SENIOR COURTS COSTS OFFICE

SCCO Refs:
See below

1 February 2021

ON APPEAL FROM REDETERMINATION

REGINA v SYMONS	**SC-2020-CRI-000149**
REGINA v THOMPSON	**SC-2020-CRI-000147**
REGINA v DELAFONTAINE	**SC-2020-CRI-000148**
REGINA v MCCARTHY	**SC-2020-CRI-000156/163**
REGINA v CLIFFORD	**SC-2020-CRI-000154/160**

CROWN COURT AT NEWPORT

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

CASE NO: T20197442

DATE OF REASONS: VARIOUS

DATE OF NOTICE OF APPEAL: VARIOUS

APPLICANTS: COUNSEL

JONATHAN REES QC (149) (Symons)
CAROLINE REES QC (160) (Clifford)
MARK COTTER QC (156) (McCarthy)
LUCY CROWTHER (147) (Thompson)
SUSAN FERRIER (148) (Delafontaine)
PETER DONNISON (154) (Clifford)
STEPHEN THOMAS (163) (McCarthy)

The appeal has been successful for the reasons set out below. The appropriate additional payments, to which should be added the sum of £1,500 (exclusive of VAT) for costs (payable to Jonathan Rees QC) and the £100 paid on appeal to each applicant, should accordingly be made.

JASON ROWLEY
COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal by seven counsel against the decision of various determining officers as to the correct calculation of the fee payable to counsel under the Advocates Graduated Fee Scheme.

2. Jonathan Rees, Caroline Rees and Mark Cotter, all of Her Majesty's counsel together with Lucy Crowther, Susan Ferrier, Peter Donnison and Stephen Thomas, all challenge the categorisation of the case as being a murder falling within band 1.3 rather than, as they argue, band 1.2.

3. Siobhan Grey QC has not lodged an appeal but I understand from Mr Rees, who represented all counsel at the appeal hearing before me, that the Legal Aid Agency has agreed to treat her in the same way as the seven appellants.

4. Counsel were instructed by the various defendants who, on 22 November 2019, were charged and arraigned on an indictment containing the following single count of murder:

> "Leon Clifford, Ryan Palmer, Leon Colin Symons, Peter Francis McCarthy, ["B"], Lewis John Evans, Raymond Thompson and Nathan Joseph Delafontaine on the 28th day of August 2019 murdered Harry Paul Baker."

5. The original trial took place at the beginning of 2020 but the jury was discharged after three days when Nathan Delafontaine pleaded guilty to a lesser charge. A new jury was sworn in and the trial had been going for approximately three weeks when the Covid 19 outbreak caused the trial to come to an end prematurely. A further date in early 2021 has been earmarked for a third attempt at the trial in this case.

6. Given that the case is still on foot, I have followed Mr Rees' example and anonymised one of the defendants to whom I shall refer simply as 'B'. In fact, B is at the heart of counsel's challenge to the determination of the determining officers because he is under 16 years of age.

7. Counsel for B are not part of this appeal. There is no dispute that their fees would be calculated by reference to band 1.2 on the basis that their client is a child of 16 or under. The appellants here all say that on a correct reading of the banding document as it applies to the graduated fee scheme, they should also be paid by reference to band 1.2.

8. The fee calculation is governed by the Criminal Legal Aid (Remuneration) Regulations 2013 as amended. Regulation 7 of the Criminal Legal Aid (Remuneration) (Amendment) Regulations 2018 amended the Table of Offences in Schedule 1 of the 2013 Regulations by replacing it with the AGFS Banding Document. Paragraphs 1(7) and 1(8) of Schedule 1 now read:

"(7) A reference in this Schedule to a "band" is to the band of the offence concerned set out in Table B in the AGFS Banding Document, as read in conjunction with Table A in that document.

(8) Where the band within which an offence described in Table B in the AGFS Banding Document falls depends on the facts of the case, the band within which the offence falls is to be determined by reference to Table A in that document."

9. Table A of the AGFS Banding Document sets out the way in which cases of murder are to be classified for payment purposes.

Category	Description	Bands
1	Murder / Manslaughter	Band 1.1: Killing of a child (16 years old or under); killing of two or more persons; killing of a police officer, prison officer or equivalent public servant in the course of their duty; killing of a patient in a medical or nursing care context; corporate manslaughter; manslaughter by gross negligence; missing body killing. Band 1.2: Killing done with a firearm; defendant has a previous conviction for murder; body is dismembered (literally); or destroyed by fire or other means by the offender; the defendant is a child (16 or under). Band 1.3: all other cases of murder.

10. The classification of an offence is determined by the nature of that offence and the severity of it. There are 16 categories of offence in the full table. As above, the numbers for each category are set out in the left-hand column. There is then a general description of the nature of each category of offence before the bands are set out in the right-hand column.

11. The crux of Mr Rees' argument is that the entries in the "Bands" column are features of the offence rather than features of the accused. Mr Rees sought to draw a distinction between an "assisted person" as used in the 2013 Regulations and defendant (or offender). The former is a narrower term by definition. Whilst I am sure that Mr Rees is correct on this, it did not seem to me to be material in terms of the issue which I have to decide. The purpose of seeking to use a term other than defendant was presumably to show that the use of the word defendant did not need to apply to the person actually represented by the advocate. But in the absence of the use of the phrase assisted person at any point, it does not seem to me that this distinction casts any light upon the issue.

12. In any event, I do not think all of the entries set out in the banding column can be described as a feature of the offence. As Ms Weisman, who appeared on behalf of the Agency at the appeal hearing pointed out, previous convictions could not be part of the offence but were entirely to do with the defendant.

