SENIOR COURTS
COSTS OFFICE

SCCO Ref: 132/19

Dated: 11 November 2019

APPEAL FROM REDETERMINATION

REGINA v DANIA

THE CROWN COURT IN MAIDSTONE

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

CASE NO: T20177363

LEGAL AID AGENCY CASE

DATE OF REASONS: 19 January 2019
DATE OF NOTICE OF APPEAL: 18 February 2019

APPLICANTS/APPELLANTS : Litigators, Bond Joseph Solicitors

This appeal is successful in part for the reasons set out below. Further the Appellants should be paid costs of £500 (to include the fee for the notice of appeal).

SIMON BROWN
COSTS JUDGE

REASONS FOR DECISION

1. The issue arising in this appeal is as to correct assessment of the number of pages of prosecution evidence ('PPE') when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known, and explained in more detailed in the decision of Holroyde J (as then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE (subject to a cap of 10,000 pages), and the length of the trial. The particular dispute in this case concerns the extent to which telephone evidence served in electronic form should count toward the PPE.

2. At the hearing on 11 October 2019 the Appellants were represented by Mr. Edwards, solicitor. The Legal Aid Authority ('the LAA') were represented by Ms. Weisman, an employed solicitor.

3. The Defendant had the benefit of a representation order dated 22 January 2018. He was charged, alongside four co-Defendants, with violent disorder, murder and, in the alternative, manslaughter following an incident on 7 October 2017 in which a young boy was fatally stabbed in the Gillingham area. The attack came as part of what is described as a series of escalating revenge attacks between groups of teenagers in the Medway area of Kent. The Defendants appear to have been walking down a street when they spotted the victim in a car. All five Defendants attacked the car in an effort to force him outside. The victim escaped the car and ran to his best friend's home when he was knocked to the ground and attacked in the front garden where he was stabbed five times.

4. The main issue at trial (which lasted 41 days) was who had done what and whether each Defendant had participated in the attack and whether each Defendant intended to cause serious harm to the victim. There were cutthroat Defences as between the Defendants. It was the Crown's case that one of the Defendants, identified in my papers as Maibvisira, was essentially the ringleader of the group. In particular, a number of eye witnesses to the attack indicated that one individual remained at the scene attacking the victim after the others had fled or were in the process of fleeing the scene. There was evidence to suggest that the lone attacker was Maibvisira, but he refuted this. Defendants Maibvisira and Taylor TR ('TR') both asserted that it was the other who had been the individual that continued to attack the victim after the others had left the scene.

7 During proceedings, a disc containing the download of TR's mobile telephone (RN/37) was served as evidence in the case. The Defence for Maibvisira sought to rely on a number of videos downloaded from the telephone demonstrating TR's possession of, and interest in, knives as part of their bad character application in furtherance of the Defendant's instructions that TR had been the last individual to cease his attack on the victim.

8 Following trial, all five Defendants were convicted of murder. Maibvisira received a custodial sentence with a minimum term of 24 years the remaining Defendants, including the Defendant Dania (represented by the Appellants) received a custodial sentence with a minimum term of 16 years

9 In the course of the investigations the Defendants' mobile telephones were seized and downloads of their contents were served. There is no dispute that at least some of the telephone evidence was central to the case against the Defendants and it is common ground that the communications data on all the telephones should count towards the PPE. The LAA have allowed 8,057 pages of PPE consisting of 2,495 pages of paper evidence and 5,562 pages taken from the telephone downloads.

10 There is one disputed file or section of the evidence which was taken from the telephone of one of the co-Defendants, TR (TR). The section consists of 4,830 pages of pictures. Some of them are pixelated so that they are not intelligible and Mr. Edwards concedes that they should not count toward the PPE, leaving some 2,696 pages as the number claimed. To take them to the maximum number of PPE the Appellants only require an allowance of a further 1,942 pages of electronic evidence. No claim is made on appeal for any of the audio or video material on the phone or for special preparation on top of the 10,000 pages of PPE.

