Neutral Citation No. [2024] EWHC 1317 (SCCO)

Case No: T20217565

SCCO Reference: SC-2023-CRI-000083

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 29 May 2024

Before:

COSTS JUDGE LEONARD

R
v
O'HARE AND HARDING

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

Appellant: **Cobleys Solicitors**

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

COSTS JUDGE LEONARD

1. This appeal concerns whether, under the Graduated Fee provisions of Schedule 2 to The Criminal Legal Aid (Remuneration) Regulations 2013, the Appellant is due a cracked trial fee or a trial fee. The issue turns upon whether, for the purposes of the 2013 Regulations, a "Newton Hearing" (a fact-finding hearing for sentencing purposes, which is treated as a trial under the Regulations) took place.

2. According to the Determining Officer's written reasons the relevant Representation Order was made in July 2021. The 2013 Regulations apply as in force at that date. Schedule 2 at paragraph 1 provides the following definitions:

> '"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…
>
> … "Newton Hearing" means a hearing at which evidence is heard for the purpose of determining the sentence of a convicted person in accordance with the principles of R v Newton (1982) 77 Cr App R 13…'

Background

3. The following account of events is taken from the Appellant's submissions.

4. The Appellant represented Craig O'Hare and Nathan Harding before the Crown Court at Liverpool. The Appellant has claimed a trial fee on the basis that a Newton hearing took place. The Determining Officer concluded that the correct payment was for a cracked trial.

5. The case against Craig O'Hare and Nathan Harding was that they had conspired together and with others to supply class A and B drugs. Both defendants had entered not guilty pleas. Trial was fixed for Monday 6th December 2021.

6. At a pre-trial review on the Friday 3rd December 2021 the Crown and the Defence ironed out issues of admissibility and outstanding disclosure. As the morning progressed negotiations began between the parties as to what might be accepted by way of plea. By the conclusion of the hearing on Friday significant headway had been

made and informal bases of plea had been presented by both defendants. The case was adjourned to the Monday 6 December 2021 for all parties to take stock of their respective positions.

7. On the Monday morning, the Crown and the two defendants came close to agreement. There was one significant outstanding issue that could not be resolved, and that related to Craig O'Hare. The question was the amount, if any, of heroin or adulterant he had supplied.

8. Prosecution counsel, defence counsel, the solicitor for the Crown Prosecution Service, the Appellant and the police officers in charge of the case engaged in "intense" discussions in court corridors and conference rooms. Counsel for the Crown and counsel for Craig O'Hare agreed between themselves that:

    a. All relevant evidence had by now been served. The admissibility of the evidence was not in issue. What was in issue was the interpretation of the evidence.
    b. An agreement could not be reached on whether the defendant had actually supplied any heroin or adulterant and if so how many kilograms of heroin or adulterant he had supplied.
    c. The difference between the position of the Crown and the position of the defence was so significant that it would make a difference to sentence.
    d. The actual evidence that was open to interpretation would be put before the trial judge for determination. It comprised about three pages of encrypted texts.
    e. Counsel would make submissions on interpretation and leave it to the judge to decide which interpretation of the evidence to accept.

9. Before arraignment the trial judge, HHJ Flewitt KC, was asked by both counsel to consider the text communications and to interpret them so as to accept one of two interpretations. The Crown's interpretation was that the Defendant had in fact supplied at least three kilos of adulterant for heroin, which would then be grossed up when mixed with heroin to produce at least six kilos. The Defence's was that the Defendant had never possessed any adulterant, but at the very highest had agreed to take part in a future supply of adulterant that may have been three kilograms and which supply had never in fact taken place.

The Transcript

10. A transcript of the proceedings on Monday 6 December 2021 (I have tidied up the text slightly) includes the following discussions between HHJ Flewitt KC, Mr Barraclough for the Defendant and Miss Hayden for the Crown:

> "JUDGE FLEWITT: Right. Well, Mr. Barraclough, I have read the basis of plea. This reflects something I think you said to me on Friday.
> MR. BARRACLOUGH: That is right, your Honour.
> JUDGE FLEWITT: Miss Hayden, what is the Crown's view of that? I assume it has been the subject of some discussions.
> MISS HAYDEN: It has been the subject of discussions. There's no difficulty with paragraphs 2 or 3. There's certainly in terms of paragraph 4,

