



SENIOR COURTS  
COSTS OFFICE

SCCO Ref: 98/19

Dated: 6 September 2019

**ON APPEAL FROM REDETERMINATION**

**REGINA v MOTE**

KINGSTON CROWN COURT

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

CASE NO: T20177296

LEGAL AID AGENCY CASE

DATE OF REASONS: 16 MAY 2019

DATE OF NOTICE OF APPEAL: 5 JUNE 2019

APPLICANT: LIBERTY LAW	SOLICITORS	
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The appeal has been dismissed for the reasons set out below.

**COLUM LEONARD**

**COSTS JUDGE**

## REASONS FOR DECISION

1. This is an appeal against a decision of the Determining Officer in relation to trial fees payable to the Appellant litigator under the graduated fee provisions of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013.
2. The matter in issue is whether the Appellant is entitled to two trial fees of £89,975.11, or an initial 50% trial fee of £44,987.56 and a 25% retrial fee of £22,493.80.

### The Regulations

3. The 2013 Regulations provide for the payment of one graduated fee for each “case”, as defined at Schedule 2 paragraph 1(1):

“‘case’ means proceedings in the Crown Court against any one assisted person...on one or more counts of a single indictment...”

4. Paragraph 13 deals with retrial and the transfer of the case from one litigator to another:

“(1) Where following a trial an order is made for a retrial and the same litigator acts for the assisted person at both trials the fee payable to that litigator is—

- (a) in respect of the first trial, a fee calculated in accordance with the provisions of this Schedule; and
- (b) in respect of the retrial, 25% of the fee, as appropriate to the circumstances of the retrial, in accordance with the provisions of this Schedule.

(2) Where—

- (a) a case is transferred to a new litigator; or
- (b) a retrial is ordered and a new litigator acts for the assisted person at the retrial,

the fee payable to the original litigator and the new litigator is a percentage of the total fee, calculated in accordance with the table following this paragraph, as appropriate to the circumstances and timing of the retrial, transfer or withdrawal of the section 16 determination.”

5. The table referred to is that at the end of paragraph 13. It sets out the percentage of the total fee to be paid to the original litigator and the new litigator in a number of specified circumstances, of which the following are relevant.

6. "During trial transfer": the original litigator is paid a trial fee of 100% up to and including the day before the transfer, whereas the new litigator is paid 50% of a trial fee for the full trial length.
7. "Transfer before retrial": the original litigator is paid 25% of a cracked trial fee and the new litigator 50% of a trial fee for the full retrial length.
8. Sub-paragraph (12) of paragraph 13, which appears to be of general application, states:

"A litigator may not be treated both as an original litigator and as a new litigator in a case."

## **The Background**

9. Princilla Saka Mote ("the Defendant") was charged on indictment with one count of conspiracy to steal and one count of possessing criminal property. A representation order was made on 11 July 2017. At the time, the solicitor appointed was GT Stewart.
10. The log at Kingston Crown Court shows that trial commenced on 2 January 2018 and continued over 3, 4 and 5 January 2018. GT Stewart instructed counsel on behalf of the Defendant. The trial judge was HHJ Campbell.
11. On 8 January 2018, the Defendant's legal team had to withdraw for professional reasons. New counsel and solicitors (the Appellant) were appointed. On 9 January, the Defendant's new counsel made an application to sever their indictment and to discharge the jury. The jury was discharged, but the indictment was not severed. HHJ Campbell ordered a retrial for 2 July 2018 with a time estimate of 2/3 weeks. I have not seen a formal order for retrial, but it seems clear that that was the direction given by him.
12. Two bail hearings followed on 9 and 16 February, followed by a mention hearing on 8 May. The 2 July trial date was confirmed and the time estimate reduced to 10 days, due to one of the Defendant's co-defendants pleading guilty.
13. The Appellant, on behalf of the Defendant, obtained forensic evidence that ultimately led to the conspiracy charge being dropped. In July, she was tried only upon the count of possessing criminal property.
14. The retrial commenced, as scheduled, 2 July 2018 before HHJ Lodder QC. It continued on 3, 4, 5, 6, 9, 10, 11, 12, 13, 17 and 18 July. On 18 July the jury returned a unanimous verdict of guilty against the Defendant. A sentencing hearing took place before HHJ Lodder on 5 September.

## **Payment**

15. The Appellant made two claims for two full trial fees. The first was for a 2-day trial on 8 and 9 January 2018. The second was for a 12-day trial between 2 and 18 July 2018.

16. These were initially paid, but upon review the LAA allowed a 50% trial fee for the proceedings in January 2018 and a 25% trial fee for the proceedings in July. This resulted in a substantial recoupment of fees.