11 The Determining Officer was not satisfied that the pictures in the section in question, were relevant and (as he put it) pivotal to the Defendant's case and he said that the LAA were unable to consider the claim further. The Officer indicated that consideration of this evidence should be compensated by way of a special preparation fee.

12 Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all —*
> *(a) witness statements;*
> *(b) documentary and pictorial exhibits;*
> *(c) records of interviews with the assisted person; and*
> *(d) records of interviews with other Defendants,*
>
> *which form part of the served prosecution documents or which are included in any notice of additional evidence.*

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which —

(a) has been served by the prosecution in electronic form; and
(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

13 There is no dispute that the material in question is to be treated as served. It is accepted by the Appellants, and is in any event clear from the terms of Regulation 1 (5) is not of itself enough for the material to count as PPE that it be served. It is clear that downloaded material need not be regarded as one integral whole, as a witness statement would be and that when exercising discretion under paragraph 1(5) a qualitative assessment of the material is required having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017) and I have considered them in this context.

14 In his judgment Holroyde J, when dealing with the issue as to whether served material should count as PPE, said this:

"If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.

If an exhibit is served in electronic form but the Determining Officer or Costs Judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by Paragraph 20 of Schedule 2".

15 The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, provides as follows:

"In relation to documentary or pictorial exhibits served in electronic form (i.e. those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –

"*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the Defendant*."

16 At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

"*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the Defendant's case*.

Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the Defendant's case, e.g. it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the Defendant's involvement.

Raw phone data where the case is a conspiracy and the electronic evidence relates to the Defendant and co-conspirators with whom the Defendant had direct contact."

17 In his decision Holroyde J also cited, with apparent approval, part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi [2014]* 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are at paragraph 11:

"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper. So, in a case where, for example, thousands of pages of raw telephone data have been served and the task of the Defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count." [my underlining]

18 Even if the material is not appropriately to be regarded as PPE then it may be remunerated by a special preparation fee, pursuant to Para. 20 Schedule 2 of the 2013 Regulations which provides, so far as is relevant, as follows:

Fees for special preparation

(1) This paragraph applies in any case on indictment in the Crown Court—

(a) where a documentary or pictorial exhibit is served by the prosecution in electronic form and— (i) the exhibit has never existed in paper form; and (ii) the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence; or

…

(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the fee payable under Part 2.

(3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable—

(a) where sub-paragraph (1)(a) applies, to view the prosecution evidence; and

(4) A litigator claiming a special preparation fee must supply such information and documents as may be required by the appropriate officer in support of the claim.

(5) In determining a claim under this paragraph, the appropriate officer must take into account all the relevant circumstances of the case.

19 Such a fee would be based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence. The LAA say that much of the material in this case, which I consider has been served, should be compensated by such a fee. I take the following passage from *R v Sana* [2016} 6 Cost LR 1143:

"*A line has to be drawn as to what evidence can be considered as PPE and what evidence we considered the subject of a special preparation claim. Each case depends on its own facts. The regulations do not state that every piece of electronically served evidence, whether relevant or not should be remunerated as PPE. Quite the contrary, as electronically served exhibits can only be remunerated as PPE if the Determining Officer side is that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances*."

20. Mr Edwards argued that a point of law arose in this case as to the extent to which sections of material should be allowed. He submitted that in exercising the discretion under Regulation 1 (5) as to electronic page count, where some but not all of the images are on examination relevant, once a certain point was reached the entirety should be allowed; his submission was that such a point is reached when the proportion is more than trivial, he put it at 5-10%. He referred me in particular to a decision of Master Rowley in *R v Mooney* (SCCO Ref, 99/18). I do not think there is any basis to construe the statutory words so as to impose such a constraint on the Determining Officer and the Costs Judge nor do I consider that this decision supports the proposition advanced. The relevant provisions require the Determining Officer s[pany other relevant circumstances. If the Appellants were correct no regard need be

