SENIOR COURTS
COSTS OFFICE

SCCO Ref: 232/19

Dated: 7 April 2020

ON APPEAL FROM REDETERMINATION

REGINA v KEVILLE

CROWN COURT AT SWINDON

APPEAL PURSUANT TO SCHEDULE 2 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20180047

LEGAL AID AGENCY CASE

DATE OF REASONS: 25 June 2019

DATE OF NOTICE OF APPEAL: 31 August 2019 (received)

APPELLANT: Sukhdev Garcha
Counsel
Priory Court Chambers
DX 23507
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The appeal has been successful. The Appellant is awarded £1,000.00 costs plus £100.00 Appeal fee.

COSTS JUDGE
JENNIFER JAMES

REASONS FOR DECISION

1. I heard this matter as long ago as 8 November 2019 and apologise to the parties for the length of time taken to produce this decision. I note in passing that the Appeal was timely, although the dates on the front sheet may suggest otherwise. The date on the face of the Written Reasons, and the date on which they were sent out, were some weeks apart. That is not intended as a criticism, but the Respondent has rightly taken no issue regarding timing and neither does the Court.

2. The Appellant represented the Defendant Desmond Keville in proceedings before the Swindon Crown Court. He was charged with three counts; possession with intent to supply cocaine (Class A drug), handling stolen goods (counts 1 and 2 both dated 31 August 2017) and concealing/disguising/converting/transferring/removing criminal property (dated 2 October 2015 so rather more historic).

3. To the first count, the Defendant eventually pleaded guilty following the submission of a basis of plea. The Appellant claimed payment for a one-day trial fee whereas the Determining Officer assessed that the correct fee payable was for a cracked trial; PPE had also been in dispute but was resolved between the parties and therefore the trial/cracked trial issue, is all that is before me on this Appeal.

4. On 14 August 2018 the Defendant was arraigned on a 3-count indictment. He did not deny that he had cocaine with intent to supply, but his defence was that he was threatened to supply drugs because he owed money to those who had instructed him to do so. He asserted that calls and texts on his phone proved he had received threats of death or serious harm.

5. The Prosecution denied that such evidence existed but (per the Appellant) after he went through the downloads he uncovered messages, sight of which enabled the Prosecution to accept his Basis of Plea. This led to a custodial sentence of 3 years 2 months, which was said to be less than half of the 7 to 8 years that could have been imposed, had that Basis not been accepted.

Regulations and Legislation

6. This claim is governed in general by the 2013 Criminal Legal Aid (Remuneration) Regulations. The Remuneration Regulations, at Schedule 2, paragraph 1 (1) (a) set out the following definitions:

"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;

7. Schedule 2, Part1, Paragraph 2 (4) of the Remuneration Regulations sets out that:-

Where following a case on indictment a Newton hearing takes place –

a) For the purposes of this Schedule the case will be treated as having gone to trial;

b) the length of the trial will be taken to be the combined length of the main hearing and the Newton hearing.

8. The definition of "Newton hearing" is given as *a hearing at which evidence is heard for the purposes of determining the sentence of a convicted person in accordance with the principles of* ***R v Newton*** 77 Cr. App. R. 13 CA.

9. "Guilty plea" is defined as:

…a case on indictment which—

(a) is disposed of without a trial because the assisted person pleaded guilty to one or more counts; and

(b) is not a cracked trial;

10. The Legal Guidance for Crown Prosecutors, version dated 19 October 2018 makes clear that the question of duress is one for the decider(s) of fact.

Submissions

11. The Respondent (LAA) has set out in its Written Reasons the following, taken from the Court Log for the Hearing (on 14 August 2019):

10:30 Case called on
10:33 Defence Counsel seeks guidance from Court re: Duress directions
10:45 Judge addresses [Counsel] *– Duress Defence – subjected to threats, resulted in dealing drugs. Says threats via phone, some evidence on phones say defence*
10:47 [Counsel] *addresses Judge – requests guidance on Duress defence*
10:47 Judge addresses [Counsel] *– Jury guidance on Duress*
10:51 [Counsel] *addresses Judge – Requests time to discuss with Defendant*
10:52 Case adjourned until 11:30
11:32 [Counsel] *addresses Judge – Thank you for time, Defendant be arraigned Counts 1 and 3*

12. The LAA based its decision upon the fact that (in effect) the above extract from the Court Log does not confirm that a Trial proceeded in a meaningful sense on 14 August 2018. The decision of Master Whalan in *R v Coles* [SCCO] 51/16 turned upon its own facts; in that case it is said that matters of significant evidential import were addressed, which (per the LAA) was not the case here, so that it does not assist the Appellants. Nor does the LAA accept that asking the learned Judge for guidance on Duress, as evidenced by the Court Log, constitutes a substantial matter of case management, as

in *Lord Chancellor v Iain Henery Solicitors* [2011] EWHC 3246. In short, the Determining Officer concluded that a trial had not commenced in any meaningful sense, hence the decision to pay for a cracked trial.

