



Neutral Citation No. [2024] EWHC 1080 (SCCO)

Case No: T20227278
SCCO Ref: SC-2023-CRI-000046

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 01/05/2024

Before :

COSTS JUDGE NAGALINGAM

Between:

R

-v-

Tyrone Rowe

and

IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION

Miss Victoria Rose

Appellant

- and -

The Lord Chancellor

Respondent

Hearing date: 01/12/2023

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 and charged initially with two counts, with a third count later added. CCTV footage was used as evidence of a series of events which unfolded on 22 June 2022.
2. Initially, a Mr Craig Taylor, Mr Marvin Loi and Mr Junior Bailey met up outside a hot food establishment on Peverill Street, Nottingham. Mr Taylor was observed aiming a punch at Mr Bailey which descended into a fight during which both Mr Taylor and Mr Loi assaulted Mr Bailey. Mr Bailey sustained punches, kicks and knee strikes.
3. Mr Bailey then pursued Mr Taylor, who tripped and fell. At this point, the Defendant arrived and appeared to be holding a camera. Mr Bailey and the Defendant were seen to briefly converse, before both men further pursued Mr Taylor. In the proceeding attack, Mr Taylor was forced to the ground by Mr Bailey and the Defendant.
4. Whilst Mr Taylor was laid on his side, the Defendant began the assault by stamping on Mr Taylor's head. The rest of the violence is observed to be perpetrated by Mr Bailey, including stabbing Mr Taylor at least twice.
5. As a consequence of the attack, Mr Taylor sustained a number of serious injuries. The Defendant subsequently faced the following counts:

Count 1 - The Defendant, along with one other, was charged with attempted murder, contrary to section 1(1) of the Criminal Attempts Act 1981, in that on 22 June 2022 he attempted to murder Craig Taylor.

Count 2 - The Defendant, along with one other, was also charged with having an article with a blade or point, contrary to section 139(1) of the Criminal Justice Act 1988, in that on 22 June 2022 without good reason or lawful authority, had with him in a public place, namely Peverill Street, an article which had a blade or was sharply pointed, namely a knife.

Count 3 - A 3rd count was later added, of assault occasioning actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861, in that on 22 June the Defendant, along with one other, assaulted Craig Taylor thereby occasioning him actual bodily harm.

6. Having been positively identified as being involved by a police officer, the Defendant answered "no comment" to all questions following his arrest.
7. Proceedings against the Defendant started later than any other co-defendants because he was not arrested until after the CCTV footage had established his involvement. On 14 September 2022, the Defendant appeared in the Magistrates' Court. On 26 September 2022, the Defendant appeared in the Crown Court, where he was unrepresented because

of strike action by the Criminal Bar Association at the time.

8. HHJ Shant KC preserved credit until such time that the Defendant was represented. On 22 November 2022, the Defendant was represented but was not arraigned. His counsel indicated that he would plead guilty to a count of actual bodily harm at that hearing, notwithstanding no such count stood on the file at the time. That plea was therefore deemed not acceptable.
9. Count 3 having later been added, the Defendant entered a guilty plea to a count of assault occasioning actual bodily harm on 24 January 2023, which was accepted by the prosecution. The Defendant's case was thereafter adjourned for sentencing, to be addressed at the conclusion of his co-defendant's trial. The prosecution offered no evidence on the count of attempted murder against the Defendant.
10. On 17 February 2023, before His Honour Judge Coupland and at the end of a 5 day trial, a jury formally found the Defendant guilty of Count 3.
11. The Defendant was found not guilty of Count 1 (attempted murder), and not guilty of Count 2 (being in possession of a knife).
12. The Appellant advocate claimed a cracked trial fee but was remunerated on the basis of a guilty plea. That decision is now the subject of this appeal.

