SENIOR COURTS
COSTS OFFICE

SCCO Ref: 77/18, 143/18, 144/18

Dated: September 2019

ON APPEAL FROM REDETERMINATION

REGINA v HAMID ALI

PRESTON CROWN COURT

APPEAL PURSUANT TO PARAGRAPHS 1(1) AND 27 OF SCHEDULE 1 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20167568

LEGAL AID AGENCY CASE

DATE OF REASONS: 12 March 2018 (Harwood Solicitors)
9 July 2018 (Mr Valli of Counsel)
12 July 2018 (Harwood Solicitors)

DATE OF NOTICE OF APPEAL: 20 April 2018 (received - Harwood Solicitors)
13 August 2018 (Mr Valli of Counsel)
14 August 2018 (received – Harwood Solicitors)

APPLICANT:	COUNSEL	SOLICITORS
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The appeal has been partially successful for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £250.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Appellant Solicitors. The Appellant Counsel has been unsuccessful and no costs are due accordingly.

J. JAMES
COSTS JUDGE

REASONS FOR DECISION

1. The Appellants are Mr Valli, who was at the time an Advocate (but who has now ceased to practice law) and Harwood Solicitors who were Litigators acting for the Defendant. Originally, the Defendant was represented by different Solicitors and Counsel, but he dismissed them on 4 April 2017. Harwood sought to appeal the decision of the Determining Officer ("DO") dated 12 July 2018 to pay on the basis of a "During Trial Transfer" (new) Trial fee. That matter was proceeding under SCCO reference 144/18, but Mr Rimer of the LAA was good enough to confirm (via e-mail on the morning of the Hearing) that, following a further review of this case, the LAA recognised that on 4 April 2017, Mr Ali dismissed his legal team at 14:20 and the hearing finished for him at that point. The trial for his co-defendants began at 14.39. Consequently, the LAA accepted that Harwood (who were not granted a Representation Order until 19 April 2017) ought to be treated as a New Litigator in a pre-trial transfer, with the effect (applying the table under para 13 of Schedule 2 of the Remuneration regulations) that Harwoods are entitled to 100% of the trial fee (as opposed to 50% of the trial fee). Hence, other than to record that concession, I have nothing to say about that matter other than to thank the LAA for resolving it.

2. Cases proceeding under SCCO references 77/18 and 143/18 remain live as to whether there were two case fees payable in respect of the way the case was resolved, or one. The (Costs Appeal) Hearing took place as long ago as 1 May 2019. I expressed a preliminary view that my decision in the case of *R v Abdisalam* (SCCO reference 175/18) was on point here, but as that decision was handed down a few days before the Hearing in Ali, it was clearly not factored into the Respondent (LAA's) decision-making. I therefore invited the parties to take instructions and if the matter could not be resolved without a formal Judgment then I would give both parties a short amount of time for further written submissions; those came in recently and I now give my decision along with apologies for how long this process has taken. In fairness it has been partly due to the parties having difficulties attending Hearing dates previously listed by me (in August 2018 and January 2019) but it has also been partly due to me and for that I apologise.

Background

3. The Appellants represented the Defendant in proceedings before the Preston Crown Court. The Defendant was charged, alongside eighteen others, with two conspiracies reflecting the activities of a drug supply network in the Blackburn area in 2015 and 2016, centring around one particular phone number referred to as the "666 Sharky" number. There were a variety of roles ranging from those at the top, said to be involved in or closely connected to the importation of a significant quantity of heroin and the distribution of Class A drugs to street dealers, down to those at the bottom, said to be drug users in Blackburn, recruited into street dealing.

4. From his position on the original indictment (19th out of 19) and from the Case Summary, the Defendant was a very minor "Category 3" play. He was a driver for Hassan Rahman (one of several dealers who supplied crack cocaine and heroin to an undercover officer) on two days (8 and 10 June 2016) and to have had a drug-related conversation with the undercover officer on the second of these dates, which indicated that he knew what was taking place.

5. However, he was very far removed from the "Category 1" Defendants, who were said to have close links with one Liaquat Ali, who had been arrested at Manchester Airport on 14 February 2016 in possession of 11.4kg of heroin, worth around £1 million. It was asserted by the Prosecution that several of the Defendants not only knew about, but were actively involved in, the importation by Liaquat Ali. The original indictment charged the Defendant with two Counts of conspiracy to supply a Class A controlled drug (heroin on one Count and crack cocaine on another). In other words, he was charged with participation in a conspiracy involving the importation of £1 million of heroin into the UK, between 16 March 2015 and 11 October 2016. That was exactly the same charge as those in Category 1.