there is an agreement to move "bottom smash" which is an accepted reference to an adulterant for heroin. We say that there is evidence that that move actually took place and that was, we would say, evidence of involvement, active involvement in that stage which went beyond a mere agreement... But aside from that, it is difficult because it is the movement of adulterant to identify an amount actually supplied. We'd say in his case it's at Category 2 because of the acceptance of an agreement to be involved in the movement of "Tops" which are kilograms of cocaine and there's reference to "3k of bottom smash" or "Bobby smash", again---
JUDGE FLEWITT: Just, just. .. So that. .. So far as the cocaine is concerned, a willingness to move kilo quantities of cocaine---
MISS HAYDEN: Yes. There's a reference a clear reference to "Tops".
JUDGE FLEWITT: ---and the indicative quantity for Category 2---
MISS HAYDEN: 2.
JUDGE FLEWITT: ---is one kilo.
MISS HAYDEN: ---is one kilo.
JUDGE FLEWITT: Well was he only agreeing to move just one kilo?
MISS HAYDEN: Well I think, bearing in mind the fact there's no evidence that that actually transpired---
JUDGE FLEWITT: I see.
MISS HAYDEN: ---the Crown take that view that Category 2 would adequately encompass-
JUDGE FLEWITT: All right. And how much of the adulterant?
MISS HAYDEN: The reference is to "3k".
JUDGE FLEWITT: All right.
MISS HAYDEN: So again---
JUDGE FLEWITT: You say it was actually moved?
MISS HAYDEN: Yes. That's certainly the interpretation of the message the Crown would invite.
MR. BARRACLOUGH: It's an interpretation, in my submission, which has to be shown on the... They discuss it at great length.
JUDGE FLEWITT: Yes. Well all I am worried about is whether this is an issue that I am going to have to resolve.
MR. BARRACLOUGH: Well, my learned friend points to the message which shows it was moved because the basis is the willingness to do it.
JUDGE FLEWITT: Is there a single message or is it a sequence?
MISS HAYDEN: It's a sequence. I can take your Honour to it, it's only a page of A4, if needs be…
JUDGE FLEWITT: What is it about that that tells me that it was actually delivered rather than agreed to be delivered?
MR. BARRACLOUGH: That's the point, yes.
MISS HAYDEN: Well, the message that the Crown is aware of is, "I'll get on him now". I accept there isn't then a message saying, "I've done that', but the Crown say that in reality there's not perhaps always going to be that confirmatory text message.
JUDGE FLEWITT: I see.
MISS HAYDEN: So, the Crown's interpretation of that message is, "I'll get on him now", is evidence that that was an action that would then be done. There's no message saying anything to the contrary and the Crown say you can't always expect that there would be the follow on.

JUDGE FLEWITT: I see.
MISS HAYDEN: But ultimately, it's a matter for the Court, hence directing your Honour to the messages.
JUDGE FLEWITT: Well, I am not going to say at the moment that I require a Newton Hearing. I think we will just see how it pans out.
MISS HAYDEN: Yes.
JUDGE FLEWITT: It may be that there is very little difference between you being able to show that he was on the point of doing it and actually being able to show he actually did do it.
MISS HAYDEN: And it may in reality given the amount---
JUDGE FLEWITT: It depends on what; it may depend on what the mitigation is.
MISS HAYDEN: Yes.
JUDGE FLEWITT: It may depend on what's said about what happens next, if anything.
MISS HAYDEN: Thank you.
JUDGE FLEWITT: Mr. Barraclough, are you going to say anything about what happens next that is going to cause me concern?
MR. BARRACLOUGH: No, sir. You have seen the basis of plea---
JUDGE FLEWITT: Yes.
MR. BARRACLOUGH: ---and you can see that the exercise that I am inviting now---
JUDGE FLEWITT: Yes.
MR. BARRACLOUGH: ---is the exercise that we went through at some length on Friday.
JUDGE FLEWITT: Yes.
MR. BARRACLOUGH: And we have, for example, at the end of page 75, "Think May's on it now", and then they say, "Do you want price off him first?" So, it isn't like a message, "Got it now. It's been delivered". Now those are messages which are in about other things but not for this defendant.
JUDGE FLEWITT: Yes. Mr. Barraclough, I do not want to unpick a compromise---
MR. BARRACLOUGH: Yes.
JUDGE FLEWITT: ---that has been carefully agreed. I just want to avoid---
MR. BARRACLOUGH: Yes.
JUDGE FLEWITT: ---any problems down the line, and it seems to me that we are probably going to be able to achieve that.
MR. BARRACLOUGH: Yes. And on that basis, I invite the re-arraignment of him as I said.
JUDGE FLEWITT: Okay. All right. Well let us do that now, thank you…"

11. Both defendants then pleaded guilty to all counts on the indictment except for money laundering charges, which were to lie on file. HHJ Flewitt suggested a period of reflection "to allow people to turn their minds from the trial issues to the sentencing issues". A sentencing hearing was listed for Thursday 9 December, sentencing submissions to be filed by 4 p.m. the day before.

12. A written Prosecution Opening for Sentence dated 7 December 2021, and a transcript of the sentencing hearing on 9 December, record the Crown's concession to the effect

that there was no evidence to support the proposition that Craig O'Hare had actually carried out his agreement to deliver the adulterant, and (as intimated on 6 December) that his offence should be treated as a Category 2 offence.

