



Neutral Citation No. [2024] EWHC 1319 (SCCO)

Case No: T20217065

SCCO Reference: SC-2024-CRI-000001

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 28 May 2024

Before:

COSTS JUDGE LEONARD

R

v

R v Rafiq & Others

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

Appellant: Yates Ardern (Solicitors)

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

The appropriate additional payment, to which should be added the sum of £500 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. Yates Arden Solicitors (“the Appellant”) represented Mohammed Rafiq (“the Defendant”) in proceedings before the Crown Court at Wolverhampton. The defence was funded by Criminal Legal Aid under a Representation Order dated 5 March 2021 and the Appellant is entitled to payment from public funds in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013. The Appellant argues that under the 2013 Regulations, two trial fees and one retrial fee are payable. The Legal Aid Agency (“LAA”)’s Determining Officer has concluded that one trial fee and two retrial fees are payable.

Rules and Authorities

2. The appeal turns on whether, for the purposes of the 2013 Regulations, there was (as the Determining Officer found) only one indictment, or (as the Appellant contends) there were two indictments, against the Defendant. The relevant provisions are to be found in the Litigators' Graduated Fee Scheme at Schedule 2, as in effect at the date of the Representation Order.
3. Schedule 2 starts at paragraph 1(1), with this definition:

“In this Schedule—
‘case’ means proceedings in the Crown Court against any one assisted person-
(a) on one or more counts of a single indictment...”
4. Schedule 2 incorporates the “graduated fee” scheme for litigants like the Appellant, who conduct criminal litigation on behalf of legally aided defendants. Schedule 1, which incorporates a graduated fee scheme for advocates, includes an identical definition of a “case”.
5. The particular significance of that definition, for the purposes of this appeal, is that a graduated fee is payable for each “case”. For that reason, if an indictment against a defendant is severed into two separate indictments, there may be two “cases” under the regulations and the litigator or advocate representing that defendant may in consequence receive two graduated fees. In contrast, if two separate indictments against a given defendant are joined into one, then there may be only one “case” against that defendant and only one graduated fee payable. It follows, inevitably, that the graduated fee or fees payable to a litigator or advocate in either circumstance may not reflect the amount of work undertaken.
6. This is true not only of the 2013 Regulations, but of identical graduated fee provisions in the Criminal Defence Service (Funding) Order 2007, which preceded them.
7. I have been referred by the parties to a number of Costs Judge decisions. The decisions of Costs Judges are not binding, but they may set down principles which are incorporated into the LAA's Crown Court Fee Guidance and followed by the LAA's determining officers on assessing graduated fee claims.

8. I do not find it necessary to refer to all of the decisions to which I have been referred. That is partly because they are fact-specific and partly because the principles that they embody are helpfully summarised in some of the cases to which I will refer. I will however be focusing on the consideration given in some recent decisions to practice and procedure with regard to indictments preferred through the Crown Court's Digital Case Management system ("DCS").
9. One of the most frequently quoted Costs Judge decisions on the subject of whether, as a result of multiple indictments, there has been one or more "case", is that of Master Gordon-Saker, now the Senior Costs Judge, in *R v Hussain and Others* [2011] 4 Costs L.R. 689.
10. In *R v Hussain and Others* it appeared that there had been four indictments against the same defendant. Indictments 1 and 2 ("the second indictment") had been joined, but not proceeded with. Indictment 4 amounted only to an amendment of indictment 3 ("the third indictment"), which went to trial and resulted in a conviction.
11. The Senior Costs Judge found that, by reference to the 2007 Order, there had been two cases, for which two graduated fees were payable. A trial fee was payable (and had been paid) for the third indictment. On the facts of that particular case, a cracked trial fee was also payable for the second indictment.
12. At paragraphs 15 and 18 of his judgment, he expressed his conclusions in this way:

"Had the second and third indictments been joined, then there would only be one case. However there is nothing to suggest that happened. There is nothing which prevents two indictments being in existence at the same time for the same offence against the same person on the same facts. The court will not however permit both to proceed and will require the Crown to elect which will proceed to trial..."