13. The Appellant asserts to the contrary, that the case comes squarely within *Henery* and *Coles* as well as *R v Hoda* [SCCO] 11/15 (see paragraph 17 below) as the learned Judge heard submissions on the Basis of Plea, after which the Basis of Plea was annotated. As such it is said that, at the very least this was a Trial (Newton Hearing) but the Appellants' primary position is that the trial had commenced in a meaningful sense and that therefore the claim should be paid as a one-day Trial.

My deliberations and decision

14. The term 'Trial' is not defined in the Regulations but the following paragraphs (taken from the Crown Court Fee Guidance) provide guidance on determining when trials have begun and when retrials are payable.

    A 'trial' includes all hearings that pertain to the main case i.e. from when the Jury is sworn (or before if legal argument is part of the trial process) and evidence is called or from the date of a preparatory hearing, to the day of the verdict.

    Mentions, bail applications etc between a preparatory hearing and the start of a Jury trial do not count as trial days, only days where a preparatory hearing takes place.

    Whenever a judge has directed that there be a preparatory hearing under Section 29 of the Criminal Procedure and Investigations Act 1996, the first preparatory hearing shall be deemed as the start of the trial.

    Refer to Costs Judge decision: ***R. v. Jones*** *(2000) which held that this, and any subsequent preparatory hearing, will therefore be included in the length of trial calculation irrespective of whether the preparatory hearing(s) is held immediately before the rest of the trial or at an interval of some months before. No other fee should be paid for the attendance at the preparatory hearing(s).*

    Where there is a preparatory hearing but no Jury is sworn thereafter because the client pleads guilty, or the case comes to an end for any reason, the case is either a Cracked Trial where a PTPH or FCMH (at which a 'not guilty' plea is entered) has taken place or a Guilty Plea where a guilty plea has been entered at or before a PTPH or FCMH.

    Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the Determining Officer, as Mitting J did in ***R v Dean Smith****, in the light of the relevant principles explained in the judgment.*

15. Further, it was held in ***Lord Chancellor v. Henery*** (2011) that in deciding whether a trial has begun the question is whether there has been a trial in any meaningful sense; whether the Jury has been sworn is only one of the relevant factors to be considered. The judgment provides the following guiding principles:

96. I would summarise the relevant principles as follows:

(1) Whether or not a Jury has been sworn is not the conclusive factor in determining whether a trial has begun.

*(2) There can be no doubt that a trial has begun if the Jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (**R v Maynard, R v Karra**).*

*(3) A trial will also have begun if the Jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (**Meek and Taylor v Secretary of State for Constitutional Affairs**).*

*(4) A trial will not have begun, even if the Jury has been sworn (and whether or not the defendant has been put in the charge of the Jury) if there has been no trial in a meaningful sense, for example because before the case can be opened the defendant pleads guilty (**R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd** [the present appeal]).*

*(5) A trial will have begun even if no Jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the Jury, the opening of the case, and the leading of evidence (**R v Dean Smith, R v Bullingham, R v Wembo**).*

(6) If, in accordance with modern practice in long cases, a Jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

*(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in **R v Dean Smith**, in the light of the relevant principles explained in this judgment.*

16. To expand on Principle 5, the ***R v Bullingham*** 2011 judgment states:

i. The LSC's contention that as no Jury was sworn, the trial could not have started, is wrong since it is plain from the authorities that the swearing of the Jury is not the conclusive factor in deciding under the scheme when the trial begins.

ii. Even if a Jury is sworn, the trial will not start unless it begins "in a meaningful sense", that is to say otherwise than for the mere convenience of the jurors or so that the legal representatives will be paid a trial fee rather than a cracked trial fee.

iii. If the Jury is sworn and the prosecution opens its case only for the defendant to change his plea, a trial, not a cracked trial fee is payable.

Where (as here), no Jury is sworn, but the judge directs that there will be a voir dire involving substantial argument which may affect the evidence that the prosecution can use in the case, the trial starts when he gives that direction.

