



Neutral Citation No. [2023] EWHC 2187 (SCCO)

Case No: T20217218

SCCO References: SC-2022-CRI-000166, SC-2022-CRI-000167

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 1st August 2023

Before:

COSTS JUDGE WHALAN

R

v

CHARLIE GEORGE

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

Appellants: Mr J Higgs, KC and Mr M Dacey, Counsel

The appeals have been successful for the reasons set out below.

The appropriate additional payment, to which should be added the £100 (x2) paid on appeal, should accordingly be made to the Appellants.

COSTS JUDGE WHALAN

Introduction

1. Mr Jonathan Higgs KC and Mr Mark Dacey ('the Appellants') appeal against the decisions of the Determining Officer at the Legal Aid Agency ('the Respondent') in respect of claims submitted under the Advocate's Graduated Fees Scheme ('AGFS'). The issue, which is identical to both appeals, is whether these claims are paid as a trial and a new trial, as the Appellants submit, or as a trial, as assessed by the Respondent.

Background

2. The Appellants represented Mr Charlie George ('the Defendant') who appeared with four co-defendants at the Central Criminal Court on an indictment alleging eight counts of murder, attempted murder, wounding with intent, having an offensive weapon and conspiracy to commit violent disorder.
3. The trial was listed before HHJ Dennis KC on 25th July 2022. A jury was selected and sworn, and the prosecution opened the case. On 28th July 2022, four days into the trial, the jury was discharged, apparently after one of the jurors raised an issue with the judge.
4. On 1st August 2022, the case was re-listed for trial, but it was unable to proceed that day as insufficient jurors were available. The judge signed an 'Effective, Cracked & Ineffective Trial Monitoring Form' (CITM 3.1), which recorded that the 'Trial outcome' was 'Ineffective'.
5. The case was re-listed on 8th August 2022, when a new jury was sworn. The trial then ran for 33 days until 7th October 2022. The Defendant was convicted on the final count, conspiracy to commit violent disorder.
6. The Appellants submitted AGFS claims for a trial (25th-28th July) and new trial (8th August – 7th October). The Respondent assessed their claims as a trial, on the basis that 25th July – 7th October constituted one continuous trial.

The Regulations

7. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended in 2018, apply.
8. Paragraph 2(2) to Schedule 1 of the 2013 Regulations provides (where relevant) as follows:

2. Application

- (1) *Subject to sub-paragraphs (2) to (11), this Schedule applies to...*
 - (2) *Sub-paragraphs (3) and (4) apply where, following a trial, an order is made for a new trial and the same trial advocate appears at both trials where –*
 - (a) *the defendant is an assisted person at both trials; or*
 - (b) *the defendant is an assisted person at the new trial only; or*
 - (c) *the new trial is a cracked trial or guilty plea.*
 - (3) *Subject to sub-paragraph (4), in respect of a new trial, or if the trial advocate so elects, in respect of the first trial, the graduated fee payable to the trial advocate must be calculated in accordance with Part 2 or Part 3, as appropriate, except that the fee must be reduced by –*
 - (a) *30%, where the new trial started within one month of the conclusion of the first trial;*
 - (b) *20%, where the new trial did not start within one month of the conclusion of the first trial;*
 - (c) *40%, where the new trial becomes a cracked trial or guilty plea within one month of the conclusion of the first trial; or*
 - (d) *25%, where the new trial becomes a cracked trial or guilty plea more than one month after the conclusion of the first trial.*
9. I am referred to the judgment of the SCCO in R v. Forsyth [2010] Ref: 155/10, R v. Tabassum Mohammed [2020] Ref: SC-2020-CRI-000054, R v. Nettleton [2014] 2 Costs LR 387 and R v. Bernard-Sewell [2021] Ref: SC 2020-CRI-000094.

The submissions

10. The Respondent's case is set out in Written Reasons (x2) dated 7th December 2022 and in Written Submissions drafted by Mr Jonathan Orde, of the Government Legal Department, dated 5th July 2023. No appearance was made at the appeal hearing on 7th July 2023. The Appellants' case is set out in Grounds of Appeal appended to the Notices of Appeal and in undated Submissions on Redetermination. Mr Higgs KC, the first Appellant, attended and made submissions at the hearing on 7th July 2023.