6. The Defendant pleaded Not Guilty to conspiracy; the timeline is somewhat confusing but the key dates, as set out in the Court Log, are as follows; explanations appear below.

28 November 2016	First Hearing re: Original indictment (Counts 1 and 2, conspiracy)
24 February 2017	Defendant arraigned on above 2 Counts; pleads NOT GUILTY to both Case listed for a PTR before HHJ Woolman (Trial J)
4 April 2017	Defendant severed from Trial as he dismissed his representatives for not telling him about two NEW Counts (of supply – Counts 32 and 33 on the multi-party indictment, 3 and 4 on his own indictment)
9 April 2017	Date Listed for Trial
19 May 2017	Defendant arraigned on Counts 1 and 2 (of supply)

7. According to the LAA, at the Hearing on 24 February 2017 the Prosecution sought leave to amend the indictment to add further Counts against certain Defendants, to reflect their level of involvement. Leave was granted and (per the LAA) the Prosecution indicated at that stage, i.e. on 24 February 2017, that if those charged with alternative Counts, pleaded Guilty to them, the original Counts of conspiracy would not be pursued. Per the LAA, on 4 April 2017 and preparatory to the Trial taking place, leave was given to add two Counts to the indictment against the Defendant, being two substantive charges of being concerned in the supply of Class A Drugs, namely heroin and crack cocaine.

8. Per the LAA, these Counts were added to the trial indictment (against all 19 Defendants) as Counts 31 and 32, and to the indictment faced by this Defendant, as Counts 3 and 4. The Defendant, who said on 4 April 2017 that his then Solicitors had not told him about the two new Counts (nor, presumably, the offer to drop conspiracy if he pleaded Guilty to the new Counts) indicated that he wished to dismiss his then Solicitors. He indicated an intention to represent himself, and was severed from the Trial listed for 9 April 2017.

9. Per the Appellants, having indicated that it intended to proceed with the conspiracy charges, at the PTR on 19 May 2017, the Prosecution preferred a new indictment with two substantive charges of being concerned in the supply of Class A Drugs, namely heroin and crack cocaine. This was (per the Appellants) wholly different to the original indictment and certainly, it was much narrower in scope both as to time (two discrete occasions rather than a conspiracy spanning some 18 months) and quantity (two supplies rather than involvement in importing 11.4kg of heroin). The Trial that proceeded on 30 May 2017 was on the new indictment, and on the sentencing Hearing (29 June 2017) the Prosecution formally offered no evidence on the original, conspiracy indictment and formal verdicts of Not Guilty were recorded.

10. The Appellants sought two fees; on the basis that a new indictment was preferred <u>after</u> the original indictment was created they seek a cracked trial in respect of the conspiracy charges that did not proceed in April 2017 (but which it is said were concluded on 29 June 2017) and a Trial for the supply charges in respect of which the Defendant ultimately pleaded Guilty in May 2017.

11. The LAA has assessed this as one fee, on the basis that the supply charges were added to the conspiracy charges on the same indictment against this Defendant, which ended with Counts 1, 2, 3 and 4, all upon the same indictment. Hence (per the LAA) one indictment, one

"case".

Regulations

12. "Case" is defined under paragraph 1(1) of both Schedules 1 and 2 in the following way:

""case" means proceedings in the Crown Court against any one assisted person—
(a) on one or more Counts of a single indictment;
(b) arising out of a single notice of appeal against conviction or sentence, or a single committal for sentence, whether on one or more charges; or
(c) arising out of a single alleged breach of an order of the Crown Court,
and a case falling within paragraph (c) must be treated as a separate case from the proceedings in which the order was made."

13. The Crown Court Fee Guidance refers, at Schedule 2, to the Advocates' Graduated Fee Scheme definition of "case" as follows:

2.1 Interpretation

Definition of a Case

2. *A 'case' is defined as proceedings against a single person on a single indictment regardless of the number of Counts. If Counts have been severed so that two or more Counts are to be dealt with separately, or two defendants are to be dealt with separately, or if two indictments were committed together but dealt with separately, then there are two cases and the representative may claim two fees.*

3. *Conversely, where defendants are joined into one indictment, or a single defendant has been committed separately for matters which are subsequently joined onto one indictment, this would be considered to be one case and the advocate may claim one fee. Refer to Costs Judge decision: Eddowes, Perry, and Osbourne (2011) which held that in cases involving multiple defendants represented by the same solicitor one claim should be submitted with the appropriate uplift for the relevant number of defendants*

14. The Crown Court Fee Guidance refers, at Schedule 3, to the Litigators' Graduated Fee Scheme definition of "case" – as it is, in every material respect identical, I do not cite it here but have of course considered it carefully.

