



Neutral Citation No. [2024] EWHC 103 (SCCO)

Case No: T20220009
SCCO Ref: SC-2023-CRI-000031

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 17/01/2024

Before :

COSTS JUDGE NAGALINGAM

Between:

R

-v-

Harmain Asif

and

IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION

Arora Lodhi Heath Solicitors

Appellants

- and -

The Lord Chancellor

Respondent

Hearing date: 22/12/2023

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COSTS JUDGE NAGALINGAM

Costs Judge Nagalingam:

Background

1. The Defendant was arrested following allegations of domestic abuse of his wife, the complainant. Namely, that over a period of some 34 months, he engaged in a campaign of psychological, physical and emotional abuse amounting to controlling and coercive behaviour. During this period, the complainant was pregnant on two occasions and, as a consequence, particularly vulnerable. The crown described the abuse as “sustained and appalling”.
2. The Defendant originally faced a 3 count indictment.
3. Count 1 being controlling or coercive behaviour in an intimate or family relationship, contrary to section 76 (1) and (11) of the Serious Crime Act 2015. Namely, that between the 1st day of February 2019 and the 31st day of December 2021, the Defendant, at a time when he was personally connected to the Complainant, engaged in behaviour towards the Complainant that was controlling or coercive which had a serious effect on the Complainant, namely to fear, on at least two occasions, that violence will be used against her, at a time when the Defendant knew or ought to have known that the behaviour will have a serious effect on the Complainant.
4. Count 2 being assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. Namely, that between the 1st day of January 2020 and the 31st day of January 2020 the Defendant assaulted the Claimant thereby occasioning her actual bodily harm.
5. Count 3 being assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. Namely, that between the 1st day of March 2020 and the 31st day of March 2020 the Defendant assaulted the Claimant thereby occasioning her actual bodily harm.
6. Following his arrest, the Defendant’s mobile phone was seized by the police and a full download was made (exhibit BH/01) with the intention of securing and preserving evidence relating to the commission of the offences upon which the Defendant was indicted.
7. Within the full download was data pertaining to a messaging application (or ‘app’) known as “WhatsApp”, which contained around 29,000 messages amounting to some 9,747 pages of electronic evidence and marked as Exhibit DJH/01.
8. This was condensed down further into the messages between the Defendant and the Complainant only of 7,117 messages which amounted to 2,564 pages of electronic evidence.
9. It is the status of these pages of evidence which is the main focus of this appeal. The Respondent has concluded that Exhibit DJH/02 was unused material. The Respondent also relies on the fact that the Advocate in this matter has already been remunerated on the basis that Exhibit DJH/02 was unused material, and in any event submits there is no evidence that DJH/02 was served in this matter.

10. There is also a dispute as to classification of offence for remuneration purposes.
11. Following negotiations between the crown and the defence, the Defendant was rearraigned on counts 2 and 3 (to which he pleaded guilty) plus a guilty plea to a new count 4 (assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. Namely, that on the 14th day of June 2020 the Defendant assaulted the Complainant thereby occasioning her actual bodily harm). It was agreed that Count 1 would lie on file.

The Relevant Legislation

12. The applicable regulations are The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended for cases with representation orders issued on or after 17 September 2020, and in particular regulations 5 and 28.

The Parties' Submissions

13. Mr Mahmood, solicitor, appeared on behalf of the Appellant in this Litigator's appeal. The Respondent elected to be unrepresented and instead rely on their written reasons dated 28 February 2023 and an e-mail from Ms Quarshie of the Legal Aid Agency dated 21 December 2023.
14. Mr Mahmood confirmed the areas to be addressed in this appeal are status of the electronic PPE and classification of offence.
15. In consistency with the original three count indictment, Mr Mahmood observed that the crown's case could be summarised as allegations of a sustained and appalling campaign of physical and psychological abuse over a period of nearly three years during which time the Complainant was pregnant twice and therefore even more vulnerable as a consequence.
16. Mr Mahmood explained that the evidence contained in Exhibit DJH/02 demonstrated a pattern of conduct by the Defendant which amounted to controlling or coercive behaviour.
17. Exhibit DJH/02 contained WhatsApp messages between the Defendant and Complainant which made references to domestic violence, threats and abuse throughout the relationship, committed by the Defendant. The messages demonstrated that the Defendant had engaged in behaviour which sought to belittle and degrade the Complainant.
18. The crown also argued that the messages provided evidence of the Defendant's state of mind, which was pivotal in order for the Crown to prove its case, and evidence of the Complainant's state of mind as the recipient of the abuse observed.
19. Mr Mahmood observed that exhibit DJH/02 was exhibited to the witness statement of PC Hick dated 17 May 2022 and describes the same as pivotal evidence.