Submissions

13. The Appellant, counsel Miss Rose, represented herself at this appeal. The Respondent was represented by Ms Weisman, Senior Legal Advisor at the Legal Aid Agency.
14. The Appellant has produced no separate hearing bundle and no further written submissions. Miss Rose relies on the documents uploaded to the court's CE File system, her oral submissions today, and the Respondent's case law bundle.
15. Miss Rose submits the question before me today is basic. Should counsel be remunerated on the basis of a guilty plea or a cracked trial?
16. Miss Rose accepts there was no formal arraignment before the trial, but submits that clear indications were given of a not guilty plea (to the charge of attempted murder), at a time when the Defendant was unrepresented due to strikes by the Criminal Bar Association (CBA).
17. With reference to the Respondent's written submissions document, Miss Rose sought to distinguish this appeal from the cases the Respondent relies on because of the relevant chronology, in particular the date by which the Defendant became involved in the proceedings.
18. This is because proceedings against the Defendant's co-accused were already underway, such that in their case a trial date of 5 December 2022 had already been fixed, i.e. the

trial date had been fixed before the Defendant had officially become involved in the criminal proceedings.

19. Miss Rose observed that the 26 September 2022 plea and trial preparation hearing (PTPH) was the first hearing the Defendant attended, and where he was unrepresented due to the ongoing CBA strike at the time. In those circumstances, formal arraignment could not take place, yet procedurally the Defendant was still to face trial on counts 1 and 2 on the date fixed for his co-accused, being 5 December 2022.
20. Miss Rose questions why the Defendant would be facing a 5 December 2022 trial unless he was deemed to have pleaded not guilty, or indicated an intention to plead not guilty.
21. Miss Rose also referenced the crown's "case summary for the purposes of allocation/listing", dated 15 November 2022, which named both the Defendant and Mr Bailey in allegations of the attempted murder of Craig Taylor.
22. The case summary proceeds to describe the case as "...straight forward. Likely issues concern questions about the defendants' intent and competing arguments about what the CCTV shows. There may be a subsidiary issue of identification insofar as Tyrone Rowe is concerned. Psychiatric defences are not anticipated."
23. Miss Rose submits that the crown's case summary dated 15 November 2022 is consistent with the crown and the court having treated the Defendant as having entered a not guilty plea to counts 1 and 2, or having indicated an intention to plead not guilty. She says that additional issues such as the correct identification of a Defendant due to stand trial for attempted murder within 20 days of the submitted case summary, and where the trial had been listed for 5 days, further strengthened her argument.
24. Miss Rose confirmed that by the time of the 22 November 2022 hearing before HHJ Shant KC, the Defendant was represented. At that hearing, the requirement for a mental health assessment of the co-accused was identified and the 5 December 2022 trial was vacated, re-listed to 13 February 2023. Miss Rose wished to stress that the trial date was not adjourned to arraign the Defendant, but rather for a mental health assessment of Mr Bailey.
25. Miss Rose gave anecdotal evidence, which was not challenged by the Respondent, that HHJ Shant KC confirmed in the clearest of terms that the original 5 December 2022 trial listing had been intended to include the Defendant, and that there would be no extension of time for defence witness statements on behalf of Mr Rowe, who was also asked to provide a supporting witness statement.
26. Miss Rose said this all amounts to a clear indication that the court was proceeding on the basis of a not guilty plea from the Defendant.
27. Miss Rose then referred to the next hearing being the pre-trial review hearing on 24 January 2023 (i.e. 20 days before trial), and observed there had been no alternative

intervening hearing at which the Defendant could have confirmed a not guilty plea. Miss Rose observed that a defence statement had been taken from the Defendant in advance of the 24 January 2023 hearing, which would not have been prepared unless counsel was working towards the trial of a defendant who had pleaded not guilty, or was being treated as having pleaded not guilty.