15. "Cracked Trial" is defined under paragraph 1(1) of both Schedules 1 and 2 in the following way:

"cracked trial" means a case on indictment in which—

(a) a plea and case management hearing takes place 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 plea and case management hearing; or
(bb) in respect of one or more Counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or

(b) the case is listed for trial without a plea and case management hearing taking place;

The Parties' Submissions

16. The Appellant submitted that the LAA has misstated the timeline of events; there may have been changes to the other Defendants' indictments on 24 February 2017, but no new substantive offence was added for this Defendant and as such he was still charged with conspiracy; only on 19 May 2017 did the Prosecution indicate that they would NOT be pursuing that indictment, and a new indictment with two Counts of being concerned in supplying Class A drugs (one Count in relation to heroin and one in relation to crack cocaine) was preferred. The Defendant was arraigned on 19 May 2017 on the new indictment and entered Not Guilty pleas; his Trial – only on those two new offences - took place on 30 May 2017 and at a Sentencing Hearing on 27 June 2017 the Prosecution formally offered no evidence on the Conspiracy indictment, and verdicts of Not Guilty were entered thereon.

17. The LAA submitted that the Court Log shows only one final/signed indictment for this Defendant, with no note of there being another indictment. This (per the LAA) indicates that the amendment was for administration purposes and hence was not recorded. The Court Log, the LAA asserts, reflects the learned Judge adding Counts to the indictment but not a [new] indictment being preferred. As such, the case started as two Counts [of conspiracy] new Counts [of supply] were added from 24 February 2017 onwards and at no point was the original [conspiracy] indictment quashed or stayed or a new indictment preferred. Within the parameters of the Regulations and Fee Guidance it is payable only as one "case" not two.

Decision

18. Dealing first with *R v Abdisalam* there was no dispute in that case that there were two separate indictments and so there were two separate "cases"; the narrow issue which arose on that appeal was whether the two cases were "heard concurrently" as per paragraph 27(2) of Schedule 1. I therefore accept Mr Rimer's submission to the effect that *R v Abdisalam* does not assist the Appellants; I regret having set that particular hare running but I am grateful to the parties for their submissions upon the point.

19. Here the question is very different; were there two separate indictments? If so even the LAA accepts that there would be two separate cases and hence two fees. However, if there was only one, amended, indictment, they say only one fee falls due. To answer that I must ask another question, namely when was that amendment (or new indictment as the case may be) made? Putting it another way, did the decision for the Defendant to be tried separately give rise to two indictments and hence two cases; and even if it did, does the date of instruction mean that there was only ever one case for these Appellants?

20. In my view, given the sequence of events that I am about to describe, there was only ever one case, because the decision to sever the Defendant from the Trial, came after he dismissed his legal team, which he only did after learning that two new charges had been added to the indictment against him. Based upon the timeline set out below, and before the Appellants were ever instructed, the amendment to the indictment (by adding Counts 3 and 4) had already taken place, probably on 24 February 2017 but certainly no later than 4 April 2017, so that there was only ever one "case" for the Appellants and the events of 19 May 2017 are a mere diversion of no substance or effect.

21. The parties are not in agreement about dates upon which key events took place and therefore I reviewed the Court Log very carefully as indicated in the table at paragraph 6 above. From the Court Log it appears that the intention was to add Counts regarding supply (whether designated as 3 and 4 or as 32 and 33) against the Defendant on 24 February 2017. The Court Log is very difficult to follow, but upon my reading of it, the two new (supply) Counts were <u>in fact</u> added on 24 February 2017. It took me a long time to find the proof of this and I

do not remotely criticise the Appellants for not having found it, not least because the LAA did not refer to the specific entry which, in my judgement, establishes this as the relevant date.

22. From the Court Log on 24 February 2017 it appears that the Defendant and five others, joined the Hearing at around 10:54. They were all in custody; three (including the Defendant) in HMP Liverpool and three in HMP Preston. The Defendant was identified (as being present, presumably by video link) at 10:56 and the case was called on at 11:06. The Defendant's name appears at numerous times, as either he or his advocate addresses the Court; notably at 11:27 he is arraigned and pleads Not Guilty to Counts 1 and 2 (conspiracy) and his advocate makes an unsuccessful Bail Application at 14:08 after which the Hearing finishes for the Defendant who would presumably have been returned to his cell at HMP Liverpool.

23. I could not fix the Defendant with knowledge of anything that happened prior to 10:54 on 24 February 2017 or after 14:08 on that date. His representatives may have attended for longer, but were present physically between those times. Hence, matters arising during that window should have been known to, and ought to have affected the Defendant and his legal team.