had to the nature of 95-90% of the documents in any given section if 5-10% were relevant (see the decision of the Senior Costs Judge, Master Gordon-Saker in *R v Shepherd* 124/18 to this effect); indeed it might be said that in order to achieve some reasonable reciprocity in the approach in cases where the number of relevant pages were below 5-10% then none of the file should count as PPE- albeit it might be compensated by way of special preparation. As to the decision in *R v Mooney*, I do not consider it supports the proposition that has been set out above; I have set out my views in relation to the points raised detail in an decision refusing to certify a similar proposition an earlier decision *R v Mucktar Khan* SCCO Ref: 2/18 which I shall not repeat here. In my judgment, Master Rowley was concerned with the application of hindsight in the context of a dispute as to whether all of the 427 documents in a category of documents should count towards the PPE where 425 had been established as relevant; that is very different to the situation here. To my mind the guidance in *SVS* and the provisions are clear and no refinement of the sort proposed is appropriate.

21. Turning back then to the facts of this case, it is clear that the relevant section of images contained a substantial amount of obviously irrelevant material. This includes pop-up banners and adverts, Internet jokes - memes, images of women, shots of chat conversations. I agree that it is also clear that the majority of images in this section could readily have been discounted as wholly irrelevant on an initial scan, as Mr Rimer (employed barrister) for the LAA put it in his skeleton argument. However there are also quite a number of photographs which were of relevance in the proceedings, in particular as to the issue of the character of the co-Defendant TR, showing either gang affiliation or an interest in gang affiliation. I have looked through the description of the photographs in the Notes provided by the Appellants. Some of the pictures show an interest in knives and weapons; there are some photographs of drugs, large sums of money and photographs of people wearing hoods and masks.

22. Ms Weisman argued that the material, being the contents of another co-Defendant's phone, was not of sufficient direct relevance to the case against this Defendant, indeed not of sufficient centrality to the case at all. If it were relevant, per the LAA, it was only indirectly so; the direct evidence was the witness evidence and other such evidence as to what occurred on the day in question. It seems to me that notwithstanding it related directly to a co-Defendant, nevertheless because of the cutthroat nature of the defences as between the Defendants and the nature of the photographs, showing an interest in gang culture, this bad character evidence would have played a sufficiently important role in the case against the Defendant Dania that at least some of the images required close consideration. There were images of the co-Defendants and other male figures making gestures as if holding guns and holding their hands in the shape of guns and it seems clear that evidence that one or more of the group were affiliated to a gang would have an effect on the case against the others.

23. Mr. Edwards stated that this his clients had counted some 263 pages of relevant photographs if all the photographs of TR alone were excluded, 306 if all such photographs are included. A USB stick was provided to me after the hearing and I have considered the material.

24. The list of photographs said to be relevant included photographs simply showing the co-accused TR. I am not satisfied that all these photographs. Including in particular those of TR alone, would themselves have required close consideration and think some significant discount is appropriate to the photographs listed as relevant. I understand that Mr Edwards accepted that there were some photographs that did not prove to be relevant but might have required close consideration: I agree however that even though some of the photographs did not prove to be relevant nevertheless they would have required some close consideration and ought to be included in the count.

25. It is inevitable, as both parties appeared to agree, that if I were against the Appellants on the issue of principle raised, some degree of sensible approximation is necessary. It cannot have been the intention of Parliament that there be a line by line assessment as to the relevance of each page of disputed electronic evidence. Having looked at the material and cross referred it to the schedules produced by the Appellants I consider that a further 280 pages (as PPE) is an appropriate allowance.

26. This allowance does not preclude a claim by way of a special preparation fee for the balance of the identified material but I will leave it for the parties to agree, in the first instance, a timetable for the submission of such a claim.

27. The Appellants have been successful in adding to the PPE allowance. However they lost on the point of principle raised and have recovered very substantially less than sought. This justifies some discount from the costs claimed. Further, notwithstanding the evident assistance of Mr. Edwards, I think the costs are substantially too high. Indeed stripped of the point of principle the issues arising were straightforward and to my mind the time taken in preparation for this hearing should have been modest. I allow a contribution to the Appellants' costs only in the above sum (to include the appeal notice fee).

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