Neutral Citation No. [2024] EWHC 21 (SCCO)

Case No: T20210814

SCCO Reference: SC-2023-CRI-000004

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 4 January 2024

Before:

COSTS JUDGE ROWLEY

R
v
WALKER

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

Appellant: Altaf Solicitors

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Altaf solicitors against the decision of the determining officer to disallow all of the electronic pages of prosecution evidence ("PPE") when calculating the PPE to be used for the purposes of the Litigators Graduated Fee Scheme in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The solicitors were instructed on behalf of Shane Walker via a representation order dated 23 November 2021 in respect of alleged breaches of a Sexual Harm Prevention Order which had been imposed on 3 February 2017. That order prevented Walker from using any device capable of accessing the Internet unless it had the capacity to retain and display the history of Internet use and he made the device available on request for inspection by a police officer. The order prevented the deleting of such history, storing images on another device (unless it too was available for inspection) or using any software designed to remove traces of the Internet usage. The order was imposed for an indefinite period of time.

3. When the police came to view devices held by Walker, the officers formed the view that there had been attempts to remove traces of Internet usage via an application and six items were initially seized from Walker's work premises. Four of those items were returned on the basis that they belonged to Walker's brother. However, two were retained, a mobile phone and a computer which the police considered to be Walker's.

4. The indictment contained two counts which, save for the identification of the particular device, were identical. The particulars of offence were that between 27 January 2021 and 22 February 2021, Walker, without reasonable excuse, Walker used the relevant device on which software was installed which was designed to remove traces of the Internet usage and which was a prohibited act under the Sexual Harm Prevention Order made by the Crown Court on 3 February 2017.

5. The prosecution's evidence in respect of the existence of the relevant app ("CCleaner") came from a streamlined forensic report provided by Dean Fisher, a Digital Forensic Investigator, on 11 March 2022. At the end of the report, a statement to the court and to the defence states that the prosecution proposed to rely on the streamlined forensic report for the purposes of establishing that the devices were forensically examined, and the examination had produced the results described. The prosecution asked the defence to identify any real issues in relation to that evidence as soon as possible. The report listed the two exhibits (RJ1 and RJ2) and stated that the prosecution would not ordinarily undertake further forensic analysis unless and until the exact issue that such analysis needed to address had been identified; and only if, in light of that issue, it was appropriate that the next stage of analysis should be undertaken by the prosecution rather than a defence expert.

6. According to the case summary, Walker was first visited by the police to check his devices on 19 November 2020. The police officers considered it to be apparent that CCleaner was installed on the computer that was checked. Walker originally opposed any such check on the basis that the order was no longer valid. A further visit was made on 27 January 2021 by police officers and again the validity of the order was challenged but Walker was provided with a copy to show its indefinite application. According to the case summary, Walker admitted deleting his history and using despite being told in a number of occasions that the order was valid and prevented

him from doing so. He was given a warning about his behaviour. A third visit occurred on 22 February 2021 and the various devices were seized after the police officers considered it to be apparent that the defendant was continuing to use CCleaner on his business computer.

7. On 28 February 2021, Walker and police officers looked at a community order which had expired in February 2020 and which it appeared that Walker had confused with his SHPO.

8. At the PTPH on 28 December 2021, the defence's case, as recorded on the PTPH form and included in the agreed facts, was that the defendant did not dispute that CCleaner was present on the two devices. But, he said that the CCleaner App was not capable of removing traces of files and Internet usage because the CCleaner was an old and basic system not capable of permanently deleting files from the device. The prosecution had (wrongly) assumed that the software was capable of deleting Internet history and so Walker was not in breach of the SHPO.

9. The defendant's defence statement signed on 25 May 2022 also denied breaching the SHPO. It stated that Walker denied was using had been installed with the relevant software. The mobile phone had been given to him by his brother and the laptop was used by his brother as well as himself. The defendant believed that his brother had installed the software on the computer without his knowledge. He denied that he had ever used such software.

10. The exhibits RJ1 and RJ2 are Excel spreadsheets. I was provided with RJ2, which I was told was the considerably larger spreadsheet after the hearing. This appeal centres on whether the spreadsheets should form part of the PPE and if so, to what extent.

11. The defence instructed CYFOR to provide expert evidence and I was provided with a copy of the report of Sarah Felton dated 20 April 2022. She was asked questions regarding CCleaner concerning its installation and its effectiveness in deleting history et cetera as well as whether there was any other software installed on the devices which was designed to remove traces of Internet usage.

12. In order to produce the report, a Ms Archdeacon liaised with Mr Fisher regarding access to the exhibits. I have received a breakdown of the pages on the two exhibits, which amount to 223,787 pages, and which presumably was produced by Ms Felton or Ms Archdeacon.

13. It does not seem to me that this provision of access to the exhibits amounts to formal service of them as prosecution evidence. The appeal documentation and the submissions of Colin Wells of counsel, who appeared on behalf of the solicitors on this appeal, seem to accept that there was no formal service in this case. The determining officer took the view that in the absence of any formal service then there should be no allowance of any of the electronic evidence as PPE. In particular, he concluded that the evidence was not relied upon by the prosecution and so any disclosure was simply provided as unused material. There was no relevant evidence on the download and the only aspect that was in dispute was whether the CCleaner application was on the device. The rest of the download did not therefore appear to be relied upon by the prosecution and as such was not served.

