the PPE count. The PPE question is relevant primarily to the AGFS claim, because if the count exceeds 1000 pages, the claim will be classified as Band 9.4, and not the existing 9.7, where the PPE count is lower than 1000 pages.

The submissions

9. The Respondent's reasoning is set out in a plethora of (not entirely consistent) Written Reasons dated (sometimes incorrectly) 5th January 2021, 29th April 2021, 1st March 2022, 2nd December 2022 and 5th December 2022. The Respondent's case was then helpfully consolidated in written Submissions (18 pages) drafted by Mr Michael Rimer, a Senior Lawyer at the LAA, dated 13th October 2021.

10. The Appellants' case is set out similarly in several (often overlapping) written documents, namely an Explanatory Note on Fee Claim, dated 10th February 2021, a Submissions on Payment as a Trial dated 5th March 2021, Final Submissions on Costs Appeal dated 22nd April 2021 and Additional Submissions dated 21st October 2021. There are, moreover, two Appellants' Notices (albeit covering the same issues) filed on 30th April and 7th May 2021, with the result that the SCCO administration has accorded this matter two separate case references.

11. No request was made for an oral hearing, and I am asked to consider these appeals on the paper. I should express some regret at the Appellants' election. These are comparatively detailed, involved appeals, where the parties' submissions are set out (sometimes inconsistently) in many written submissions. The court would have been assisted greatly – and a significant amount of judicial time would have been saved – had the Appellants elected an oral hearing.

Trial or Cracked Trial?

The Regulations

12. The application regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') as amended.

13. The Determining Officer cites paragraph 1(1)(a) of Schedule 2 to the 2013 Regulations, which states:

> "*cracked trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing take places 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 plea and case management hearing; or*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or*
>
> *(b) the case is listed for trial without a plea and case management hearing taking place…*

Case Guidance

14. I was referred by both the Appellant and the Respondent to the guidance in Lord Chancellor v. Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) where Mr Justice Spencer stated (at para. 96) that:

> *96. I would summarise the relevant principles as follows:*
>
> *(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 the 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) *A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the 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 and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited (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 practise 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 purpose of the graduated fee schemes. It will 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 began, 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*.

15. The Appellants cite and rely on additionally my judgment in R v. Coles SCCO Ref: 51/60. The decision of CJ Rowley in R v. Sallah SCCO Ref: 281/18 and the judgment of CJ Browne in R v. Shaikh [2019] SC-2019-CRI-000137.

My analysis and conclusions

16. The Respondent, in summary, points out on 1st December 2020, during a relatively short court hearing, no jury was empanelled or sworn in, the prosecution did not open the case and no evidence was given. Considering the guidance of Spencer J in Henery (ibid) at para. 96(6), it could not be said that substantial matters of case management had taken place, so that the trial had commenced in a meaningful sense. Mr Rimer points out (para. 77 of his Submissions) that the court log recorded the hearing (at 13:09) as a "Trial Cracked".

17. The Appellants, in summary, rely on the Henery guidance at 96(6). It is accepted that no jury was sworn but asserted that substantial matters of case management had taken place. Accordingly, on the particular facts of this case, it should be assessed as a trial and not a cracked trial.

18. Each case turns on its particular facts and it is sometimes difficult to distinguish between the features of a trial and a cracked trial. I reject the Respondent's submission that the issue only arises in long or complex cases. It is clear to me – as reflected in the relevant, recent jurisprudence – that a trial can effectively begin during the course of the comparatively short court hearing. Quite commonly, as in Shaikh (ibid), the relevant hearing could amount to an hour or so. In Coles (ibid), I concluded that whether or not there had been substantial case management, as envisaged by Spencer J, was not dependent necessarily on whether there had been a judicial determination of disputed issues. In this case, in fact, the judge determined a contested application to exclude the mobile telephone evidence relied on by the Crown. Clearly this was an important (even determinative) decision, as without this evidence the prosecution could not prove intent, but with its admissibility, the Defendant became reconciled to acceptable guilty pleas. The prosecution also made a disputed Bad Character application, although this was adjourned effectively by the trial judge. Otherwise, there was a discussion – contentious but evidently substantive – concerning the Schedules of telephone evidence to be put before the jury.

19. My conclusion, on the facts of this case, is that the Appellants' fee for 1st December 2020 should be properly assessed as a trial and not a cracked trial. Although the hearing was relatively short, it involved two contested applications argued before the

judge, one leading to substantive judicial determination, along with other matters for discussion and negotiation relevant to the admissible evidence. This case management, to my mind, was substantial, as it determined effectively the Defendant's decision to change his pleas to ones acceptable to the Crown. No two cases are identical, but the facts are similar to and my decision is consistent with the recent judgments in Coles, Sallah and Shaikh.