It may be thought that the solicitors have obtained something of a windfall for, in layman's terms, this was really only one case. However the regulations have to be applied mechanistically and if, as here, there were two indictments which were not joined, then there must be two cases and two fees."
13. In *R v Ayomanor* (SC-2020-CRI-000146, 12 January 2021) Costs Judge Whalan considered a case in which a defendant had entered not guilty pleas on an indictment alleging six counts of fraud and converting criminal property. That indictment was quashed, and at the time of Costs Judge Whalan's judgment the defendant was facing trial on a second indictment. Judge Whalan found that two graduated fees were payable. Having reviewed a series of Costs Judge decisions, at paragraph 19 of his judgment he offered this summary:

“The principles to be taken and applied from these cases are, in my view, as follows. An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, a count or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. Where, however, the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable.”

14. In *R v Wharton* (SC-2020-CRI-000195, 1 February 2021), Costs Judge Rowley considered the way in which indictments are managed within the DCS.
15. *R v Wharton* concerned an assault in the course of which the defendant had injured his partner. He first faced two counts of occasioning actual bodily harm and common assault. In the course of a bail hearing, the offences with which he was indicted changed in that his assault on his partner was alleged to have caused grievous bodily harm.
16. The appellant in that case, Mr Turner, claimed two case fees, relying upon DCS entries which indicated that an application was made by the Crown and leave given to prefer a new indictment, the original being stayed. Judge Rowley, in accordance with regulation 29(11) of the Criminal Legal Aid (Remuneration) Regulations 2013, made enquiries of the Trial Judge. He found that judges in the Crown Court were increasingly adopting a flexible approach where the prosecution seeks to change an indictment. Because of the way in which the DCS works, it may be more practicable to stay an existing bill of indictment and prefer a new version, than to amend the original, but in effect no more than an amendment is being made.
17. It follows that the fact that an original indictment was stayed or quashed is not, of itself, determinative of whether there were two cases, although it may be cited in support of that proposition. In *R v Wharton* the second indictment simply represented an amendment to the first: there was never any prospect of the defendant facing charges of both actual and previous bodily harm arising of the same incident. There was no basis for concluding that there had been two cases.
18. In *R v Moore* [2022] EWHC 1659 (SCCO), costs Judge Whalan, in the light of the changes in practice identified by Costs Judge Rowley in *R v Wharton*, refined his approach from that taken in *R v Ayomanor*. In *R v Moore*, second indictment had superseded a first, which was formally stayed by the court, and the changes were substantive rather than “a mere tinkering or tidying up of the charge”. Yet, he found, the offence was essentially the same. The second indictment was, accordingly, merely an amendment of the original indictment.

19. I adopted a similar approach in *R v Thomas* [2022] EWHC 2842 (SCCO).
20. In *R v Brazendale* [2024] EWHC 108 (SCCO) Costs Judge Whalan found that there had been two cases in a prosecution where an indictment alleging a single count against one Defendant became an indictment alleging two counts against four co-defendants and the overall criminality alleged against the co-defendants changed quite radically. In the circumstances, he concluded that the changes made to an indictment were not technical amendments, but represented a substantial, substantive development in the alleged criminality. The stay of previous indictments reflected the fact that the case had evolved to the extent where it was right to conclude that the Defendant was effectively subject, to two cases.

The Procedural History of This Case

21. The Defendant appeared before the Crown Court at Wolverhampton on 19th March 2021, pleading not guilty to one count of conspiracy to murder (count one of a three-count indictment: co-defendants faced charges of possessing a firearm and conspiracy to murder). The charges arose from an incident on 31 January 2021, when one Mohammed Zeb was shot in the head whilst standing on his driveway. The case was adjourned for a trial to commence on the 18 October 2021.
22. Trial commenced on 18th October 2021 before Mr Justice Soole. There were significant delays to the trial process, because Covid Protocols still in force at the time required that the case be heard in two Courts. A number of difficulties also emerged with the Jury, which ultimately resulted in the Jury being discharged on 8th December 2021. Over 38 days, the Crown had only managed to open the case and was proceeding with the evidence of the first Prosecution witness when the jury was discharged.
23. As a result of the Jury being discharged, the case was adjourned to 20th December 2023 for a case management hearing at which the Court listed a trial at Loughborough Trial Centre in October 2022 before Mr Justice Bennathan, with an estimated length of hearing of 10 weeks. The case was also listed for a pre-trial review.
24. On 23rd June 2022, the Crown uploaded and indictment to the DCS which I understand to have been referred to as the “Trial 2 Indictment”, and to which I shall refer as the “June 2022 indictment”. The June 2022 indictment added two new defendants. As against the Defendant and others, it incorporated a new offence (count 3) of doing acts tending and intended to pervert the course of justice.

