SENIOR COURTS COSTS OFFICE

SCCO Ref: SC-2020-CRI-000108

Dated: 20 January 2021

ON APPEAL FROM REDETERMINATION

REGINA v JORDAN HALL

DERBY CROWN COURT

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

CASE NO: T20197115

LEGAL AID AGENCY CASE

DATE OF REASONS: 4 OCTOBER 2020

DATE OF NOTICE OF APPEAL: 15 MAY 2020

APPLICANT: JD SOLICITORS	SOLICITORS	

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

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns whether, under the Graduated Fee provisions of Schedule 2 to The Criminal Legal Aid (Remuneration) Regulations 2013, the Appellant is due a cracked trial fee or a trial fee. The issue turns upon whether, for the purposes of the 2013 Regulations, a "Newton Hearing" (a fact-finding hearing for sentencing purposes, which is treated as a trial under the Regulations) took place.

2. According to the Determining Officer's written reasons the relevant Representation Order was made on 19 September 2019. The 2013 Regulations apply as in force at that date. Schedule 2 at paragraph 1 provides the following definitions:

> '"cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea 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 [first hearing at which he or she entered a plea; or
> (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the [first hearing at which the assisted person entered a plea, declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea…
>
> … "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…'

Background

3. The Appellant represented Jordan Hall ("the Defendant") before the Crown Court at Derby. The Appellant has claimed a trial fee on the basis that a Newton hearing took place. The Determining Officer concluded that the correct payment was for a cracked trial.

4. The following account of the case history, taken from a helpful summary prepared by Ms Weisman for the Lord Chancellor (itself extracted from documents including the court log) is not, subject to some points I shall come to, in issue.

5. The Defendant was charged alongside two others with conspiracy to supply heroin. The Crown's case was initially that the Defendant and one of his co-defendants played a more significant role in the conspiracy than a third co-defendant.

6. On 18th July 2019 the Defendant attended court for a plea and trial preparation hearing and entered a not guilty plea. The matter was placed in the warned list for trial in the week commencing 7th October, with a mention hearing fixed for 6th September.

7. The Defendant attended the 6th September hearing and changed his plea to guilty. The court directed he should serve a basis of plea by 20th September and there should be a mention hearing on 11th October to review whether the prosecution accepted the basis of plea. The basis of plea was not accepted, so a Newton hearing was fixed for 19th November.

8. In preparation for the Newton hearing, the defence argued that Hall's role was less significant than suggested by the Crown and that this would impact on sentencing. The matter was listed for mention on 14th November and the Newton hearing was moved to 20th December at the defence's request.

9. On 20th December, the parties attended court for the Newton hearing as scheduled. Discussion took place between prosecution and defence as to the role Hall had played in the conspiracy and they were able to reach an agreement as to his significance. In court, the prosecution informed the Judge that a Newton hearing was no longer necessary as there was now an acceptable basis of plea.

10. Prosecution counsel explained the basis of plea to the court, and the matter proceeded to mitigation and the setting of a timetable for POCA proceedings. The defendant was sentenced to 45 months' imprisonment. According to the court log, the time spent in court on oral representations prior to the Judge indicating acceptance of the basis of plea was around three minutes.

Submissions

11. Mr Selby for the Appellant refers me to *R v Hoda* (SCCO 11/15, 13 May 2015) and to *R v Morfitt* (SCCO 55/16, 29 July 2016) in support of the proposition that the hearing on 20 December 2019 should properly be characterised as a Newton hearing.

12. Mr Selby had represented the Defendant before the Crown Court. He explained that following service of the basis of plea, both parties had prepared further expert evidence. The agreement reached between the Prosecution and the Defence was, for the purposes of the sentencing guidelines, on the role played by the Defendant in the conspiracy. That was founded on a joint expert report dated 24 October 2019. Some differences as to the facts remained, so that the basis of plea was not completely accepted, but both Prosecution and Defence counsel were of the view that the disputed facts should have no significance for

the purposes of the guidelines. Nonetheless it remained necessary to put that that to the judge, whose decision it was and who might disagree. In the event the judge did not disagree, but it might well have been necessary to call evidence.

13. Mr Selby emphasised that the hearing was listed as a Newton hearing and fully prepared for as such. At the hearing, the judge was called upon to make a finding to the effect that the remaining differences between the Prosecution and the Defence either would or would not have an effect upon sentencing. In the event, he decided that it would not. It was not necessary for him to find in favour of either the Prosecution or the Defence, but he did have to make a finding and in doing so he embarked upon a fact-finding exercise. In the course of that exercise reference was made of necessity to the expert evidence on the court's case management system which recorded the agreed facts and those which were not agreed, so in effect evidence was considered.