13. In my view, Ms Weisman was right to say that the issue really boils down to whether or not the phrase "the defendant is a child" really did mean the defendant represented by the advocate and not simply any of the defendants. In Ms Weisman's submission, the trigger for the classification as a band 1.2 offence was the relationship between the child defendant and their legal team.

14. Defined in this way, the central issue is different from other cases which have been decided in respect of the new banding arrangements. They have largely centred on the question of whether or not more than one offence can be taken into consideration when calculating the correct banding, most notably where there is a need for two separate counts of murder to enable a category 1.1 offence to take place. I do not think that the other cases on the new banding tables assist me here.

15. Mr Rees relied upon the case of R v Stables (1999) which, in one of the appendices to the Crown Court Fee Guidance, is reported as follows:

> "A robbery where a defendant or co-defendant was armed with a firearm or the victim thought that they were so armed or where the defendant or co-defendant was in possession of an offensive weapon, made or adapted for causing injury or incapacitating, should be classified as an armed robbery."

16. As Mr Rees pointed out, it did not matter which defendant was armed et cetera, both defendants would face a count under section 8 of the Theft Act 1967 and which, for the purposes of the graduated fee scheme, would be considered to be armed robbery. The relevance of this guidance, notwithstanding its vintage, is the fact that the graduated fee scheme has always made a distinction between armed robbery and simple robbery even though the same statutory provision appears on the indictment in either case. Where there is a dispute between the determining officer and the advocate or litigator, a costs judge has to consider the facts of the case in order to conclude whether the robbery was armed or not for the purposes of calculating the fee.

17. It seems to me that we are in similar territory here. I do not think that much weight can be placed on the fact that the definite article is used in the phrase "the defendant is a child" where, not three lines above, the word defendant is used without either a definite or indefinite article. It appears to be a piece of lax drafting and the reference to a defendant at all is only to be found in category 1 since the drafters of the banding document do not appear to have felt it necessary to include similar matters in the other categories.

18. The Government's response to the consultation paper on the revision to the graduated fee scheme represented by the banding document contains a conclusion to split sexual offences between adult and children offences,

contrary to the original proposal. It seems to me that this recognition of a distinction between such offences contains an echo of the banding in category 1. The killing of a child (1.1) and the situation where a child is alleged to have committed a murder (1.2) are specifically noted as features of the case which attract a greater fee.

19. Whilst the features generally in category 1.1 suggest exacerbations in the nature of the crime committed, in my view the features in category 1.2 are at least partly in respect of the alleged perpetrator of the crime. As with most things in the banding document, there is no rigid line to be drawn.

20. Mr Rees set out at some length the practical and logistical difficulties in dealing with a co-defendant who is a child. In particular the nature of the questions that can be put and the manner in which that occurs clearly impact upon the co-defendants. The very nature of the defence to be put forward would also seem to vary where cutthroat defences and allegations of abuse by an adult co-defendant are said to be common (with the child regarded as being vulnerable even if charged with a crime as serious as murder). Professional obligations on the co-defendants' counsel are clearly onerous as exemplified by the fact that advocates need to have undertaken specific training in order to be able to represent not only a young defendant (or to prosecute them) but also in representing an adult co-defendant. As Lord Thomas, the then Lord Chief Justice, said in the case of R v Grant-Murray and Another [2017] EWCA Crim 1228 at paragraph 226:

> "We also confirm the importance of training for the profession which was made clear at paragraph 80 of the judgment in *R v Rashid (Yahya)* (to which we have referred at paragraph 111 above). We would like to emphasise that it is, of course, generally misconduct to take on a case where an advocate is not competent. It would be difficult to conceive of an advocate being competent to act in a case involving young witnesses or defendants unless the advocate had undertaken specific training. That consequence should help focus the minds of advocates on undertaking such training, whilst the Regulators engage on the process of making such training compulsory."

21. This obligation is reinforced by the Criminal Practice Directions 2015, at Division I, which refers to the court and to advocates considering numerous matters involving vulnerable defendants (the definition of which includes defendants under 18). For example, whether they should be tried with other defendants or separately (3G.1) and, in particular, whether modifications described in the practice direction would enable a joint trial to take place. Those modifications are described at some length and include the questioning of the vulnerable witness (3E). Reference is made to the use of "toolkits" by advocates to assist them in their preparation. Mr Rees provided me with a number of these toolkit documents.

22. For the reasons largely given by Mr Rees, it seems to me that the juvenile nature of one or more defendants will also affect all of the co-defendants in their defence. This is partly the potential nature of the defences which may be run by a child defendant against adult co-defendants but inevitably the running of the trial is going to be affected by needing to modify it to allow the child defendant to take a full part.

23. Where, as here, all of the defendants are charged with the same single offence, there seems to me to be no reason in principle why this feature should not be recognised when categorising the offence for the purposes of the graduated fee. The facts of the case must include features of the defendants in my view.

24. For this reason, I consider that the circumstances of this case mean that it should be placed in band 1.2 for the purposes of calculating the graduated fee.

25. Accordingly these appeals succeed and the appellants are entitled to costs in respect of the appeal in addition to the return of the court fee that each appellant has paid. Mr Rees appeared on behalf of all the appellants and he has produced a fee note which I presume is intended to cover the costs of all the appellants. I do not consider that the sum claimed is reasonable for a single appellant to pursue this appeal. Divided between all seven appellants it would not be unreasonable but as the arguments were general in nature rather than defendant specific, I do not think I should allow it and instead have allowed £1,500 to reflect the work done and the weight of the case overall.

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