SENIOR COURTS
COSTS OFFICE

SCCO Ref: 118/19

Dated: 26th September 2019

ON APPEAL FROM REDETERMINATION

REGINA v RIDWAN

CROWN COURT AT PRESTON

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

CASE NO: T20170893

LEGAL AID AGENCY CASE

DATE OF REASONS: 13th March 2019

DATE OF NOTICE OF APPEAL: 12th April 2019

APPLICANT: Mr Jonathon Turner, Counsel

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. Mr Jonathan Turner, Counsel ('the Appellant') appeals against the decision of the Determining Officer of the Legal Aid Agency ('the Respondent') in a claim under the Advocates Graduated Fee Scheme ('AGFS'). The two issues for determination are whether the fees allowed for attendance at Preston Crown Court on 8th and 9th October 2018 should be paid as a trial or a "cracked trial", and the decision to reduce the number of pages of prosecution evidence ('PPE') claimed by the Appellant. The claim was originally for 10,000 PPE, reduced on appeal to 3938 pages. The Respondent allowed 2348 PPE. 1140 pages remain in dispute and comprise the second issue in this appeal.

Background

2. The Appellant represented Mr Ridwan Mohammed ('the Defendant') who was charged at Preston Crown Court with two co-defendants on an indictment alleging two counts of possessing Class A drugs (crack cocaine and diamorphine) with intent to supply. He pleaded not guilty and the trial was listed on 8th October 2018. On that day, the case was called late in the afternoon and the judge, HHJ Dodd, adjourned until the following day. On 9th October 2018, the Defendant entered a guilty plea and was remanded in custody to await sentence.

3. Four mobile telephones were seized from the defendants and the contents downloaded onto a disc exhibited as LSH/11589/1911. This disc was served on the defence under a Notice of Additional Evidence. The dispute concerns the exercise of the Determining Officer's discretion and his decision to allow some but not all of the electronic datum as PPE.

The Regulations

4. The Representation Order is dated 1st November 2017 and so The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply.

5. Trial is not defined specifically in the Regulations. Reference is made to paragraph 1(1)(a) of Schedule 2 which states:

""*cracked trial" means a case on indictment in which –*

(a) a plea and case management hearing take places 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 plea and case management hearing; or

(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or

(b) the case is listed for trial without a plea and case management hearing taking place…"

6. Paragraph 1 of Schedule 2 provides additionally (where relevant) as follows:

"*1. Interpretation*

…

(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).

(3) The number of pages of prosecution evidence includes all –

(a) witness statements;

(b) documentary and pictorial exhibits;

(c) records of interviews with the assisted person; and

(d) records of interviews with other defendants,

which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which –

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Case guidance

7. On the issue of trial/cracked trial, both the Appellants and the Respondent refer to the guidance in guidance in Lord Chancellor v. Ian Henery Solicitors Limited [2011] EWHC 3246 (QB), where Mr Justice Spencer stated (at para. 96) that:

"*96. I would summarise the relevant principles as follows:*

(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 the 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 because before the case can be opened the defendant pleads guilty (R v. Brook, R v. Baker and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited (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 practise 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".

8. On the issue of PPE, authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50) these principles:

"*(i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.*

(ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.

(iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.

(iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispense with the need for service of a notice of additional evidence, before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.

(v) The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary pre-condition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages could be excluded from the count of PPE merely because the notice had for some reason not reached the court.

(vi) In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.

(vii) Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore served an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues would depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have

to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

(viii) *If – regrettably – the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Office (or, on appeal, the Costs Judge) will have to determine it in the light of the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) will be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) will be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.*

(ix) *If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures the public funds are not expended inappropriately.*

(x) *If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.*

(xi) *If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply.*"

The submissions

9. The Respondent's submissions are set out in Written Reasons dated 13th March 2019 and in Written Submissions drafted by Mr Rimer, a senior Lawyer at the Legal Aid Agency, on 6th September 2019, which exhibits a Schedule. The Appellant's submissions are set out in Grounds of Appeal lodged on 12th April 2019. No request was made for an oral hearing and I am asked to determine this appeal on the papers. I will, where relevant, summarise the parties' arguments in the course of my determination.

My analysis and conclusions

Trial or "cracked trial"

10. The Respondent, in summary, notes that the hearing on 8th October 2018 lasted just 16 minutes, between 15:17 and 15:33 hours. No jury was empanelled or sworn. HHJ Dodd undertook no "substantial matters of case management"; she simply dealt with the Defendant's bail and adjourned the case to the next day. When the case was called again, in the afternoon of 9th October 2018, the Defendant changed his pleas to guilty. This is, argues the Respondent, a "cracked trial".

11. The Appellant, in summary, produces a transcript of the hearing on 8th October 2018 and relies on the following comment from the learned judge:

> "*JUDGE DODD: All right. Well, gentlemen, given that the trial has started I do not see the need really for reporting conditions. Both have now attended for the first day of trial*".

He relies, therefore, on the guidance of paragraph 96(8) of the guidance in Henery (ibid).

12. This was, in my conclusion, a "cracked trial" and not a trial. As the Respondent points out, no jury was empanelled or sworn and the learned judge undertook no "substantial matters of case management". Her comment that "the trial has started" must be construed in context, namely the question of continuing the Defendant's conditional bail. As Mr Justice Spencer noted in Henery (ibid), any indication or view by the trial judge should be given "in the light of the relevant

principles explained in this judgment". For a trial, these principles require that the trial judge engages in "substantial matters of case management" in circumstances where no jury is sworn the trial is not open. HHJ Dodd neither heard nor determined any disputed submissions; she simply called the case on and adjourned it to the next day. The appeal on this issue must be dismissed.

PPE

13. I note from the outset that the Respondent concedes the appeal to the extent that an additional 441 pages should be added to the PPE.

14. The Respondent, in summary, disputes the Appellant's calculation of the paper PPE. The Appellant argues the Determining Officer failed to include 37 pages; Mr Rimer now concedes an additional 16 pages. It is argued also that the Determining Officer exercised correctly the discretion under paragraph 1(5) of Schedule 2 to the 2013 Regulations. Thus, in construing the electronic datum, the pages relating to contacts, SMS messages, call logs, chats and e-mails were allowed, while the remaining material was excluded.

15. The Appellant, in summary, challenges the calculation of the paper PPE and argues that an additional 1561 pages of electronic datum should be included. Mr Rimer, having looked at the disc again, agrees that an additional 425 pages (i.e. the 441 pages conceded – the 16 paper pages) should be included in the PPE. The Appellant's submissions, supported by an Appendix, argues that his calculation "is not duplicitous", in the sense that discounts duplicated material at all relevant tabs.

16. I see no grounds for discounting pages such as "cover sheets" so the Appellant's calculation of an additional 37 pages should be preferred to the Respondent's concession of 16 pages. Accordingly, an additional 21 PPE is added to the Respondent's concession of 441 pages. Mr Rimer has otherwise carried out a very detailed analysis of the electronic datum which concedes the inclusion of contacts, SMS messages, call logs, chats and e-mails, along with an additional Excel file overlooked apparently by the Determining Officer. It was reasonable to exclude technical data, metadata and Timeline sections, along with some apparent duplication. I am satisfied ultimately that the

Respondent exercised its discretion reasonably and appropriately, so that this part of the appeal succeeds only to the extent conceded by Mr Rimer, with aditionally my decision to add an additional 21 pages of paper PPE. I direct, therefore, that the PPE in this case is 2810 (2348 + 441 + 21).

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