25. The court record is not particularly helpful as to what happened after the June 2022 indictment was filed. I understand that according to the DCS that there was a hearing on 24 June 2022, but I have not seen any record of it, and there is no mention of it on the court log.
26. The court log does record a hearing on 27 July 2022 before Mr Justice Bennathan, in which he observed that there were two things “touched on last hearing” which needed to be revisited, one of them being joinder/severance, adding that if an order were required to join the two new Defendants, it was granted.
27. Trial commenced on 4th October 2022 at Loughborough Trial Centre. An additional 9,000 pages of evidence had been served by the Crown. The Defendant and his co-accused, on the first day of trial, pleaded Not Guilty Pleas to the offence of perverting the course of justice.
28. On 12th October 2022, with the permission of Mr Justice Bennathan, the Crown amended the June 2022 indictment, replacing the conspiracy charge at Count 1 with a simple charge of murder.
29. The trial continued until 19th January 2023. A Not Guilty verdict was returned in relation to Count 1 against the Defendant, but the Jury was unable to reach a majority verdict in relation to count 3 (perverting the course of justice).
30. On 3rd February 2023 the Crown confirmed that they sought to retry the Defendant in relation to Count 3. A new trial commenced on 11th September 2023 and lasted for 41 days before the defendant was found guilty on the charge of perverting the course of justice.

The Claim for Two Fees

31. Following the conclusion of the October 2021 trial, a graduated fee claim for a 38 day trial was submitted by the Appellant in January 2022. That claim was reviewed and payment authorised in full by the Legal Aid Agency. Following the conclusion of the October 2022 trial, a further graduated fee claim for a 61 day trial was submitted and assessed by the Legal Aid Agency as a 61 day retrial fee. Following the conclusion of the September 2023 trial, a further graduated fee claim was made for a 41 day retrial. That claim was reviewed and payment authorised in full by the Legal Aid Agency.
32. The Appellant argues that the October 2022 trial fee should have been paid in full as a separate new trial fee, not a retrial fee. The October 2022 trial was before a different Judge, in a different court, with two additional Defendants and a new indictment with an additional charge. The new count of perverting the course of justice, and the addition of the two defendants, significantly changed the complexion of the case. In particular, was a substantive change of emphasis from the buildup to Mr Zeb’s murder to the aftermath, in which the Defendant was said to have moved a vehicle used for the purposes of the murder to a location where it was picked up and transported by one of his two new co-defendants. The change in this case led to the servicing of an additional 9000 pages of evidence, and ultimately to a separate trial on the charge of perverting the course of justice.

33. The Appellant submits that there were two indictments against the Defendant, which were not joined. This was not a change to an existing indictment or mere “housekeeping”. There have, accordingly, been two cases against the Defendant which justify two full trial fees for the October 2021 trial and the October 2022 trial. In the alternative, there should be a full trial fee for the September 2023 trial.

Conclusions

34. An indictment may incorporate one or more counts against a given defendant and may name more than one defendant. It follows that the addition of additional defendants or additional counts to an indictment may represent nothing more than an amendment to the indictment. It seems to me however that this is not such a case. It bears more similarity to *R v Brazendale* than to *R v Wharton* or *R v Moore*.
35. Procedurally speaking, for the reasons given by the Senior Costs Judge in *R v Hussain*, it must be right to conclude that (presumably on 24 June 2022) the court quashed or stayed the first indictment against the Defendant and allowed the June 2022 indictment to proceed in its place. In consequence, the Defendant faced an additional count of perverting the course of justice, one of the persons with whom the Defendant was alleged (and ultimately proved) to have done so, having been added to the indictment. That radically changed the nature of the criminality alleged against the Defendant, the case he had to face, and the nature and volume of evidence relied upon by the Crown.
36. For those reasons, the June 2022 indictment cannot simply be described as an amendment to or variation to the indictment upon which the Defendant first faced trial in October 2021. This can properly be described as a case in which there were two separate indictments and two separate cases. It follows that two full trial fees are payable for the October 2021 and October 2022 trials. This appeal, accordingly, succeeds.