24. Tucked away at 12:03 on 24 February 2017 is the following:

    Prosecution addresses Judge; seeks leave to amend the indictment for the Defendants currently on the link.

    At 12:05 the Court Log shows:

    Judge addresses advocate; as [leave to amend] *does not affect Defendants not here, grants leave.*

    That is a very oblique reference but from the fact that the Defendant was clearly on the link at that time, with his advocate being in Court then as well, it is evidence that leave was granted to amend the indictment to reflect two new charges against him, namely Counts 3 and 4 (32 and 33) supply, at 12:05 on this date. I cannot see the relevant numbers spelled out in the Court Log; the LAA says that this is because it was an administrative step but that is an assumption. However, it is clear that leave to add supply, was granted at 12:05.

25. The Defendant was arraigned and pleaded Not Guilty to Counts 32 and 33 (supply) at 11:47 on 4 April 2017, as shown in the Court Log; these were added to, but did NOT replace Counts 1 and 2 (conspiracy). At 12:23 he indicated that he wished to dismiss his legal team because they had not told him about the new charges and he had not had any papers. After some to and fro the Defendant was severed from the trial at 14:19 and the Hearing finished for him at 14:20 (bearing in mind he was in custody and not in Court). It was not a question of Counts 1 and 2 being severed from Counts 32 and 33, it was a question of this Defendant being severed from the main Trial because (he said) he had had no prior notice of the two new Counts and had dismissed his legal team. It is very clear from the Court Log that Counts 1, 2, 3 and 4 were expected to proceed in relation to him, but not on this date nor alongside other Defendants.

26. With his severance from the multi-Defendant Trial it appears that Counts 32 and 33 on the multi-Defendant indictment may have fallen away but they were in any event Counts 3 and 4 by another name and those Counts went forward on the same indictment as Counts 1 and 2.Not Guilty pleas to Counts 3 and 4 were entered at 15:45; this was over an hour after the Defendant had left the Hearing and at a time when he had dismissed his legal team so that there was likely nobody in Court representing him by that time. Even so, as 15:47 on 4 April 2017, the Defendant had been arraigned and had pleaded Not Guilty to Counts 1 and 2 (conspiracy) and Counts 3 and 4 (32 and 33) supply. All of these were recorded in the Court

Log, and the Defendant and his then advisers were certainly present for Counts 32 and 33.

27. I have seen the Transcript of proceedings on 19 May 2017 during which there is a reference (on page 3 at C/D) to the Defendant not yet having been arraigned on this Trial indictment; the Clerk put TWO Counts to him, described as Count 1 and Count 2, being supply of Class A drugs, heroin [diamorphine] and crack cocaine, to both of which the Defendant pleaded Not Guilty. However, the Court Log for 19 May 2017 also clearly states, *"not sure why* [the Defendant is being arraigned today] *as he already pleaded to Counts on 4 April 2017".*

28. In Master Leonard's case of *R v McCarthy* [SCCO] 168/13 the original indictment, from May 2015, was replaced in November 2015. In this case, the Appellants say that the original (conspiracy) indictment, to which the Defendant had pleaded Not Guilty, was replaced in May 2017 by a new (supply) indictment. However, per the LAA, the Trial in April 2017 was unable to proceed in respect of this Defendant, because he dismissed his legal team, specifying that he did so because they had not notified him of the two new (supply) Counts against him. Based upon the Court Log, the LAA is clearly correct. Even if my reading of events on 24 February 2017 is regarded as tenuous, the dismissal of the Defendant's legal team for not telling him about the two new Counts, would be nonsensical if those Counts had not been preferred by 4 April 2017 at the very latest.

29. In Master Campbell's case of *R v Sharif* [SCCO] 36/17 the issue was whether Counsel could be paid a cracked trial fee on a quashed indictment, in circumstances where the Defendants had gone on to be arraigned under a new indictment. Factually that case is again rather different to this one; in *R v Sharif* the original indictment was quashed because it alleged a conspiracy between husband and wife, which would render it ineffective as a matter of law. Here, there was no quashing of the original indictment, two new Counts were added to it.

