SENIOR COURTS
COSTS OFFICE

SCCO Ref: 198/19

Dated: 21 October 2020

APPEAL FROM REDETERMINATION

REGINA v ALTASS-GOMEZ

CROWN COURT in CROYDON

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20180018

LEGAL AID AGENCY CASE

DATE OF REASONS: 20 June 2019

DATE OF RECEIPT OF NOTICE OF APPEAL 30 July 2019

APPLICANT/APPELLANT: Solicitors/Litigators

This appeal is successful for the reasons set out below; the Appellants should receive the fee for a one-day Trial plus £400.00 for costs of Appeal (to include the £100 Court fee).

JENNIFER JAMES
COSTS JUDGE

REASONS FOR DECISION

1. The Appellant litigator firm represented the Defendant Callum Altass-Gomez in proceedings before the Croydon Crown Court, on a three count indictment charging him with putting a person in fear of violence by harassment, contrary to s 4(1) of the Protection from Harassment Act 1997, assault by beating, contrary to s 39 of the Criminal Justice Act 1988 and damaging property, contrary to the Criminal Damage Act 1971. The Defendant in this domestic violence case ultimately pleaded Guilty to count 2 (assault by beating upon the victim) and the Prosecution did not proceed on the other counts.

2. The Appellants claimed payment for a one-day trial, after amending their original claim, which was for a cracked trial fee. The Determining Officer ("DO") assessed that the correct payment was the fixed fee in accordance with Part 4 (it appears Part 3 was meant) Paragraphs 10 and 11 of schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013, applicable in circumstances in which the Defendant elects jury trial and then pleads Guilty.

Background and Chronology

3. The Defendant appeared initially at Croydon Magistrates' Court in relation to the matters detailed above, and elected trial by jury on the basis that the first of the matters he faced was triable either way. There is no suggestion that there was any indication of plea to the magistrates and pursuant to his election all three matters were sent to Croydon Crown Court.

4. On 6 February 2018 the Defendant appeared at Croydon Crown Court and was arraigned after pleading Not Guilty to all three counts. The case was listed for a 4 to 5-day Trial commencing in June 2018, although this was later re-fixed for 4 February 2019; between 6 February 2018 and 4 February 2019 there were several hearings as the matter progressed towards Trial.

5. On 4 February 2019, the Defendant attended Court for Trial; the case was called on in the morning and various discussions took place between the Advocates and the Judge, with Prosecution Counsel asserting that the Trial was to be effective, but that some issues needed to be resolved before commencing. Defence Counsel addressed the Judge regarding disclosure, and there was reference to a jury being sworn, though this did not in the event take place. Both parties made brief submissions, lasting 14 minutes in total, regarding the inclusion of bad character (against the victim) and the Judge made no findings on the issue at that stage. Instead, he put the matter over to the afternoon. After lunch, during which time discussions continued, the parties confirmed that matters had progressed; Count 2 was put to the Defendant and he pleaded Guilty to assault by beating. The other 2 counts were left to lie on file, with sentencing on Count 2 alone.

Regulations and Legislation

6. As noted by Spencer J in *Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB)* there is no definition of the word "trial" in the relevant provisions. There is, however, a definition of "cracked trial" in the Criminal Legal Aid (Remuneration) Regulations 2013 (as amended). The Remuneration Regulations, at Schedule 2, paragraph 1(1)(a) set out that:-

"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 he or she 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;

7. The fixed fee provisions are as follows, at Schedule 2 Part 3 paragraph 10:-

(1) Subject to sub-paragraph (2), this Part applies to a case sent for trial to the Crown Court on the election of a defendant where the magistrates' court has determined the case to be suitable for summary trial.

(2) This Part does not apply where the trial is a cracked trial because the prosecution offer no evidence on all counts against a defendant and the judge directs that a not guilty verdict be entered.

At paragraph 11 the fee is set out:

The fee payable to a litigator in relation to a guilty plea or cracked trial to which this Part applies is £330.33 per proceedings.