14. The grounds of appeal dispute the determining officer's conclusion. They refer to the statement in Mr Fisher's report that evidence of the use of CCleaner was present on the devices. As such, it was wrong to assert that there was no evidence that the downloads were relied upon by the prosecution. The evidence did not state that there was no relevant evidence found on the phone but, in fact, quite the reverse. The grounds of appeal make the point that it is not simply the existence of CCleaner on the device that was required but also that it had actually been used on the devices that had to be established by the prosecution.

15. The grounds of appeal also rely upon the case of the Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB) and this was the centre of Mr Wells' submissions regarding service. At paragraph 44 of that decision, Holroyde J, as he then was, stated:

> "I respectfully agree with those general observations as to the duties of the defence when asked to agree a schedule of some proposed agreed facts. The agreement of schedules and/or agreed facts, which reduce the 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 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."

16. The grounds of appeal say that in order to present a fair summary of the totality of this evidence, the exhibits RJ1 and RJ2 had to be considered in full. Mr Wells described the reference in the streamlined forensic report to the evidence in those exhibits as being central to the case. There are apparently 3,884 entries in RJ2 referring to CCleaner and, in the appellant's submissions, those entries are the very minimum that had to be considered.

17. Mr Wells drew a distinction from cases regularly heard on appeal regarding PPE which he described as "images" cases. There, numerous pages of images on mobile phones are regularly disallowed either in full or by allowing 5% of them to reflect there being some relevant images alongside many irrelevant ones. That was not the case here and so taking a percentage approach, as appear to be suggested by the LAA in their submissions, both in writing by Mr Orde and orally by Ms Quarshie, were not really to the point.

18. There are a number of hurdles for the solicitors to jump in order to establish that the spreadsheets amount to PPE for the purposes of the graduated fee scheme. Since they were not formally served, the first matter to establish is that they were central to the case so as to be treated as if they were served in accordance with SVS. That was Mr Wells' submission, and it is not one that was disputed by the LAA as they conceded

in their written submissions that the court's discretion should be exercised to find that the evidence had been served given the guidance in SVS.

19. The second hurdle is to establish that the evidence was sufficiently important to be considered to be the equivalent of paper PPE. Otherwise, it falls to be remunerated by payment of time spent by way of special preparation. The relevant provisions in the 2013 Regulations are set out in Schedule 2 and specifically at paragraph 1(5) which refers to electronic evidence not being included within the number of pages of PPE:

> "…unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

20. This threshold test has been described in a number of ways where synonyms for the word "important" have been used. The importance needs to relate to the prosecution's case and not simply something that is important to the defence. The purpose of this additional threshold is to prevent the "economic balance", as it was once described, of the graduated fee scheme being thrown out of kilter by the inordinate number of pages that can accrue where the evidence is electronic. It also reflects the fact that electronic evidence can often be searched in a manner that is not available where the evidence is produced on paper.

21. In my view, this case is a good example of where the electronic evidence is important to the defence but not to the prosecution. The prosecution's case rested solely on Mr Fisher's evidence that the existence of a particular app could be seen on the two devices and demonstrated signs of deletion of internet usage. At that point the prosecution had established the particulars of offence on the two counts on the indictment faced by Walker.

22. The onus was then on Walker to establish that he had a reasonable excuse for the software having been installed on those devices. Walker's first defence was that the SHPO had in fact expired but that did not last very long in the face of the terms of the order. Subsequently, two separate arguments were put forward. The first was that the application did not do what the prosecution said i.e. permanently deleting traces of Internet usage. It is not clear to me that, even if this were proved, it would amount to a defence since the particulars of the offence only refers to the software being designed to remove traces of Internet usage. The second argument was that the software had been installed by another person i.e. the defendant's brother. On that basis the defendant was oblivious to the existence of the application and so used the devices with a reasonable excuse. It seems to me that such a defence would very largely depend upon the evidence of Walker himself rather than anything on the devices. But to the extent that the usage of the phone or laptop might demonstrate the brother's involvement, then that is plainly a matter for the defence rather than the prosecution.

23. Similarly, the questions raised of the expert appear very much to be an attempt to find a reasonable excuse rather than a critique of whether the application was indeed installed on the devices.

24. In short, it does not seem to me that the electronic evidence in this case amounts to PPE. Although not formally served, I can see that, in accordance with SVS, the

defence was entitled to establish that the facts surrounding the streamlined forensic report were proved by the downloads. But that does not seem to me to have been a time-consuming task at all when a simple control plus F type search would bring up thousands of entries. The work in this case involved establishing a reasonable excuse for the defendant and whether that involved obtaining witness evidence from the defendant and anyone else relevant, instructing an expert to peruse the downloads or for the solicitors themselves to review the downloads, it does not seem to me that it amounts to passing the threshold required regarding the nature of the document and the relevant circumstances regarding the case as a whole.

25. As such, I uphold the determining officer's allowance of PPE as being the paper documents including the streamlined forensic report but none of the electronic evidence deemed to have been served. Accordingly, this appeal fails.