SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2019-CRI-000072

Dated: 6 January 2019

ON APPEAL FROM REDETERMINATION

REGINA v MAKENGELE

WOOLWICH CROWN COURT

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

CASE NO: T20170498

LEGAL AID AGENCY CASE

DATE OF REASONS: 30 MAY 2018

DATE OF NOTICE OF APPEAL: I OCTOBER 2018

APPLICANT: NORTON PESKETT	SOLICITORS	

The appeal has been successful 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.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. The determination of this appeal, regrettably, has been delayed for a number of reasons. It would appear that the appeal was filed at the SCCO on about 1 October 2018 but that delay ensued from the loss of the file, a matter for which the Appellant is due an apology. Insofar as any extension of time for the appeal is necessary, it is granted.

2. The appeal concerns work undertaken by the Appellant in representing Major Makengele ("the Defendant"). The question is whether on 3 August 2017, the date upon which the Defendant was sentenced for four drugs offences, a "Newton hearing" took place.

3. A Newton hearing involves the sentencing court making findings, usually following the giving of evidence, in order to determine the correct level of sentence. It is common ground that on the authority of *R v Newton* [1983] Crim LR 198 such a hearing can take three forms. The disputed facts may be put before the jury for a decision; the judge may hear evidence and then come to a conclusion; or the judge may hear no live evidence but instead listen to submissions from counsel and then come to a conclusion.

4. The Defendant was charged with three counts of possessing a controlled Class A drug with intent to supply and one count of possession of criminal property. He was granted a representation order on 17 May 2017. He pleaded guilty on all counts and was sentenced on the 3 August 2017.

5. The Defendant had put in a basis of plea at a hearing 27 July 2017, to the effect that he played a relatively minor role in the drug distribution network of which he was a part. He said that he was only a "packager" and that he would plead guilty to possession of cannabis, but not possession with intent to sell. As for the criminal property charge (of holding money from the sale of drugs) he was willing to plead to that on the basis that he was holding it for someone else.

6. The proposed basis of plea was not accepted, and on 3 August counsel for the Crown indicated to the court that the prosecution was of the view that the Defendant had played a much greater role in the drug distribution network than he was prepared to admit. The Defendant entered guilty pleas to each of the counts on the indictment, the count relating to cannabis having been changed to simple possession.

7. An advice on appeal against sentence subsequently prepared by Mr Alex Matthews, counsel for the Defendant at the hearing, describes what happened next:

> "There were then extensive submissions from both myself and the prosecutor as to category/role… I submitted that the case was very much in the lesser role. I indicated there was an incident a few days before the events in these facts (the car crash) and provided details in my submissions as to the threats and pressure the defendant was

under. Discussion was had, and the issue was raised by me that the defendant maintains this basis completely and that we would go to a Newton hearing if necessary… The judge gave the following ruling on category and the basis proffered…

I am not persuaded that the determination of role is an appropriate matter for a trial of issue in this case; it is for me, weighing all of the material before me…"

8. The judge, HHJ Saggerson, went on to make findings, including that the Defendant felt that he had no option but that to cooperate with those managing the drug distribution network, but also that he had played an essential and important role. Sentence was based on those findings.

The Regulations

9. The Appellant's right to remuneration is governed by the provisions of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. If there was indeed a Newton hearing on 3 August 2017, the Appellant will be entitled to a trial fee. If not, the Appellant will be paid a lesser fee. The relevant provisions are to be found at paragraph 2(4) of Schedule 2:

   "Where, following a case on indictment, a Newton hearing takes place—

   (a) for the purposes of this Schedule the case is to be treated as having gone to trial;
   (b) the length of the trial is to be taken to be the combined length of the main hearing and the Newton hearing; and
   (c) the provisions of this Schedule relating to cracked trials and guilty pleas will not apply."

10. A Newton hearing is defined at paragraph 1(1) of Schedule 2:

   "'Newton Hearing'" means a hearing at which evidence is heard for the purpose of determining the sentence of a convicted person in accordance with the principles of R v Newton (1982) 77 Cr App R 13…"

Submissions

11. Ms Weisman for the Lord Chancellor submits that the Determining Officer's assessment was based on a review of the court log, and in particular the observation of HHJ Saggerson to the effect that there was no need for a "trial of issue".

12. Ms Weisman submits that the Determining Officer's conclusion was correct. What is at issue here is, she says, whether the court heard evidence, albeit by way of submission rather than witness testimony, which was disputed and which the judge resolved before sentencing. She argues that that did not happen. The court rejected the Defendant's bases of plea, but there was no

question of going to the underlying facts which were at the heart of the dispute. What was at issue was the proper interpretation of those facts, and what inferences might be drawn from them about the seriousness of the Defendant's role.

13. Counsel's advice, says Ms Weisman, itself indicates that the ingredients for a Newton hearing are absent. The guilty pleas entered were to an indictment which the Crown had amended and those pleas were accepted. The judge then considered whether a" trial of issue" would be necessary, and concluded that it would not. The short quote from HHJ Saggerson set out above clearly indicates that there was no factual dispute to be resolved. It was merely a matter of the court weighing the evidence before it, evidence that was not in itself in dispute, and drawing a conclusion regarding the Defendant's role.

14. The Appellant relies upon the judgments of Master Rowley in *R v Morfitt* (SCCO 55/16, 29 July 2016) and *R v Hoda* (SCCO 11/15, 13 May 2015), discussed below.

Conclusions

15. I agree with Ms Weisman that *R v Morfitt*, which concerned the attendance of a defendant at a Newton hearing held for the purposes of sentencing a co-defendant, does not seem to have much bearing on this appeal.

16. I do think however that it has some facts in common with *R v Hoda*, which concerned a Newton hearing at which submissions were made but no evidence heard. Master Rowley took the view that the hearing in question fell into the third category of hearing which, on the authority of *R v Newton*, qualifies as a Newton hearing: one in which the judge hears no live evidence, but having listened to submissions from counsel comes to a conclusion on disputed facts.

17. This case can be distinguished from *R v Hoda* in that a Newton hearing was never listed. The question, however, is whether one actually took place. In that respect I agree with the Appellant that one must have regard to what actually happened.

18. The evidence before me supports the conclusion that HHJ Saggerson came to a conclusion on two factual issues not agreed as between prosecution and defence: the importance of the Defendant's role in the drug distribution network, and the extent to which he played that role under duress. The judge had to come to conclusions on those facts before sentencing, and he did so having heard what appear to have been extensive submissions from counsel for the Crown and for the Defendant.

19. It seems to me that HHJ Saggerson, in referring to a "trial of issue" (or more probably, to a "trial of issues") had in mind a hearing at which evidence would be heard. He did not think that such a hearing was necessary, but it does not follow that there were no factual issues to be determined by him. It seems to me that he simply concluded that he could do so on the basis of the submissions he had already heard and the evidence already before him. There would have

been no good reason for him to give consideration to the question of whether, by reference to the relevant (and here, agreed) criteria, a Newton hearing was already taking place.

20. I note that counsel for the Defendant appeared to take the view that a Newton hearing would not take place unless evidence was heard but if that is what he thought, it is inconsistent with what the parties agree is the correct test.

21. For those reasons, the appeal succeeds. My conclusion is that a Newton hearing did take place, in which HHJ Saggerson heard no live evidence but considered submissions from counsel and then come to conclusions on factual matters essential to determining an appropriate sentence. The Appellant should be remunerated accordingly.

TO: EBR Attridge

DX58500
Tottenham 1

COPIES TO: Carmel Curran
Senior Caseworker
Litigator Fee Team
Legal Aid Agency
DX10035 Nottingham