17. In relation to whether a Newton hearing took place, ***R v Hoda**,* SCCO ref. 11/15 to which the Appellant refers in his Skeleton Argument, was a case in which it was decided that that if the court had to determine a factual dispute material to sentencing, this would equate to a Newton hearing regardless of whether live evidence were called, and even if the parties' differences were outlined only by way of submissions. Hence there is an issue as to whether what happened in the instant case, constituted a Newton Hearing even if no evidence was heard.

18. The Respondent's position, to the contrary, is that there would have to be "substantial matters of case management", or discussions of "significant evidential import" in order for the matter to meet the test of a trial proceeding in a meaningful sense on 14 August 2018. Whilst noting the authorities cited by the Appellant, per the extracts from the Court Log above referred-to, the Respondent's position is that Counsel requested, and was provided with, information upon the defence of duress which resulted in the Defendant pleading Guilty; that, they say, warrants a fee for a cracked trial. Hence there is a second issue, as to whether the trial had commenced in a meaningful sense.

Discussion and Decision

19. I have to decide this case upon its own facts. Looking at the issue of duress, upon which the Appellant had sought an indication from the learned Judge, was there a dispute between the parties which required judicial intervention, by 14 August 2018? Matters were proceeding towards trial, not merely towards sentencing; the Defendant intended to plead Not Guilty, relying upon the defence of duress, and the Appellant had (through meticulous attention to the mobile phone downloads) found evidence to corroborate what the Defendant had to say on that topic.

20. If evidence had been heard simply for the purpose of determining the sentence handed down to the Defendant, that should have been paid as a Newton Hearing. If not (if, for example, all that was heard was mitigation) that should have been paid as a cracked trial. That is a factual rather than a legal question but the particular issue here is the Respondent's strong line that, based upon the contents of the Court Log and especially the references therein to seeking guidance from the Judge upon duress, this was neither a trial or a Newton Hearing but could only be a cracked trial.

21. In a letter sent to the parties with the Notice of Hearing, I pointed out that the Appellant had been in Criminal Practice for almost 20 years and had presumably argued duress before the instant case, so that the Legal Guidance to Crown Prosecutors (taken from the 19 October 2019 version) should not be news to him. That guidance states:

"Once the Defendant has raised sufficient evidence of duress to allow it to be considered by the Magistrates/District Judge/Jury, the legal burden then falls upon the Prosecution to prove beyond reasonable doubt that the Defendant was not acting under duress: R v Bone, 52 Cr App R 546 CA"

22. At the Hearing, which was attended by the Appellant but not the Respondent, the sequence of events was explained as follows. On the morning of the trial, the Defence Statement was served, setting out the duress relied upon; the telephone downloads contained some evidence that the Defendant had indeed been threatened (despite the Prosecution having denied that there was any such evidence). The learned Judge was asked two questions; firstly, would he leave the question of duress to the Jury, or would he withdraw it, and secondly, if he left duress to the Jury, how would he direct them?

23. The Appellant took the learned Judge (HHJ Pawson) through the relevant messages and the learned Judge indicated that, based upon that evidence, there would be difficulties in meeting the legal test for the defence of duress. At least part of the problem appears to have consisted in the fact that, threatening messages aside, the Defendant had not used the money he earned through criminal activity to pay down the debts in respect of which those threats were made. He disregarded those threats (as the evidence showed) instead spending his money on an extravagant standard of living (the Skeleton Argument for example refers to a raid on his premises finding a room full of designer clothes).

24. As such, on the facts and the evidence pertaining to this particular Defendant, the learned Judge stated that, because of the difficulties in meeting the legal test, his preliminary view was that he would not leave the defence of duress to the Jury. As a result of that very clear indication from the learned Judge (after he had sight of the evidence upon which the Appellant intended to rely) the Appellant spent some time with the Defendant and advised him, whereupon the Basis of Plea was settled, and that was in turn annotated by the learned Judge once the Hearing resumed.

25. On a strict application of the relevant rules, does the fact that the Appellant took this pragmatic approach to a trial which was listed for 5 days and would otherwise have run its course at considerable cost to the public purse, mean that this must be viewed as a cracked trial? In my view the answer (on these facts) is no. It was not a Newton Hearing; it did not involve submissions made by Counsel, concerning a factual dispute material only to sentencing, settled by the Learned Judge (which would bring it within ***Hoda***).

26. The submissions in this case, were in relation to a potential defence (duress) which, had it been left to the Jury might (or might not) have led to an acquittal. I appreciate that evidence was not "heard" as such, because the Appellant asked the learned Judge to review the relevant evidence in the Jury's absence. Nor was it a factual dispute as such; the evidence was there to be seen, on downloads produced by the Prosecution. Their initial denial that there was any evidence of duress was based upon a failure to locate it, rather than an assertion that the evidence in question did not contain threats against the Defendant.