30. Although as I have said, the Court Log is not at all clear, in my judgement, the indictment in this case was clearly amended, probably on 24 February 2017 but certainly no later than 4 April 2017. As such, the LAA clearly prevails; I note Master Leonard's comment in *R v McCarthy* as he states (paragraph 27, quoting the LAA's published 2017 Guidance):

> *"A case is defined as proceedings against a single person on a* ***single indictment*** *regardless of the number of Counts. If Counts have been severed so that two or more Counts are to be dealt with separately, or two Defendants are to be dealt with separately, or if two indictments were committed together but dealt with separately, then there are two cases and the representative may claim two fees."* [my emphasis]

31. Here, there was ONE indictment against the Defendant; it started with two Counts of conspiracy but was amended to include two lesser Counts of supply. By the time the Court rose on 4 April 2017, the Defendant had been arraigned upon, and had pleaded Not Guilty to, all four charges; 1 and 2 conspiracy, 3 and 4 (32 and 33) supply. The Appellants' reliance upon the Transcript for 19 May 2017, whilst entirely understandable, does not assist them. I have of course read that extract and I acknowledge that it says what the Appellants say, that the Defendant was being arraigned on Counts 1 and 2, supply, on that date. However, from the surrounding facts and the Court Log that is clearly incorrect.

32. The Appellants knew that the Defendant had dismissed his former legal team before instructing them and a simple question as to why he did that, should have elicited the answer that it was because they did not tell him about the new (supply) charges. Hence the Appellants could and should have known, by the time they took this matter on, that the Defendant had been charged with, and had pleaded Not Guilty to, all four Counts on a single indictment; repeating the extract quoted at paragraph 30 above, these were *proceedings against a single person on a* ***single indictment*** *regardless of the number of Counts*.

33. The Appellants ought also to have known that the quid pro quo for a Guilty plea to the supply charges would be no further action on the conspiracy charges. According to the Court Log, that was first mooted at 12:01 on 28 November 2016 and it was spelled out in Court at 11:11 on 24 February 2017, at a time when the Defendant (via link) and his advocate (in Court) were there to hear. Per the Appellants' own papers, the Defendant was still charged with conspiracy as at 24 February 2017 and they say that only on 19 May 2017 did the Prosecution indicate they would not be pursuing those Counts. That may be so (the previous indication had been that conspiracy would not be pursued IF the Defendant pleaded Guilty to supply) but whereas the Appellants refer to a NEW indictment, for supply, being entered upon 19 May 2017, as shown above it was not a new indictment at all, it was an addendum to the original indictment. It had already been preferred and pleaded to, no later than 4 April 2017; that was before the Appellants were even instructed. They were granted (by way of transfer) Legal Aid on 19 April 2017 and that date is not a technicality; per the Court Log three separate firms attended at the Hearing on that date, all seeking to represent the Defendant.

34. I have considered where this leaves the Appellants given that, as at 19 April 2017, they were facing four Counts, two of conspiracy and two of supply, and were on any reading entitled to prepare the Defendant's defence on conspiracy on the basis that, until he pleaded Guilty to the supply charges, he was still facing conspiracy charges. As the Court Log from 30 and 31 May 2017 makes clear, it was far from a foregone conclusion that he would do so. Matters even got as far as him losing his credit for an early Guilty plea, by waiting for the Jury to be sworn in and going into the second day, before he pleaded Guilty to supply.

35. I refer to the definition of a "Cracked Trial" under paragraph 1(1) of both Schedules 1 and 2, as referred to above. Given my decision upon this being a single "case" this case on indictment did proceed to Trial on May 30 and 31 2017, and the Appellants have been paid for a two-day Trial accordingly. They cannot claim a "Cracked Trial" in respect of the conspiracy charges on the same indictment. Nor can they claim a "Cracked Trial" because there was a separate sentencing Hearing in June 2017: on their own account of events, they knew before the Trial in May that conspiracy would not be pursued and they did not attend the sentencing Hearing with any expectation of conspiracy being dealt with as a live issue.

36. As Master Gordon-Saker observed in *R v Hussain* [2011] Costs LR 689*:*

"It may be thought that the Solicitors have obtained something of a windfall for, in layman's terms, this was really only one case. However, the regulations have to be applied mechanistically…"

Whilst this scenario does not involve a windfall, applying the Regulations mechanistically the question is not whether the Appellant has "earned" payment for one or two indictments but whether, under the 2013 Regulations, two fees are payable. In my view, on the facts in this case, they are not; this was a single (four-Count) indictment, it went to Trial at which the Defendant was found Guilty of supply (having pleaded Guilty thereto on the second day) and the Appellants have been paid for that Trial.

37. It therefore follows that the Appellant Litigators have succeeded on part of their Appeal, as conceded by the LAA in May 2019, and to the relevant extra payment should be added the sum of £100.00 (Appeal fee) and £250.00 (costs). However, they have not succeeded in regard to the only "live" point and neither they nor Appellant Counsel, receive anything on the point in relation to the cracked Trial.

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