## **The Issues**

17. The Appellant argues that it should not be placed in a worse position than if it had represented the Defendant through one trial, when in fact it represented the Defendant in two trials, the first being a 2-day trial finishing on 9 January 2018, and the second a much longer trial starting on 2 July 2018.
18. In the interim it was necessary to consider all of the evidence served by the Crown in a complicated case of conspiracy to steal involving five defendants and their mobile phones. The Crown took a substantially different approach in the second trial, following its abandonment of the conspiracy charge. That was thanks to the forensic evidence obtained by the Appellant on behalf the Defendant. There was also a break of about 6 months between the two trials, which says the Appellant shows a sufficient break in the “procedural and temporal matrix” to justify the payment of a full trial fee for the trial commencing on 2 July 2018.
19. It cannot have been the intention behind the 2013 Regulations, says the Appellant, that the Appellant should be paid in the way proposed by the LAA. To the extent that the 2013 Regulations provide for this, they are unfair and in consequence unenforceable. The Appellant had no control over the timing of the transfer and should not be penalised for matters over which it had had no control. The Appellant relies upon the judgment of Master Rowley in *R v Sallah* (SCCO 281/18, 18 March 2019) in arguing that the Appellant should not be penalised for doing a good job.
20. Further, in awarding only a 25% fee for the second trial, the Determining Officer has, submits the Appellant, wrongly treated the Appellant as both the original and the new litigator, contrary to the provisions of Schedule 2, paragraph 13(12).

## **Conclusions**

21. I must preface my conclusions by saying that the 2013 Regulations can properly be interpreted in a purposive fashion, with the aim of striking an appropriate balance between protecting the public purse and ensuring adequate remuneration for an advocate or litigator. It is however established law that the Regulations operate in a mechanistic fashion. They cannot be rewritten to achieve what anyone (myself included) envisages as a fair outcome. One must apply them as they are. *R v Sallah*, which is about whether a trial started, really has no bearing on this case.
22. The Determining Officer’s written reasons make reference to a number of authorities on whether, in any given case, there has been one continuous trial or a trial and re-trial. So does the Appellant: hence the reference to the “procedural and temporal matrix” referred to by Master Gordon-Saker in *R v Seivwright* (SCCO 75/10, 16 July 2010) and *R v Forsyth* (SCCO 155/10, 19 October 2010).

23. It is not necessary to go into these authorities in any detail, because it is common ground between the LAA and the Appellant that this was not a case in which there was one continuous trial. I agree with both of them. There was a trial in January 2018, followed by a retrial in July 2018. That is the only conclusion that can properly be drawn given the circumstances in which the original jury was discharged; the change of representatives; the change of trial judge; the change in the charges brought against the Defendant; and the lengthy period between January and July.
24. The difficulty for the Appellant is that it does not follow that two full trial fees are payable. If counsel had persuaded the court, on 9 January 2018, to sever the indictment then two trial fees might (arguably, at least: I have not heard submissions on the point) have been payable on the ground that there were two “cases”. That however is not the position.
25. That, to my mind, furnishes a good example of how the Regulations can work in practice. In any given case, the proper application of the Regulations may seem to result in an arbitrary, but that is the inevitable consequence where payment is determined by reference to set formulae rather than by broad principles of reasonableness.
26. Given that there is one case, one must look to the provisions of the 2013 Regulations for trial and retrial in one case which has been transferred to a new litigator. Those provisions are to be found at paragraph 13 of Schedule 2.
27. As to the interpretation of paragraph 13, both parties have referred to the Crown Court Fee Guidance published by the LAA (the guidance referred to is that in effect at the relevant time, although I do not believe that there have been any material changes, for the purposes of this decision, since).
28. At appendix H, the Guidance indicates that the term “Transfer before retrial” addresses a situation in which “the new solicitor has taken over the case from the original solicitor between the trial and the retrial...”. The Determining Officer also refers to appendix P, which states that “where an order is made for a retrial and the same litigator acts for the defendant at both trials the fee payable to that litigator is a graduated fee for the trial and 25% of the fee is appropriate to the circumstances of the retrial”.
29. I have borne the Guidance in mind, but I must also bear in mind that, as Master Gordon-Saker pointed out in *R v Seivwright*, it is not a source of law: *Lord Chancellor v Purnell* (2009) EWHC 3158 (QB). One must look to and interpret the Regulations themselves.
30. These are my conclusions. Sub- paragraph 13(1) must be distinguished from sub- paragraph 13(2). The former deals with situations in which a litigator acts for an assisted person at both a trial and a retrial. The latter deals with transfers between litigators.

31. In this case, paragraph 13(2) applies to the first trial. For the purposes of calculating the trial fee, this is a “During trial transfer” in which the Appellant is the new litigator and entitled to 50% of the trial fee.
32. A transfer cannot be both a “During trial transfer” and a “Transfer before retrial”. The LAA Guidance is, I believe, right in saying that the latter term refers to transfer between trial and retrial.
33. For the purposes of the retrial in this case, paragraph 13(1) applies. The Appellant acted for the assisted person at both the trial and the retrial.
34. That does not entail treating the Appellant as both the “original litigator” and the “new litigator”, contrary to paragraph 13(12). The Appellant was the new litigator at the original trial, but was the “same litigator”, as provided for at paragraph 13(1), at the retrial.
35. For those reasons, I believe that the Determining Officer was right in her assessment of the fee payable to the Appellant. The appeal must fail.
36. I am sorry to note that the substantial recoupment of fees undertaken by the LAA caused the Appellant some difficulty, and that the LAA’s attempts to ease the blow, apparently due to administrative and/or IT failures, tended to be ineffectual. In fairness, however, the Appellant never had a viable claim to the payment of two full trial fees.

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