14. Given that the Lord Chancellor accepts that the definition of a Newton hearing, as considered in the Costs Judge decisions upon which the Appellant relies, is necessarily flexible Mr Selby submitted that the hearing of 20 December 2019 was in essence a Newton hearing. To come to any other conclusion would he suggested be to encourage parties to "tick a box" and earn the appropriate fee by reciting before the court the evidence that had already been agreed.

15. Helpful as they are, I do not find it necessary to refer in any detail to the submissions of Ms Weisman for the Law Chancellor. That is because, as my conclusions will demonstrate, I agree with what she says.

Conclusions

16. in order to put this case into context it is necessary to go back to first principles. In *R v Robert John Newton* (1983) 77 Cr. App. R. 13, the Court of Appeal identified the three forms of what is now known as a "Newton Hearing". 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.

17. On the wording of the 2013 Regulations in isolation, it might appear that live evidence must be heard for a hearing to qualify as a Newton hearing. In fact, if reference is made to the principles of *R v Newton*, to which they expressly refer, it becomes apparent that such is not the case.

18. In *R v Hoda* Costs Judge Rowley rejected the proposition that to have a Newton hearing, it is necessary for live evidence to be given. Helpfully, at paragraph 12 of his judgment, he said this:

> "The purpose of a Newton hearing is to establish the facts so that the correct sentence can be imposed. From this can be gleaned the proposition that only cases where a material difference in the sentence will depend upon the Judge's findings will justify a Newton hearing. Consequently, it is unusual for the parties to be content to

address the judge on the written evidence… But it is just as much a Newton hearing as one where live evidence is called".

19. I came to a similar conclusion in *R v Ashley Boyd* (SC-2020-CRI-000166, 2 September 2020), a case in which the judge's finding had been based on submissions. I found that that case fell into the third category contemplated by the Court of Appeal in *R v Newton* and that it was not necessary for evidence to have been called.

20. In *R v Morfitt* Costs Judge Rowley considered a case in which the appellant's client had attended a Newton hearing, listed for the purposes of sentencing the client and his co-defendant, in which the relevant factual issues to be determined were, as regarded each defendant, identical. The court heard evidence in relation to the co-defendant and then reached factual conclusions which were sufficient for the purposes of sentencing both defendants. The argument there was whether, in respect of the appellant's client, there had been any Newton hearing at all. Costs Judge Rowley concluded:

> "It seems to me that, where a defendant prepares for a Newton hearing; turns up to that hearing; hears evidence given on matters which concern the disputed facts and then relies upon that evidence to support the submissions made by his advocate, it cannot properly be said that a Newton hearing has not taken place. The judge has heard evidence upon which he can make findings of fact where they are disputed between the Crown and the defence. The fact that the evidence was being led and cross-examined in respect of the co-defendant's Newton hearing does not seem to me to make any difference to that analysis…"

21. That is a conclusion with which I would respectfully agree.

22. None of the decisions to which I have referred, however, seem to me to support the Appellant's case.

23. That is because, on the facts of this case as put to me, there was no fact-finding exercise for the judge to carry out. Following agreement it was no longer a case in which, to paraphrase Costs Judge Rowley, a material difference in the sentence would depend upon the Judge's factual findings.

24. I appreciate that a Newton hearing was fully prepared for, but it did not actually take place. As Ms Weisman submits that is true of many cracked trials.

25. There is a tension between the fact that the summary of events I have recited above was (as I was advised at the hearing) not disputed, and some of Mr Selby's submissions. If the Prosecution advised the court, as I am told, that there was now an acceptable basis of plea then the remaining factual issues cannot have been of any significance for sentencing purposes and there would have been no reason to suppose that the judge might disagree. If the hearing still qualified as a Newton hearing, surely the judge would not have been told that there was no need for one.

26. This tension arises, as far as I can see, from the fact that the Appellant's case rests on characterising the judge's agreement to the effect that no fact-finding hearing was necessary, as in itself a fact-finding exercise. That to my mind is an inherently contradictory proposition.

27. Because of what had been agreed between Prosecution and Defence it was unnecessary for the court, in determining sentence, to hear live evidence, to consider written evidence or to hear submissions. There was, accordingly, no Newton hearing. If there was a decision on the judge's part it was an administrative one: a matter of case management, not fact-finding. Insofar as the expert evidence upon which the agreement was based was referred to, it was referred to in that context. It was not considered by the court for the purposes of making a decision on the appropriate sentence.

28. I cannot attach any weight to the proposition that that a refusal on my part to characterise a cracked trial as a Newton Hearing might encourage litigators and advocates, in order to secure a Newton Hearing fee, to go through the motions of putting unnecessary evidence before the court. I hope that no responsible litigator or advocate would do that, and I do not expect that a judge would be prepared to waste court time and resources to that end.

29. In any event I must interpret the 2013 Regulations as they stand, and in my view they cannot bear the interpretation contended for the Appellant.

30. For those reasons, this appeal fails.

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