20. Mr Mahmood submits that if evidence is exhibited to a witness statement from the investigating officer and that statement makes specific reference to pages of the exhibit then the exhibit has to be considered as it has clearly been relied on. The Appellant couldn't ignore the exhibit and therefore had to look at the messages contained within the same.
21. Even then, Mr Mahmood wished to stress that the Appellant is not seeking remuneration for Exhibit BH/01 (i.e. the entire phone download), nor is the Appellant seeking remuneration for all of the messages on the phone, but rather only the WhatsApp messages between the Defendant and the Complainant, and even then only those messages which the investigating officer considered to be relevant.
22. Mr Mahmood drew my attention to the multiple page references (accompanied by a message number for identification purposes) contained in PC Hick's witness statement, each of which is intended to demonstrate that the Defendant engaged in multiple threats of violence, controlling behaviour, and potentially demonstrated that the Defendant understood his behaviour was coercive control.
23. The Appellant relies on Section 9.7 of Criminal Justice Act 1967, which provides that "Any document or object referred to as an exhibit and identified in a written statement tendered in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement."
24. Mr Mahmood explained that information contained within exhibit DJH/02 was also used to negotiate and reach an agreement with the prosecution that the charge of controlling and coercive behaviour be withdrawn in return for guilty pleas to the assault charges and to an additional assault charge.
25. Mr Mahmood relies on *R v Hayes* 2017 EWHC 138 QB, and in particular paragraph 24 which states:

"Given the importance of the text messages to the prosecution case it was, in my view, incumbent on those acting on behalf of the defendant to look at all the data on the disc to test the veracity of the 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. I regard the stance taken by the appellant in respect of the surrounding material on this disc as unrealistic. It fails to properly understand still less appreciate the duty on those who represent defendants in criminal proceedings to examine evidence served upon them by the prosecution."
26. Mr Mahmood also relies on *Lord Chancellor v SVS* [2017] EWHC 1045 (QB), in particular paragraphs 40, 44 and 50(viii) of the same which state:

"40. ... Both counsel agreed that neither the word "served" nor the phrase "served on the court" is defined in the Regulations. Mr Bedenham submits that the concluding words of paragraph 1(3) of Schedule 2 must mean that evidence or exhibits can only be part of the PPE if they are either served as part of the initial evidence and exhibits on the basis of which the case is sent for trial, or are subsequently served by way of notice of additional evidence (even if, as in *Qu*, the formalities of such service are

overlooked). He relies in this regard on the decision of Costs Judge Gordon-Saker in Ward [2012] 3 Costs LR 605.."

"44. ... I respectfully agree with those general observations as to the duties of the defence when asked to agree a schedule or some proposed agreed facts. The agreement of schedules and/or agreed facts, which reduce a mass of evidence and exhibits to a much more convenient and efficient form, is central to the proper progression of very many criminal trials. But it is important to bear in mind that the role of the defence lawyers is often not confined to checking the accuracy of the summaries of the material which the prosecution has chosen to include: it often extends also to checking the surrounding material to ensure that the schedule does not omit anything which should properly be included in order to present a fair summary of the totality of the evidence and exhibits which are being summarised. It may therefore often be necessary to review what has been omitted before being able to agree to the accuracy of that which has been included."

"50(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 Officer (or, on appeal, the Costs Judge) will have to determine it in the light of all 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) would 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) would 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."

27. Mr Mahmood submits that PC Hicks' witness evidence gives multiple page references (accompanied by a message number for identification purposes) which demonstrate multiple threats of violence, controlling behaviour and the potential to understand the behaviour was coercive control.
28. Mr Mahmood considers it unsustainable for the Respondent to argue that PC Hicks' evidence, and by extension the material exhibited to the same, was served as unused when clearly that same evidence and material was relied on to pursue the original three count indictment and further referenced in adding a fourth count and agreeing a plea deal.
29. Mr Mahmood submits that allegations of coercive and controlling behaviour are among the most serious of offences and the prosecution clearly relied on Exhibit JH/2.
30. With regards to offence classification I adopt the summary provided in the Appellant's 2nd taxation note with regards to their submissions as to offence classification, which sets out:

"We apologise for not making this aspect of our claim clearer. The offence of controlling or coercive behaviour in an intimate or family relationship, contrary to section 76 (1) and (11) of the Serious Crime Act 2015 is not listed thus falls into offence class H. It is an

offence which involves psychological violence, which can have a lingering effect which lasts much longer than the injuries caused by a class C offence, thus it is more complex and should fall under a higher category than the class C offence on the indictment. An example of an offence involving psychological violence in offence class B is threats to kill, we see no offence in offence class C which immediately stands out as taking into account or being an offence of psychological violence. Therefore, in our view offence class B is the most appropriate class.”