28. With regards to evidence of pleas, there is no dispute between the parties that the Defendant's defence indicated a willingness to plead guilty to a charge of ABH (which was not a count at the time). Miss Rose argues that any suggestion that there is no evidence of an indication to plead not guilty to the attempted murder charge is not borne out by the facts of the chronology and how this matter was case managed by the court.
29. Citing the spirit of the regulations, and that procedurally speaking it was clearly the intention of the court that as at 22 November 2022 the Defendant would be proceeding to a 5 December 2022 trial to face an attempted murder charge, counsel had to prepare accordingly.
30. Save for *R v Williams*, upon which in fact Miss Rose relies, the Appellant submits that the other cases relied on by the Respondent can be distinguished from the index appeal because in those other cases guilty pleas can be demonstrated. It is the absence of a guilty plea to the original counts (i.e. counts 1 and 2) which is relevant here.
31. In summarising her argument, Miss Rose observed that all evidence had been served by 22 November 2022. Full disclosure had taken place. The Defendant had indicated a willingness to plead guilty to ABH, but aside from that all indicators point to the Defendant having been treated as pleading not guilty to attempted murder. At the 24 January 2023 pre-trial review hearing, the crown gave their first indication that they would accept a guilty plea to the newly added ABH count. That was communicated in private to Miss Rose and was not a result of any intervention by the case managing judge. On 13 February 2023 the trial proceeded with respect to the co-accused only.
32. Finally, whilst Miss Rose did not plead remuneration of the litigator in this same matter to be necessarily persuasive, the litigator has been paid on the basis of a cracked trial fee and as far as she is aware that decision is not under review.
33. The Respondent's hearing bundle contains written submissions prepared for this hearing and a number of reported case law decisions.
34. On behalf of the Respondent, Ms Weisman, helpfully, did not seek to challenge the account of the facts presented by Miss Rose on the basis that Miss Rose lived much of the chronology she has addressed the court on, whereas Ms Weisman was considering matters after the event only.
35. Instead, Ms Weisman invites focus on three elements she considers to be relevant as to how the court applies its mind to this appeal and what outcome ought to follow. That is, what do the regulations provide for and what is the outcome when applied mechanistically, what are the facts and context of the case, and what (if any) degree of

flexibility is there in the regulations?

36. Ms Weisman accepts the case proceeded quite far towards what would have been a contested trial but submits that nevertheless the case law set out in her written submissions supports a mechanistic application of the regulations.
37. In Ms Weisman's opinion, the Appellant appears to be arguing that a case which was progressing to trial, where there was a clear indication of a not guilty plea, but absent a formal arraignment, should not be fatal to claim for a cracked trial fee.
38. Ms Weisman submits that the majority of the recent case law in relation to claims for a cracked trial fee suggest that without a formal arraignment the case must be treated as a guilty plea fee for remuneration purposes, and there is no flexibility to find a cracked trial fee.
39. Ms Weisman accepts that the decision in *R v Williams* does not at first glance assist the Respondent. However, she describes the decision in *Williams* as "borderline", whilst acknowledging she understood why Miss Rose has brought this appeal.
40. However, Ms Weisman primarily argues that I ought to follow the consistency of the majority SCCO decisions arising out of similar circumstances, and conclude a guilty fee is payable even if that outcome seems unfair to the Appellant.

Relevant Legislation

41. The applicable regulations are The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), and in particular Schedule 1 to the 2013 Regulations which provides (where relevant) as follows:

"1(1) "cracked trial" means a case on indictment in which—

(a) a plea and case management hearing takes place 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;

“guilty plea” means a case on indictment which—

- (a) is disposed of without a trial because the assisted person pleaded guilty to one or more counts; and
- (b) is not a cracked trial;”

.....

“2(10) Where, at any time after proceedings are sent or transferred to the Crown Court as referred to in sub-paragraph (9), they are—

- (a) discontinued by a notice served under section 23A of the Prosecution of Offences Act 1985(3) (discontinuance of proceedings after accused has been sent for trial); or
- (b) dismissed pursuant to—
 - (i) paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998(4) (applications for dismissal);
 - (ii) section 6 of the Criminal Justice Act 1987 (applications for dismissal); or
 - (iii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (applications for dismissal),

the provisions of paragraph 22 apply.

2(11) For the purposes of this Schedule, a case on indictment which discontinues at or before the plea and case management hearing otherwise than—

- (a) by reason of a plea of guilty being entered; or
- (b) in accordance with sub-paragraph (10),

must be treated as a guilty plea.”

.....

“22(1) This paragraph applies to proceedings which are—

- (a) for trial to the Crown Court;

.....