13. The transcript records HHJ Flewitt KC's sentencing remarks concerning Craig O'Hare, which included these:

> "In your case, Craig O'Hare, there is also a basis of plea. You have pleaded guilty to counts 5 and 6 and 7 on the basis that you were the courier of cannabis to the extent of 10 kilos but that you did not actually move any class A dings. The basis of your plea is that you agreed to move one kilo of cocaine, and you agreed to move three kilos of adulterant to be used in relation to heroin. Those submissions can be made on your behalf because the messages effectively run out before there is any further information about what became of that agreement. I am not going to go behind the compromise reached by you and the Crown, but the fact remains that you were more than willing to involve yourself in a conspiracy involving class A drugs in substantial quantities… I have to balance the quantities of drugs which you were proposing to move and the fact that there were two drugs involved, with the fact that they were not actually moved…"

Submissions

14. The Appellant submits that on 6 December 2021, senior and experienced counsel for the defence and prosecution, after giving the disputed facts proper consideration, agreed after many conferences with their respective teams that the issue in dispute was so significant that it would affect sentence and so needed to be presented to HHJ Flewitt KC in submissions, for him to resolve.

15. It was open to HHJ Flewitt KC, who had read the case papers in readiness for the trial to begin, to tell both counsel that there was no outstanding issue to be determined and that the case could move immediately to arraignment. Had he done so, the Appellant would accept that a Cracked Trial fee is appropriate for this case.

16. What in fact happened is that HHJ Flewitt KC listened to the arguments and asked counsel to interpret the specific use of words and phrases in said specific, identified texts. Miss Hayden, in saying that "ultimately, it's a matter for the Court", invited the judge to make a finding of fact on the issue that had just been argued.

17. HHJ Flewitt KC's reply to the effect that "I am not going to say at the moment that I require a Newton Hearing" is, submits the Appellant, not helpful in determining now whether there has been such a hearing. Had he turned his mind, or been invited to turn his mind, to the authorities on the point of when a Newton Hearing actually takes place, he would not have used those words.

18. A finding of fact can be positive, but also negative. HHJ Flewitt KC's observation to the effect that "It may be that there is very little between you being able to show that he was on the point of doing it and actually being able to show he actually did it" is, in real terms, a finding of fact. Being satisfied with that finding, Mr Barraclough

invited the judge to proceed to arraignment being satisfied with the judge's finding of fact.

19. This meets the criteria for a Newton Hearing, which does not require actual evidence to be called but does require a dispute and argument between the parties on the weight and value of evidence to be ventilated by both counsel before the trial judge in submissions, with the trial judge then making a finding of fact. The finding of fact then allows the court to proceed to sentence.

20. What distinguishes this case from a case where the point in issue requiring interpretation is dismissed by the judge is, says the Appellant, the level of focus by the judge on the issue. It is conceded that the issue was discrete. It is conceded that the evidence relied upon by the Crown was concentrated to several lines of text communications within a few pages of evidence. However the judge clearly had trouble coming to a conclusion and asked counsel to identify the relevant and significant text communications. The judge clearly pondered the evidence and the submissions.

21. The most serious cases can hang on the interpretation of just one sentence. The fact that it is only one line of evidence amongst sometimes thousands of pages of evidence does not detract from how fundamental and important that one line of evidence is.

22. Had counsel called the police officer in charge of the case to give the evidence of the text communications and been asked to give his interpretation of them (the interpretation that prosecution counsel presented to the judge in her submissions) there would be no dispute that a Newton Hearing took place.

23. The only reason that did not happen, is that in the corridor and conference rooms outside the court room, trial counsel for prosecution and defence agreed between themselves that prosecution counsel could present to the judge the police officer in charge's evidence and his interpretation.

Conclusions

24. In *R v Robert John Newton* (1983) 77 Cr. App. R. 13, the Court of Appeal identified the three forms of what is now known as a "Newton Hearing". The disputed facts may be put before the jury for a decision; the judge may hear evidence and then come to a conclusion; or the judge may hear no live evidence but instead listen to submissions from counsel and then come to a conclusion.

25. For the purposes of this appeal it was common ground, despite the wording of the 2013 Regulations to which I have referred, that live evidence need not be heard for a hearing to qualify as a Newton hearing. I agree, given the principles of *R v Newton*, to which the 2013 Regulations expressly refer.

26. The essential point however is that there must be a fact-finding exercise for the judge to conduct. On 6 December 2021, counsel for the parties suggested that there should be such an exercise. HHJ Flewitt KC took the view that that remained to be seen. When he made it clear that he was not prepared, at that stage, to say that he would

require a Newton hearing, he was not accidentally using the wrong words. The learned judge meant exactly what he said.

27. As HHJ Flewitt KC anticipated, following concessions made by the Crown the case was no longer one in which a material difference in Craig O'Hare's sentence would depend upon a finding of fact by him.

28. I am unable to accept that there is anything in the transcript of the proceedings on 6 December 2021 that can properly be interpreted as a finding of fact by HHJ Flewitt KC. His observation that there might not be much between the parties was just an observation. It cannot be characterised as a finding on disputed facts.

29. For those reasons this appeal fails, and must be dismissed.