The Crown Court Fee Guidance adds the following at 3.10 to 3.11:

Paragraph 10, Schedule 2, of the Remuneration Regulations states that, for cases with a Representation Order dated from 3 October 2011, a fixed fee (instead of a graduated fee) will be paid to litigators for cases where the defendant elects for the case to be tried in the Crown Court and subsequently the case does not proceed to Trial, either by reason of pleas of guilty or otherwise…The fixed fee does not apply to elected either way cases where the prosecution offer no evidence on all counts and the judge directs that a not guilty plea is entered. For these cases a graduated fee is payable

8. The issue for determination is therefore whether the case proceeded to trial; if it did not (as the Respondent asserts) then the fixed fee will apply, but if it did, then the Appellants escape the fixed fee regime.

9. In *Henery* at [96] Spencer J gave the following guidance as to whether or not a trial has begun:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon

afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example this (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence (R v Dean Smith, R v Bullingham, R v Wembo).

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment."

Parties' Submissions

10. For the Legal Aid Agency ("LAA") it is said that the DO made her assessment on the basis that the Defendant had elected Crown Court trial for matters which could have been tried summarily, and in the event had pleaded Guilty to the single count put (assault by beating) which was a summary only offence.

11. It was accepted that the Prosecution did not proceed on two of the counts on the indictment, but per the LAA, this did not trigger the exception in paragraph 10(2) because these were not circumstances envisaged by the regulation to override the fixed fee: namely those in which the Prosecution offered no evidence in relation to <u>all</u> counts against the Defendant, and the Judge directs Not Guilty verdicts.

12. The Appellants initially argued that the appropriate fee was for a cracked trial, but later amended their claim to a one-day trial fee, contending that the matter was listed for trial, witnesses attended, and there were substantial matters of case progression in relation to a bad character application and issues of disclosure. It could therefore be said that for fee paying purposes the trial was underway. Paragraph 10(4), relied upon by the DO, would therefore not apply as this was not a case in which the matter did not proceed to trial.

13. The LAA submitted that the DO's position is correct and made additional submissions to the effect that the DO was correct in applying paragraph 10(4) and paying a fixed fee accordingly. The Court's initial acceptance of summary jurisdiction is (per the LAA) key. The Defendant faced three counts, all of which could have been dealt with at the magistrates' court either by

virtue of being summary only, or of being either way offences suitable for summary trial. They were sent to the Crown Court only through the Defendant's election, and the single count to which the Defendant pleaded Guilty was summary only and in the normal course of events would have been dealt with before the lower tribunal. The other two counts were left on the file, and there was no formal entering of Not Guilty verdicts. The fixed fee payable pursuant to election is overridden (says the LAA) only if **all** counts are not proceeded with, and Not Guilty verdicts formally recorded.

14. Taking into account all the circumstances at the Crown Court, the Defendant decided to offer a plea and the Prosecution decided, on balance, to accept that single plea rather than to proceed on a three-count indictment. Per the LAA, there is no clear reason why, on the basis of information provided, such negotiation could not have taken place at the magistrates' court following the finding that matters were suitable for summary trial. The intention of the regulations is to address circumstances in which a Defendant incurs unnecessary expense by electing Crown Court trial, without trial commencing or any real benefit being accrued or prejudice avoided. The fixed fee allowed here is clearly in keeping with that intention.

15. Notwithstanding this, the LAA accepts that had a trial commenced, a one-day trial fee would be payable. It is accepted, too, that in determining this issue the leading authority is *Henery*, and that the test to apply is whether there were substantial matters of case management before proceedings concluded, by whatever route.

16. For this condition to be satisfied, per the LAA, normally one would expect there to be a dispute between the parties which required judicial intervention. The cases of *R v Wood* [2015] (SCCO Ref 178/15) and *R v Abdullah* [2015] (SCCO Ref 174/15) underline this position.

17. The Appellants cite *R v Coles* [2017] (SCCO Ref 51/16) in support and the LAA accepts that this differs slightly from other authorities. However, not only does *Coles* depart from the direction set by other cases addressing this issue, but also differs importantly from this case. In *Coles* there was far more detailed and extensive discussion between the parties before the matter eventually resolved by way of a Guilty plea, and there was no interplay between summary only and either way matters, and questions of mode of trial, as here.

18. It is accepted that the Defence made a bad character application, but the LAA cites *R v Jakubczyk* [2015] (SCCO Ref 32/15), in which the Costs Judge stated, at paragraph 19, "*I accept Mr Foster's submission that this is the sort of application that will usually be dealt with pre-trial in any event".* This supports the LAA's contention that a bad character application in and of itself, even setting aside the question of the court's adjudication, would not constitute a substantial matter of case management.