(5) Where, at a hearing to which this sub-paragraph applies—

- (a) the prosecution offers no evidence and the assisted person is discharged; or
- (b) the case is remitted to the magistrates’ court in accordance with paragraph 10(3)(a), 13(2) or 15(3)(a) of Schedule 3 to the Crime and Disorder Act 1998,

the advocate instructed in the proceedings must be paid a graduated fee calculated in accordance with paragraph 7, as appropriate for representing an assisted person in a

guilty plea.”

Analysis and decision

42. I have been referred to and considered the decisions in *R v Williams* (SC-2019-CRI-000118), *R v Malik* (SC-2019-CRI-000136), *R v Barzey* [2022] EWCH 1775 (SCCO), *R v Jarir* [2022] EWCH 2231 (SCCO), and *R v Gatherar* [2023]EWCH 2928 (SCCO).
43. *R v Malik* is a decision of Costs Judge Leonard which is predicated on their being clear guilty pleas entered, not only in relation to the original indictment the defendant faced but also in relation to a later indictment. The point being it is clear in *Malik* that at no time did the defendant enter a not guilty plea. In fact, quite the opposite.
44. *Malik* then proceeds to identify that the second situation in which a cracked trial fee becomes payable is where a case is listed for trial without a hearing at which the assisted person enters a plea, because there is no hearing at which the assisted person enters a plea.
45. The Appellant’s case is that not only did the Defendant plead not guilty, but that the case was listed for trial and there *was* a hearing at which the assisted person, i.e. the Defendant, entered a plea.
46. *R v Barzey* is also a decision of Costs Judge Leonard. In that case the PTPH was adjourned four times, due to a lack of preparedness by the crown. At the third adjourned PTPH a date was fixed for trial, with no plea yet entered. The defendant thereafter failed to attend an arraignment hearing which was re-listed at the same time the judge confirmed the trial would proceed as listed, the crown being ready to proceed. At the rearranged arraignment hearing, the defendant pleaded guilty.
47. Applying the same principles as in *Malik*, the appeal in *Barzey* was dismissed. Thus both cases concern facts and circumstances in which it was accepted that at no time was a plea of not guilty entered. Further, both cases recognise the alternative scenario by which a case is listed for a trial without a hearing at which the assisted person enters a plea.
48. *R v Jarir* is a further decision of Costs Judge Leonard. A PTPH was listed but not effective due to issues with the video conferencing technology, resulting in the defendant being unable to connect and therefore not being arraigned. The defendant had instructed his legal team (who were physically present in the court room) that he was not guilty and, being in court, they gave an indication as such. The case was thereafter listed for a 4 week trial based on all five defendants pleading not guilty.
49. The defendant failed to attend the re-listed PTPH but further instructed his legal representatives that he was not guilty. However, at a case management hearing the following month the defendant pleaded guilty. In this case, the Determining Officer concluded this was the first hearing at which the defendant had a formal opportunity to plead, notwithstanding that a defence statement pleading not guilty had already been produced.
50. In a clear and concise decision, Judge Leonard sets out a series of stages. The first is to

establish whether a trial has been listed or not. The second is to establish whether the accused has entered a plea of not guilty to one or more of the counts faced, or to establish if a trial was listed without a hearing at which the assisted person enters a plea.