31. Mr Mahmood then took me to Exhibit DJH/02 and in particular messages numbered 3765, 3947, 4314 and 4933 in so far as they all make references to the Complainant being killed. Mr Mahmood submits these are examples and when the messages are looked at more widely and in context, there are also messages where the word “kill” or similar might be absent, but it is clear the Complainant was in fear of not only her life but those of her children.

Analysis and decision

PPE

32. The stance adopted by the Respondent has not addressed the specificity of whether Exhibit DJH/02 ought to be treated as PPE, regardless of the status of the material. Addressing the principle of that issue, I find that where any PPE allowance is to be made for Exhibit DJH/02 then it ought to be allowed in full. That is because the exhibit is already very specific as to its contents. This is not a case where remuneration is being sought on the basis of the entire contents of a mobile phone download, nor the entirety of the messages. It is based on one section of the messages, i.e. those on the WhatsApp messaging platform, and limited to those messages between the Defendant and Complainant only, over a period of nearly 3 years.
33. The key document in this appeal is clearly the witness statement of Police Constable Hicks dated 17 May 2022, made in his capacity as “the officer in charge of an investigation into controlling and coercive behaviour relating to Harmain Asif”, the Defendant.
34. A key extract of PC Hicks’ witness statement provides:

“The specific wording of the allegation alongside the government definition as indicated above, assisted me in identifying phrases/ conversations/ messages that appeared relevant and consistent with the allegation that has been made by the complainant..

I have initially made a decision to search the download for the victim's number ending 1216 along with the suspect’s number ending, 2012 in order to establish the volume of contact between both parties. This identified no text messages but approximately 29000 WhatsApp messages. I have subsequently reviewed every message and tagged these in order to identify their relevance to the investigation.

The full WhatsApp message download consists of 9747 pages and contains over 29000 messages that shows the conversation thread [between] Harmain and [the Complainant]. I will exhibit this as DJH/01 Full WhatsApp download. The messages I have tagged that appear relevant to the investigation based on the context for the offence I will produce as

exhibit DJH/02 WhatsApp download. Exhibit DJH/02 is 2564 pages long and contains 7117 messages.

This statement relates to my findings from reviewing the full WhatsApp download and exhibit DJH/02 that appears to contain messages relevant of the investigation and the offence of controlling and coercive behaviour and shows evidence throughout its entirety including references to violence, threats and abuse designed to belittle and degrade. This is available to read in full however due to the large size of exhibit DJH/02, what follows in this statement is reference to particular sections of exhibit DJH/02 I have highlighted which are relevant to the investigation and the offence.”

35. I observe that the Appellant could have pursued a claim for the entire phone download, or all of the messages, or all of the WhatsApp messages. Instead, they have limited their claim to only the WhatsApp messages between the Defendant and Complainant which the investigating officer considered to be relevant, and only in circumstances where those messages have been exhibited to the witness statement of Police Constable Hicks, in his capacity as the officer in charge of an investigation into controlling and coercive behaviour relating to Harmain Asif, the Defendant.
36. In my view there can be no doubt that the prosecution relied on exhibit DJH/02 and whilst it may have been mis-categorized as unused material, the factual reality is that it was clearly used and was clearly of central importance to the case.
37. In all the circumstances, and notwithstanding how the Advocate may have been remunerated, I find that 2,564 pages ought to be allowed for consideration of exhibit DJH/02, in addition to the 226 pages already allowed.
38. PPE is therefore allowed in the total amount of 2,790 pages.

Offence banding/classification

39. Exhibit DJH/02 does not make for pleasant reading. It is clear that at times the Complainant was so concerned for the safety of her children she was willing to die at the hands of the Defendant if it meant that her children would be released from his guardianship. I accept the Complainant was at times in genuine fear of losing her life at the hands of the Defendant.
40. When one considers the banding of offences tables one observes that under Table B category 3, are a number of examples which either reflect the harm or bear close resemblance to the harm the Complainant suffered. In so far as classification is in dispute, my decision is that Table B applies.

Costs

41. I allow £500 plus the appeal fee for the Appellant’s costs.

COSTS JUDGE NAGALINGAM