19. The LAA also asserts that whilst the empanelment of a jury may not be determinative of the point at which a trial might be underway, proceedings such as these, which **never** reached the point of jury empanelment cannot be considered to be a trial. This point was originally addressed in *Henery,* which observed that whilst a trial may have started before the empanelment of a jury, or may not have started even after its empanelment, it was still necessary to ascertain if there had been a continuous process resulting in trial, and one would expect to see a jury in charge of proceedings eventually.

> *"(1) Whether or not a jury has been sworn, is not the conclusive factor in determining whether a trial has begun. [but]…..*
>
> *(2)There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. [and]….*

(4) A trial will not have begun even if the jury has been sworn (and whether or not the Defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example because before the case can be opened, the Defendant pleads guilty.

20. This is based on the comments of Mitting, J in the case of *R v Dean Smith & Ors* as quoted extensively in *Henerey.* As quoted at paragraph 70 of *Henery:*

"trial" means and should be taken to be the date upon which those submissions are first made to the trial judge in a continuous process which results in the empanelling of a jury without break of time and in the leading of evidence and the returning of a verdict"

21. This was further underlined by the more recent decisions in *R v Dowd* (SCCO Ref 111/18) and *R v Barrowman* [(SCCO Ref 60/19) which, in concluding that there had **not** been a trial, set out, at paragraph 17, "*the jury had not been selected ….it seems to me clear that the submissions had not begun as part of a continuous process resulting in the empanelling of the jury".* The Respondent submits that this is the correct approach.

22. In summary, the LAA's contention here is that there were no substantial matters of case management so as to signal the beginning of trial, and there were no hearings which took place or submissions made which formed part of a continuous process resulting in trial. Therefore, taking account of all the circumstances of the case, none of the factors which might operate to override paragraph 10 actually occurred here and therefore, per the LAA, the DO was correct to pay a fixed fee.

23. For the Appellant, it was stated that the Court was dealing with substantial matters of case management as per *Henery*, which the Appellant submitted is on all fours with *Sallah* and *Coles*, and may assist on the only issue of trial type. Those matters were as set out in Counsel's note from the trial (i) the matter was listed for trial (ii) much of the morning was spent dealing with disclosure issues (iii) a Defence bad character application and Prosecution submissions in reply were made, which was accepted in the penultimate paragraph of page 1 of the written reasons and paragraph 8 of the Respondent's submissions for this Appeal.

24. The Appellant submitted that how long legal submissions last, is not determinative of the issue, it is whether or not they were <u>substantial</u>, and in this case, they say that they were substantial.

25. The Appellant relied upon an email from me in which I drew to both parties' attention, "*…paragraph 94 of the Judgment of the Honourable Mr Justice Spencer in Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) and specifically to the passage therein which states, "Commonly a great deal of important work by the advocates and the litigators, vital to the smooth running of the Trial, will be going on in Court on the day on which the jury, in such circumstances, is selected but not sworn. Depending on the circumstances, and consistent with the dicta of Mitting J in R v Dean Smith, that may well mean that the Trial has begun in a meaningful sense." The dicta of Mitting J are cited at paragraph 70 of the same Judgment and refer to important preliminary rulings given before the jury is sworn in"* By reference to that extract, the Appellant submitted that the work done by Counsel for much of the morning, in dealing with disclosure and the Defence bad character application and the Prosecution submissions in reply, meant that a trial had begun in a meaningful sense.

26. The Appellant did not accept the fact that the Defendant elected Crown Court trial at Mode of Trial in the Magistrates Court, had any relevance to whether or not a trial fee is payable; it is the right of the Defendant so to elect. The Appellant stated that the discussions between the Defence and the Prosecution, on the day of the trial, did not take place then because the

Defendant chose to elect trial before a Judge and jury; it may also have been due to the lack of evidence available at the earlier mode of trial stage. The mode of trial procedure is a process in either way offences, where the Magistrates Court decides whether or not the case is suitable for summary trial or Crown Court trial. At that stage very little, if any, witness statements or exhibits are provided to the Defence. Instead they receive the Initial Details of the Prosecution Case ("IDPC") which usually contains the charge and a summary written by a police officer or Prosecutor, it sometimes contains some statements and exhibits and the previous convictions and cautions of the Defendant.