PPE

The Regulations

20. 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

21. Authoritative guidance was given in PPE cases by Mr Justices Holroyde in Lord Chancellor v. SVS Solicitors]2017] EWHC 1045 (QB). The parties refer specifically to para. 50(i) to (xi).

22. The Respondent cites additionally the judgments in R v. Jalibaghadelezhi [2014] 4 Costs LR 781, R v. Sereika SCCO Ref: 168/13, R v. Barrass SC-2020-CRI-000083, R v. Beckford [2019] SCCO Ref: 204/18, R v. Mucktar Khan [2019] SCCO Ref: 2/18 and R v. Purcell [2019] SCCO Ref: 132/19. The Appellants cite and rely on additionally Lord Chancellor v. Edward Hayes LLP [2017] EWHC 138 (QB).

My analysis and conclusions

23. The Respondent, in summary, raises a new submission on appeal, namely that the DO was wrong to include any of the electronic phone datum in the PPE count, as it was served as 'unused material', and should not be construed as served evidence within the meaning of para. 1. Further, or alternatively, it is submitted that the DO exercised her discretion at para.1(5) correctly. Recognising the importance of the electronic phone datum to the prosecution case, the DO allowed call logs, chats, messages (Instant, MMS and SMS), searched items and 3 pages (from a total of approximately 1189) of images. They excluded as irrelevant most of the images, web history and text.

24. The Appellants, in summary, argue that all the electronic datum should be included, as it is the professional duty of the defence to consider all the relevant material. Clearly the phone datum was crucial to the prosecution in establishing an intent to supply. The defence averred that the extensive phone evidence should go before the jury which would allow both sides to explain their cases.

25. I reject the Respondent's submission – raised only on appeal and in contrast to the substantive decisions of the DO's – that the electronic datum should be excluded from the PPE count in its entirety. It is clear (and effectively common ground) that the material was served on the defence in the manner anticipated by Holroyde in SVS

Solicitors (ibid). Evidently the prosecution relied on some of this material to prove an intention to supply heroin. Indeed, it seems to me that this element of the Crown's case was reliant wholly on datum downloaded from the mobile phones seized from the Defendant. Given that the prosecution relied on calls, chat, messages etc., as extracted from the totality of this datum on the phones, it must be appropriate to include the totality of this datum within the PPE count. The DO's were quite right, in my conclusion, to include call logs, chats and messages within the PPE count.

26. The DO's assessment of the images was, in my view, unreasonably conservative. Three pages of images were allowed because the phones, apparently, contained some photographs of drugs. This meant that images became effectively a relevant source of potential evidence, either to the prosecution or defence. It would not be reasonable to include the images as a whole, as the vast majority depicted irrelevant material. But it seems unreasonable to me to simply allow the inclusion of those images deemed to be specifically relevant. In my view, it is reasonable to include a modest % of the total images in the PPE count, and I would allow 10%, meaning that the PPE count in the LGFS and the AGFS claims increases by, say, 125.

27. I agree with the Respondent that there is no reasonable justification for including web history or text in the relevant PPE count. These should be excluded, along with the balance of the images. The relevant jurisprudence has developed since Hayes (ibid) and Holroyde J in SVS Solicitors emphasised properly that the discretion at para. 1(5) comprises 'an important and valuable control mechanism which ensures that public funds are not expended inappropriately'. It is not sufficient, as the Appellants purport to do, to simply aver that if it was served by the Crown it should be included in the PPE count. I accept the Respondent's observation (Rimer, para. 66) that the Text did not "in fact contain any messages; they contained metadata which was not evidence that was capable of being comprehended or carefully considered". I also agree (Rimer, para. 69) that the Appellants have failed to aver any positive or persuasive reasons why, on the particular facts of this case, Web History should be included in the PPE count.

28. Accordingly, the PPE appeals are allowed to the extent that the LGFS count should be 701 (533 + 43 conceded + 125 images) and the AGFS count should be 713 (588 +

125). Insofar as it is necessary or relevant to recalculate payment on the LGFS and/or the AGFS claims and reference to this revised assessment, I direct that this be done.

Costs

29. The Appellants have been successful (in part) and they are entitled to the return of the £100 x2 paid when lodging the appeals. There has been no oral hearing, and it is not appropriate, in my conclusion, to make an additional award of costs.

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