51. Having reviewed the 2015 amendments to the 2013 Regulations, Costs Judge Leonard concluded that had there been an intention that a cracked trial fee would be payable in any case that had been listed for trial before a plea was entered, the regulations would explicitly say so, and they do not. I am minded to agree. However, it is not apparent to me that the facts of the index appeal are analogous with this those of *Jarir* or indeed any of the cases the Respondent has relied on. For instance, *Jarir* concerned a case of counsel being present but a defendant who was not. Whereas the index appeal throws up a scenario where counsel wasn't present but a defendant who was.
52. That leaves the recent decision of *R v Gatherar*, a decision of Costs Judge Brown. In that case, no plea was taken at the initial PTPH because the defendant needed to be seen by a psychiatrist. Some 2 months later, a mention hearing was held to consider the defendant's fitness to plead. With the trial listed and some 7 weeks away, the defendant was not arraigned and the court confirmed that the fitness to plead issue would be determined at the start of the trial. Around a month before trial the prosecution indicated that they were satisfied that the issue of fitness to plead had been resolved, and indicated a number of guilty pleas from the Defendant were acceptable. Those counts were put and guilty pleas were entered, with sentencing and disposal of the remaining counts to await the outcome of the co-defendant's trial.
53. As with the other three cases relied on by the Respondent, *Gatherar* is not a case where the *defendant* pleaded not guilty.
54. Three obvious themes arise from the four cases identified by the Respondent. Firstly, a not guilty plea made by the defendant is absent in all four cases. Secondly, the cases identify situations where the defendant was not present but their legal representative was. The relevance of this is that the wording of the regulations, strictly applied, refers to the pleading of the assisted party. In the index matter, there was at least one hearing at which the Defendant was present but it was his legal representative advocate who was absent, as a consequence of the Criminal Bar Association strikes. Thirdly, that whilst the listing of a trial may be persuasive as to the basis of plea in terms of context, it is not necessarily instructive.
55. Set against the Respondent's cases is the decision in *R v Williams*, which the Appellant submits is on all fours with the circumstances of the index appeal. In that case, the defendant was one of nine. She did not plead at the PTPH but indicated an intention to plead not guilty. A trial date was set but just under 7 weeks before trial the defendant pleaded guilty at a mention hearing she attended. The trial did not go ahead.
56. The judge's note of the PTPH recorded the defendant's intention to plead not guilty but that she was "not arraigned today in absence of counsel on a busy day".
57. In consistency with the cases referred to above, Costs Judge Rowley concluded that a formal plea at a PTPH is not an absolute requirement of setting a date for trial.
58. Having satisfied himself that the hearing at which the defendant indicated an intention

to plead not guilty was a PTPH, he recognised that the only reason the defendant could not be formally arraigned to enter a plea was the absence of her counsel “on what everyone described as a busy morning”. On the basis that the defendant’s position as to the counts faced had been clear to the judge, a cracked trial fee was allowed.

59. I disagree with the Respondent that the four cases they rely on collectively conclude that the formality of entering a plea during an arraignment hearing is a requirement in order to obtain a cracked trial fee. Further, I consider this appeal succeeds on every limb of the relevant regulations in any event.
60. Firstly, I accept that the Defendant either pleaded not guilty or indicated an intention to plead not guilty at the first PTPH he attended, and that but for the unavailability of counsel that plea would have been formally recorded.
61. Secondly, the case against the Defendant did not proceed to trial on counts 1 and 2 because, ultimately, the prosecution offered no evidence in respect of those counts *after* a trial had been listed at which the Defendant was to be tried on those counts.
62. Thirdly, in respect of the counts which did not proceed against the Defendant, the prosecution did not, before or at the PTPH, declare an intention of not proceeding with them.
63. Fourthly, if the Respondent’s case was that the case against the Defendant was listed for trial without the Defendant attending a plea and case management hearing taking place, then the criteria for cracked trial is satisfied.
64. Finally, whilst the Defendant did plead guilty to a count of ABH when later added, that count did not lie on the file when the trial was listed. As such, the Defendant’s stated willingness to plead guilty to such a count cannot prevent the recovery of a cracked trial fee when the trial as listed at the time did not reflect that count.
65. The appeal is therefore allowed.
66. I would add that I disagree with Ms Weisman that the decision in *R v Williams* was “borderline”, as she put it, and I therefore decline to state where the line lies. The decision in *Williams* was clearly decided on its facts. Further, I do not consider that the decision represents a departure from the generally mechanistic and predictable application of the regulations. Costs Judge Rowley sets out the approach he consider the Determining Officer ought to have adopted in *Williams*. I do not consider that decision or this appeal is at odds with the decisions of Costs Judges Leonard or Brown. Each decision simply reflects the unique procedural facts and chronology of each case.
67. In a similar vein, I have drawn the conclusion that the assisted person, i.e. the Defendant, effectively pleaded not guilty at the first PTPH and that just remuneration should not be frustrated by such a unique factor as a historic strike by the Criminal Bar Association. However, even if I am wrong about that I am satisfied the a cracked trial fee is payable for the other reasons set out above.
68. The Appellant seeks only the appeal fee of £100 which is payable by the Respondent in addition to the remuneration consequences of this decision.

COSTS JUDGE NAGALINGAM