27. After Not Guilty pleas are entered and matters are set down for trial, if it is for summary trial a Preparation for Effective Trial form ("PET form") is completed and deadlines are set. This includes service of the Prosecution case, which at that stage includes all statements and exhibits relied upon. If it is set down for a jury trial, various stages are set and Stage 1 is for service of the Prosecution case, to include all statements and exhibits relied upon. Hence at the mode of trial hearing the full picture was not available to the Defence. The suggestion that a plea of Guilty to count 2 (assault by beating) would resolve the matter, came from the Prosecutor, not the Defence. The fact the Defendant elected jury trial does not appear to have (and is very unlikely to have had) any bearing on this suggestion from the Prosecutor.

28. The Appellant cites *Coles,* which was held to have been a trial for LGFS purposes, and places particular reliance on paragraphs 3, 15, 18, which seem to be similar to this case, namely the (i) the case did not start and disclosure and bad character issues were dealt with (ii) the case was not listed for a long trial (iii) no judicial ruling was needed and (iv) no jury was selected. The Appellant also relies upon *Sallah*, which reinforces these points and was also held to be a trial for LGFS purposes, in particular paras 10 and 16-18.

Decision

29. As both parties agree that the overarching question is whether it can be said that the trial has commenced in a meaningful way, I do not need to go into great detail on the question of the Defendant's election of jury trial. It is clear that the Regulations intend for there to be a distinction in cases where the Defendant elects a jury trial and the trial does not then proceed, but in order for that distinction to come into play the question of commencement of trial must first be answered.

30. Even if the Court had been dealing with substantial matters of case management, it would not necessarily mean that the trial had therefore begun. The passage from paragraph 96 of *Henery* cited above, states only that the result *"…may well be that the trial has begun in a meaningful sense"* and makes clear that it will be a matter for case-by-case review as to whether it has or has not begun.

31. Per a Crown Court Attendance Note dated 4 February 2019, Defence Counsel asserts (at paragraph 7) that, *"The prosecution then took the views to the complainant. She was, by all accounts, not happy <u>but she was persuaded to accept the offer by the prosecution and the OIC."</u>* [my emphasis] That was a process that required her input, and which would (presumably) not have been possible when the Defendant attended the magistrates' court to elect mode of trial. Had an offer been made earlier perhaps the outcome would have been different but it was not, and the impact on the victim, of attending Court to give evidence against the Defendant in this domestic violence case, and the fact that she obtained the protection of a five-year restraining order against the Defendant, plus the fact that she had some input into the way that matters were concluded, are all significant. Elsewhere in Counsel's note it is made clear that the Prosecution were not prepared to drop the matter entirely as it was a domestic violence case.

32. I am therefore satisfied (applying the relevant regulations and guidance, and by reference to the case law which, on the facts in this case, I find persuasive) that on the specific facts in this case, substantial matters of case management were dealt with at the hearing on 4 February 2019 such that it could be said that the trial had in fact begun.

33. In *Coles*, Master Whalan states that, *"The guidance…in Henery permits a broad, pragmatic determination on a case by case basis. It seems to me if, as here, the parties are engaged in discussions of significant, evidential import, at the direction (or with the permission) of the trial Judge, over a period during which the jury would ordinarily have been sworn and the prosecution case opened, it can be held reasonably that the trial has begun in a meaningful sense."*

34. The Prosecution asserted that the Trial was to be effective, subject to some issues still to be resolved. Defence Counsel addressed the Judge regarding disclosure, and there was reference to a jury being sworn, but that was not in fact done. Submissions were made regarding the inclusion of bad character against the victim, but the Judge made no findings on the issue at that stage, putting the matter over to the afternoon. Discussions continued (and it is clear that, not only were there discussions between advocates but that the victim's input was sought during this period as well). After lunch the parties confirmed that matters had progressed; Count 2 was put to the Defendant who pleaded Guilty to assault by beating, with the other 2 counts left to lie on file. Taken together, that sequence of events, in my view, suffices to show that the trial in this case had indeed commenced in a meaningful sense.

35. I respectfully disagree with the DO; in my view on the facts in this particular case the trial had commenced in a meaningful sense and it warrants payment of a one-day Trial fee. The amount at stake is not large and there was no hearing, but even so the Appellant had to go through this process to obtain the correct fee and I therefore award an additional £400.00 for the Appeal (to include the £100 Court fee).

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