My analysis and conclusions

11. The Respondent, in summary, refers to one trial, as opposed to a trial and a 're-trial', and cites the following reasons for concluding that, on the facts of this case, the trial effectively comprised one continuous hearing: the gap between the two trials, which was less than two weeks, the stage reached in the first trial 'leg', the relative length of the two 'legs', the fact that there was no change of trial advocate, the fact that there was no change of trial judge, the absence of evidence that there was any change in the case between the two legs, and the relevance (or otherwise) to be attached to comments by the trial judge. In Forsyth (ibid), SCJ Gordon-Saker defined 'retrial' as meaning a new trial which was not part of the same procedural and temporal matrix as the first trial. There must also be a relevant order of the court, although that order does not have to be in writing. In Tabassum Mohammed (ibid), CJ Leonard suggested that a proper interpretation of para. 13 of Schedule 2 to the 2013 Regulations, entitled 'retrials and transfers' meant that the circumstances in which a payment can be made for a retrial are relatively limited. Following Forsyth, it was necessary to consider whether the temporal and procedural matrix had been broken when considering whether there was a retrial. In Nettleton, SCJ Gordon-Saker held that the introduction of new evidence in a criminal trial is not unusual and, depending on the facts, does not necessarily alter the procedural and temporal matrix. In Bernard-Sewell (ibid), I gave some guidance as to the assistance to be derived from comments made by the trial judge in criminal costs appeals.
12. The Appellants, in summary, submit that the court should apply properly a straightforward, literal application of the relevant part of the Regulations. The straightforward issue is whether, on the facts of this case, there was a single 'trial', or alternatively a trial followed by a 'new trial'. The procedural/factual reality is such, argues the Appellants, as to militate against the conclusion that this was a single,

continuous trial. Instead, there was a trial and, following an order of the judge, effectively a new trial. Although this constitutes a somewhat mechanistic interpretation of the Regulations, the ‘swings and roundabouts’ application of criminal funding accepts that this is appropriate. In any event, points out Mr Higgs KC, there is no undue or unreasonable ‘windfall’ recovery, as the advocates in this case were effectively prevented from sitting or realistically accepting other work for a week between 1st and 8th August 2022.

13. It is of some relevance, it seems to me, to note that the regulation applicable to these appeals is para. 2(2) to Schedule 1 of the 2013 Regulations, as amended in 2018, and not para. 13 of Schedule 2, headed ‘Retrials and Transfers’. It is important, in my view, to note that the relevant nomenclature is ‘trial’ and ‘new trial’, and not ‘second trial’ or ‘retrial’, as cited in some of the reported cases and, indeed, by the Determining Officer.
14. It is also clear that some of the factors cited by the Respondent have not practical relevance to a proper interpretation of para. 2(2), namely “the gap between the two trials being less than two weeks” and “the fact that there was no change of trial advocate”. Paragraph 2(2) applies (and only applies) specifically to cases where “*the same trial advocate appears at both trials*” (2(2)), and so this fact cannot, it seems to me, militate against an advocate’s recovery. Para. 2(3)(a) anticipates specifically cases where “*the new trial started within one month*”, so it is hard to see how the fact of a short gap between the ‘two trials’ can be cited as grounds for concluding that there was only one single trial. Ultimately, the issue is whether there was, as a matter of procedural fact and reality, one single ‘trial’, or rather a ‘trial’ and, following an order of the court, a ‘new trial’. I accept that the issue of whether or not there was the same (or a breach of) the procedural and temporal matrix is of some interpretative relevance, but the question is invariably case specific and should be relatively easy to determine.
15. On these appeals, and on the particular facts of this case, I prefer the submissions of the Appellants to those of the Respondent. The trial began on 25th July 2022 and ran for four days until 28th July 2022, when the jury was discharged. An attempt to re-start the trial on 1st August 2022 was unsuccessful. On that day, HHJ Dennis KC formally recorded that the trial was ‘ineffective’ and, as such, ordered a ‘new trial’.

This hearing started on 8th August 2022 and ran until 7th October 2022. It is impossible, in my conclusion, to find that the hearings between 25th July-7th October 2022 constituted one continuous trial, in circumstances where the judge held (on 1st August) that the initial trial was ineffective and that a new trial was necessary. I am satisfied that the finding on 1st August constitutes an order for a new trial which, on any interpretation, constituted a break in the procedural and temporal matrix. The judge's finding on 1st August was made within the procedural/interlocutory progress of the trial(s); it was not intended, in other words, to give some sort of steer to a Costs Judge on a fees appeal. It is right, in those circumstances, that I note and pay regard to it. The fact that the new trial began shortly after the first trial foundered is not, as noted, a reasonable ground for concluding that the second 'leg' could not be a new trial. The 33-day hearing which began on 8th August did not effectively re-try the four-day hearing between 25th – 28th July, but the issue is not whether or not there was a 're-trial'. Again, this is a 'trial' and a 'new trial', or just a 'trial', and I cannot, on the facts of this case, uphold the Respondent's conclusion as to the latter.

16. The appeals of Mr Higgs KC and Mr Dacey are allowed and I direct that their AGFS claims are re-assessed on the basis of a trial and a new trial.

Costs

17. The £100 (x2) paid to lodge these appeals should be returned to the Appellants. There is no other claim for costs.

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