Neutral Citation No. [2024] EWHC 1322 (SCCO)

Case No: 01MP0170922

SCCO Reference: SC-2023-CRI-000107

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 3 June 2024

Before:

COSTS JUDGE ROWLEY

R
v
COBB

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

Appellant: Carson Kaye Solicitors

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Carson Kaye solicitors against the decision of the determining officer to calculate the litigators graduated fee by reference to a cracked trial rather than as a trial under the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The solicitors were instructed on behalf of Ian Cobb who was charged with two counts of conspiracy to supply Class A drugs as well as a further count of being concerned in supplying Class A drugs to another. The defendant pleaded guilty to counts one and three but not guilty to count two. Apparently the Crown were asked to consider whether a trial was necessary for Cobb on the remaining count given the number of co-defendants involved and the possibility of joinder of indictments. At a further case management hearing, the Crown confirmed that they would not pursue count two and so Cobb no longer faced trial.

3. According to the determining officer's written reasons, the defendant's advocate asked for 28 days in which to consider a basis of plea in respect of the guilty pleas. A sentencing hearing then took place and in the determining officer's view there was no evidence of a "Newton" hearing taking place. If there had been, then, in accordance with the regulations, a trial fee would have been paid. In the absence of any such evidence however, the determining officer took the view that a cracked trial fee was appropriate.

4. According to the appellant's written note, the basis of plea was consistent with the defendant playing a lesser role or, at the very minimum, a lower significant role than the prosecution contended for. Consequently, when the matter was set down for sentence, the advocates for the prosecution and the defendant could make submissions so that the judge could make a finding based on those submissions without the defendant having to give evidence. Having received those submissions, the judge ruled that the defendant fell into a significant role for count one albeit that some elements of a lesser role applied to his case. In respect of count three, the judge ruled that the defendant fell into a lower significant/lesser role.

5. By the time of the appeal hearing before me, the Legal Aid Agency had produced written submissions in support of the determining officer's decision. Those submissions annexed a transcript of the relevant hearing which enabled both Mr Kaye on behalf of the appellant and Ms Weisman for the LAA to make submissions at the appeal hearing with the benefit of the transcript.

6. That document shows that once the prosecuting counsel had rehearsed the general facts of the conspiracy, the judge decided to make some remarks regarding the relevant factors in the sentencing guidelines and how they appeared to apply to this particular case before the various advocates addressed the court. In respect of one of Cobb's co-defendants (a Mr Bacolage), the judge made reference to significant role factors being at least some awareness and understanding of the scale of the operation – "just the sheer quantity of the drugs involved in count two and allied to that, expectation of significant financial gain." He then continued to say "but equally, lesser role features, an element of limited function under direction, no influence on others in the chain above."

7. The judge then went straight onto remarks regarding Cobb and said the following:

> "…I come back to the basis of plea perhaps with counsel. I have seen the basis of plea which covers both counts one and count three. Dealing with count one, it seemed to me to be essentially the same factors regarding role that would apply, both significant and lesser so there is a balancing out. Of course the quantity concerned in count one is significantly less. Count three as own operation, I note in the basis of plea the suggestion, "social supply", which always seems to me to be something of an oxymoron where drugs are concerned."

8. Later, when he came to sentence Cobb, the judge said:

> "Turning to Mr Cobb – and again you can remain seated for now – count one, the conspiracy involving cocaine, and count three. As regards the conspiracy in count one, significant role. At least some awareness and understanding of the scale of the operation, arising from the quantity of drugs and, inferentially again, an expectation of significant financial gain.
>
> Lesser role features again. The limited function under direction and no influence on others in the chain above you. It is Category one on quantity but, as has been pointed out in fact on behalf of a co-defendant, I also should have regard to the Court of Appeal guidance in *Khan*, limiting the extent of the adjustment based on direct involvement.
>
> …
>
> As regards count three, as I indicated in the course of discussion with your counsel and, of course, with the Crown, the basis of plea, setting out suggestion of social supply, in my judgement is arguably irrelevant. Effectively, it just means dealing to people that you know and there was some evidence to which reference was made in the prosecution opening and in the response to additional dealing beyond people, it would appear, known directly by you. Frankly, at the end of the day it makes no difference. On the face of it, this was your own operation. That then deals with elements of both significant and lesser roles in much the same way as applies in count one…"

9. The judge's annotated style, as set out in the transcript, requires a little interpretation. But it seems to me to be clear that he took the view from the outset that Cobb had a role which involved some significance albeit he was clearly not the leader of the conspiracy. To some extent, that would suggest that the basis of plea was successful given the appellant's note of the submissions put forward. But it seems to me, that the judge took the same view regarding at least one of the co-defendants and so the extent of the disagreement was perhaps less than it might have appeared. As was made clear by the Court of Appeal in the case of R v Robert John Newton (1983) 77 Cr App Rep 13, which gave the term Newton hearing to the sentencing process, where there is a considerable disagreement between the prosecution and defendant as to material facts, the court is to adopt the defendant's version to the extent that that is possible.

10. It does not seem to be uncommon in drugs conspiracy cases for there to be a considerable scope for each defendant to seek to lessen their involvement in the conspiracy. The prosecution points to the evidence which suggests greater culpability and the judge is required to take all of this into account when sentencing conspirators who have been convicted.

11. I do not think that in such situations, the threshold for establishing that a Newton hearing has taken place, rather than a sentencing hearing involving pleas of mitigation by each defendant's advocate, is necessarily made out. As can be seen from the judge's comments in this case, the foundation for Cobb's attempt to lessen his involvement i.e. the basis of plea by saying that the supply of drugs was only to his social circle was not thought to be of any relevance. I noted that Mr Kaye did not press that element of the basis of plea but concentrated on count one regarding a specific meeting involving Cobb.

12. At that meeting, on the day before the drugs were exchanged and arrests were made, Cobb met one of the other co-defendants and, in the prosecution's sentencing note, this meeting was suggested to be evidence of a higher level of involvement in the conspiracy overall. Mr Kaye pointed to numerous references in the lengthy sentencing note in this respect. There was obviously a difference of interpretation regarding the events on that day but it seems to me to be clear that the judge did not see any need to make any factual findings regarding that meeting in order to sentence any of the defendants. There was no dispute that a meeting had taken place and it was the parties' interpretation of the significance of that meeting which was in play. As I say, it does not seem that the judge considered it to be of any particular relevance and swept it up with his comments regarding elements of more significant and less significant involvement generally.

13. Whilst it cannot be the case that the categorisation of a hearing as being a Newton hearing rather than simply a sentencing hearing can depend solely upon whether the judge specifically makes reference to the factual matter relied upon by the litigator or advocate, the transcript is instructive in understanding the relative weight on the matters put before the court. There have been a number of recent costs judge decisions regarding Newton hearings where oral submissions have been made without evidence formally being given. It is plain from those decisions that it is the substance of the hearing that is important rather than whether it is actually described as a Newton hearing.

14. In this case, it does not seem to me that the appellant has discharged the burden of establishing that the hearing was a Newton hearing in substance. The aim of the basis of plea, as described by the appellant's note, was little more than an attempt to place the defendant more favourably on the scale of culpability when it came to imposing the sentencing guidelines. Whilst Mr Kaye submitted that this was sufficient to demonstrate a factual matter in dispute, I do not think the issue was material to the sentencing.

15. Submissions which tend to lessen the defendant's blameworthiness are of course the purpose of mitigation generally and in my view the determining officer was correct to assess the fee in this case based upon there being a cracked trial followed by a sentencing hearing at which pleas in mitigation were made.

16. Accordingly this appeal is dismissed.