27. However, once the Appellant and/or the Litigators, had located evidence of threats to the Defendant in the telephone downloads, the focus became whether the evidence of threats to the Defendant, viewed in the factual matrix of the case (and especially the Defendant's decision to spend his money on himself rather than on paying down the debts he owed to those threatening him) made out the defence of duress.

28. Looking back to *R v Henery* and *R v Bullingham* on the question of whether, on the facts in this case, the trial had commenced in a meaningful sense, in my view the answer is yes. The Defendant came to Court to plead Not Guilty on grounds of duress; after submissions (albeit brief ones) as to the evidence for that defence, the learned Judge gave an indication of how he thought he would deal with the issue. Thereafter there was a conference between the Appellant and Defendant, the Defence then submitted a Basis of Plea and (again after brief submissions) the learned Judge annotated the Basis of Plea.

29. In my view the facts of this case support a conclusion to the effect that a trial did start in a meaningful sense. The Court did receive submissions and did offer guidance, on matters of case management (as was the case in *R v Watts* SCCO ref 188/15). It was clearly more than just housekeeping or agreeing Jury bundles (as in *R v Wood* SCCO ref 178/15) in which case Master Simons ruled that it was a cracked trial.

30. I agree with the view of Master Rowley in *R v Coles* SCCO ref 51/16 that in answering the question of whether trial has begun in a meaningful sense, the guidance at paragraph 96(7) of *R v Henery* as cited above, permits a broad, pragmatic determination on a case by case basis. Applying that guidance in *R v Coles,* Master Rowley found that discussions between the parties of a significant evidential import, at the direction or with the permission of the trial Judge, over a period during which the Jury would ordinarily have been sworn and the Prosecution case opened, could reasonably sustain a finding that the trial had begun in a meaningful sense.

31. Master Rowley went on to state in *R v Coles* that to conclude otherwise in those circumstances would penalise constructive, pragmatic advocates unfairly, and would encourage less cooperative advocates, content to rely upon direct judicial intervention as a means of establishing later remuneration. Master Rowley expressed the view (with which I respectfully agree) that such an advocate should not be penalised for trying to find a constructive way through, rather than letting matters take their course at much greater expense, time and trouble.

32. In the instant case the facts are, if anything, even stronger; these were not discussions between Defence and Prosecution outside Court, they were submissions to the learned Judge and submissions were made in order to ascertain whether the learned Judge took the view that he would be likely to leave the defence of duress to the Jury (and, had his answer to that question not been "no" what direction he would be likely to give the Jury upon that defence).

33. All of the matters raised by the Appellant before me, were previously raised on paper with the Respondent. In relation to his claim for PPE, the Appellant explained on paper

how his interrogation of the downloads located the evidence of threats to the Defendant. The Court Log timings show that, from 10:33 to 10:45 the Appellant addressed the learned Judge for some 12 minutes; that was enough time to take the learned Judge to the evidence from the downloads, showing that it contained threats to the Defendant. There was then clearly some to and fro between the learned Judge and the Appellant, regarding the defence of duress; the whole proceeding takes from 10:33 to 10:51 which is just 18 minutes. Thereafter, the Appellant conferred with the Defendant until 11:30 when the Basis of Plea was dealt with.

34. The learned Judge had of course only given an indication, he had not prejudged the issue, and the Defendant could (after the Court rose at 10:51) have instructed the Appellant to run the defence of duress and see how it played out. The Appellant, in reality checking the Defendant as to how he would likely fare from such a strategy, saved a considerable amount of public money and the result was a Basis of Plea, being accepted (as annotated) by the Court whereby the Defendant has received something under half the sentence that he might otherwise have expected to receive. I am satisfied, based upon the papers I have seen, and the submissions at the Hearing, that this was not merely a question of mitigation, it was a real issue of guilt or innocence and on the facts in this case I am satisfied that it meets the test for a trial, rather than a cracked trial.

35. For the above reasons, it follows that the Appeal has succeeded. I asked the Appellant for his costs of the Appeal and I note that he claimed costs, train fare, Court fee and "lost earnings" plus VAT totalling £2,158.40. I award the Appellant the Appeal costs of £1,000.00 costs plus £100.00 Appeal fee; VAT is not applicable in these circumstances, and the reasonable and proportionate sum to allow, is as stated.

36. The Litigators (who, as far as I am aware, have not lodged any Appeal) also sought costs, train fare and VAT, totalling £1,450.00. There is no basis for awarding them any costs for Counsel's Appeal and none are allowed.

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