SENIOR COURTS
COSTS OFFICE

SCCO Ref: 188/18

Dated: 16th December 2019

ON APPEAL FROM REDETERMINATION

REGINA v MEHMETAJ

CROWN COURT AT ST ALBANS

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO: T20177290

LEGAL AID AGENCY CASE

DATE OF REASONS: 20th September 2018

DATE OF NOTICE OF APPEAL: 4th October 2018

APPLICANT: Mr Martin McCarthy, Counsel

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

The appropriate additional payment, to which should be added the sum of £500 (no VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

R/EASONS FOR DECISION

Introduction

1. Mr Martin McCarthy, counsel ('the Appellant') appeals against the decision of the Determining Officer at the Legal Aid Agency ('the Respondents') to reduce the number of pages of prosecution evidence ('PPE') forming part of his Advocates Graduated Fees Scheme ('AGFS') claim.

2. The Appellant submitted a claim for 10,000 PPE, the maximum allowed in the regulations. The Respondent, after a redetermination, allowed 4373 PPE, comprising 645 pages of statements, 314 pages of exhibits, 40 pages of an SSR and 3728 of electronic datum. The issues between the parties have narrowed on appeal so that the only matter for determination is the inclusion or otherwise of 1925 pages of electronic datum extracted from a USB stick that is referred to variously in the papers as the 'full USB' or the 'SIM card report'.

Background

3. The Appellant represented Mr Erion Mehmetaj ('the Defendant') who was charged with four co-defendants on an indictment alleging two counts of conspiracy to supply Class A drugs. The co-defendants were arrested between March and August 2017 and the evidence against them included the seizure of 5kg of cocaine. The Defendant was arrested in October 2017 and the evidence against him was taken almost exclusively from telephone datum and material recovered from a USB stick found during a search of his home. The electronic datum was downloaded onto several discs and served under a NAE dated 9th January 2018.

4. The co-defendants all pleaded guilty. The Defendant pleaded not guilty but changed his plea to guilty several days into the trial. He was sentenced to 10 years and 9 months' imprisonment.

The Regulations

5. The Representation Order is dated 18th October 2017 so that the applicable regulation is The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations').

6. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (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'*.

Authorities

7. 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."

8. The Appellants have also cited the judgment of Nicola Davies J. in Lord Chancellor v. Edwards Hayes LLP [2017] EWHC 138 (QB).

The Submissions

9. The Respondent's case is set out in Written Reasons dated 20th September 2018 and in written Submissions drafted by Mr Michael Rimer and dated 28th June 2019. The Appellant's case is set out in Grounds of Appeal lodged on 4th October 2018 and in a Skeleton Argument dated 11th March 2019. Mr McCarthy and Mr Rimer both attended and made oral submissions at the hearing on 22nd November 2019.

My analysis and conclusions

10. The Respondent, in summary, concedes that the Determining Officer may not have received and assessed the datum on the USB at the time of the redetermination in May 2018. Nonetheless, argues Mr Rimer, in so far as the court now has to exercise the discretion at para. 1(5) of Schedule 2 to the 2013 Regulations, the material on the USB could be excluded as irrelevant to the prosecution. The disputed pages comprised various images, some of which are thumbnail size (70% of the total) and general technical metadata (30%). Mr Rimer acknowledges that the prosecution had extracted and relied on 30 relevant images. These images depicted variously expensive, high end watches and jewellery and bundles of cash. One incriminating image bore the

legend '#drugs money'. The rest, however, consisted of personal images, including '*photographs of friends/family at social occasions, photographs of him and his friends on nights out, selfies, family photos, photographs of him at a pool hall and a number of explicit images'*. None of this material provided additional context or explanation for the images extracted and regarded as incriminating by the prosecution. It was unnecessary, argues Mr Rimer, for the Appellant to consider the bulk of the material in order to assess the strength of the prosecution's case.

11. The Appellant, in summary, submits that on the facts of this particular case, the disputed 1952 pages should all be included in the PPE. The prosecution had, as noted, extracted and relied on 30 images, all of which were designed to demonstrate the contact and association between the Defendant and his co-conspirators. It was relevant necessarily to look through the file(s) as a whole to understand the context and relevance of this material. More particularly, the issues in this case concerned whether the images connected to the Defendant were either sent and/or received by his phone. They were found on a USB memory stick and the assertion was made initially by the Defendant that they were not linked directly to him. This connection was central to the prosecution's allegation against the Defendant and a consideration of the USB datum, not merely of the images but also the technical metadata, could be interpreted to demonstrate a connection (or otherwise) with the Defendant's phone. To this end, the defence commissioned a report from an expert Digital Forensic Analyst, Mr Jason Scott Dickson. This Dickson's five page report (in the form of a witness statement) is included in the Appellant's bundle. He considered three important questions: When were these images uploaded onto the USB? From which location were these photos uploaded onto the USB? What was the source of these photographs? It is clear when reading this report that the expert relied on an analysis not simply of the 30 images extracted by the prosecution, but of the datum on the USB stick as a whole. Mr Dickson's conclusions were not helpful to the Defendant and it was this that ultimately motivated the Defendant to change his pleas to guilty.

12. I am satisfied, on the particular facts of this case, that the contents of the USB stick should be included in the PPE count. Electronic datum comprised the main evidence against the Defendant. The prosecution had extracted and relied specifically on 30 various photographs which were of direct probative relevance to the Defendant's involvement in the conspiracy. Clearly the datum on the USB was central to the prosecution case. It was reasonable for the Appellant to consider all the photographs and images. It was also reasonable for the technical metadata to be included in the page count. The electronic datum was not recovered directly from a phone (or phones) seized from the defendants, but from a USB stick. Relevant questions arose as to the Defendant's proximity to this material. The defence instructed an expert Digital Forensic Analyst to consider the entirety of the material. His role was to consider and test the prosecution evidence, not to discover a 'defence angle'. I am satisfied, in these circumstances, that the 1925 disputed pages should be added to the PPE.

13. The appeal is allowed. I direct that the PPE should be 6298 (4373 + 1925).

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