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Case No: T20217366

SCCO Reference: SC-2024-CRI-000030

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 16 July 2024

Before:

COSTS JUDGE LEONARD

R
v
TURNER

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Clarke Kiernan LLP (Solicitors)**

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

The appropriate additional payment, to which should be added the sum of £750 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013, under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2. The Representation Order was made on 9 December 2021 and the 2013 Regulations apply as in effect on that date.

2. A fee is due to the Appellant for each case undertaken by the Appellant. Paragraph 1 of Schedule 2 defines a case, for present purposes, as:

> "… proceedings in the Crown Court against any one assisted person… on one or more counts of a single indictment…"

3. The fee due for each case is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"). The issue on this appeal is the appropriate PPE count.

4. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, subsections (2)-(5), which explain how, for payment purposes, the number of pages of PPE is to be calculated:

> "(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of Crown 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 committal or served Crown documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.
>
> (5) A documentary or pictorial exhibit which—
>
> (a) has been served by the Crown in electronic form; and
>
> (b) has never existed in paper form,
>
> is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant

circumstances."

5. The PPE count is subject to a cap, which for present purposes is 10,000 pages.

The Background

6. The Appellant represented Nathan Turner ("the Defendant") in proceedings before the Crown Court at Maidstone on two separate indictments.

7. The first indictment against the Defendant (along with seven co-defendants) incorporated one count of murder, one of manslaughter and one of conspiracy to rob. All three counts related to the murder of one Xhovan Pepaj at a "cannabis factory" in Tunbridge Wells, Kent, on 4 December 2021. I will refer to the first indictment as "the murder indictment", and to the case on that indictment as "the murder case".

8. The second indictment against the Defendant, which concerned him alone, incorporated one count of possession of 334 grammes of cannabis with intent to supply. I will refer to the second indictment as "the drug indictment", and to the case on that indictment as "the drug case". The drug indictment followed the Defendant's arrest on 5 December 2021, at an address in Essex, on the murder charge. At the time of his arrest the Defendant volunteered that he was in possession of a bag of cannabis, which was valued at approximately £7,500.

9. It would appear that the murder indictment and the drug indictment date from the same time, but were never joined. In fact the Crown seems, when appearing before the court, to have overlooked the drug indictment. The Defendant pleaded not guilty to the murder, manslaughter and conspiracy counts on 4 February 2022, but it was not until 14 September 2023, on the conclusion of his trial on the murder indictment, that the Crown realised that the Defendant had never been arraigned on the drugs indictment. He was then arraigned on the drug indictment, to which he pleaded guilty on 30 October 2023.

10. In the run up to the murder trial, the murder case and the drug case seem to have been treated by the Crown and by the court as if they were a single case: in other words, as if the murder and drug indictments had been joined. In consequence, on the Crown Court's Digital Case System ("DCS") there is one case record incorporating one Legal Aid Agency report, listing a large number of served documents pertinent to the murder case, but also at least three documents which can be identified as relating to the drug case: a witness statement of PC Heather, exhibiting the bag of cannabis found in the possession of the Defendant on 5 December 2021, a statement of PC Austin, which would appear to have referred to the bag of cannabis, and a statement from a drug expert named "Merrit".

The Appellant's Claim

11. The Appellant submitted a claim for payment for the murder case, based upon a PPE count of 10,000. The claim was based upon the fact that the Crown had served 836 pages of statements and 6,349 pages of exhibits (which fall within paragraph 1(3) of Schedule 2 and which, for ease of reference, I shall refer to as "paper PPE") and, in

addition, electronic evidence ("EPPE", falling within paragraph 1(4) of Schedule 2) which brought the PPE count to in excess of 10,000. The Determining Officer accepted the claim and paid accordingly.

12. The Appellant's claim for payment in for the drug case was also based upon a PPE count of 10,000. The Determining Officer accepted that payment was due for the drug case as a separate case, as defined by Schedule 2 to the 2013 regulations, but assessed PPE in the drug case at zero. In his written reasons he explained his reasoning:

> "The court record confirms that there was a separate indictment for the drugs offence and so the PPE relating to the drugs offence will need to be separated from the PPE relating to the murder and robbery offences.
>
> Before the same page count that has been authorised on the other indictment claim can be authorised, we asked the sols to provide the LAA report for this indictment, the drugs offences. As on occasions, the LAA report will split the PPE evidence for the individual indictment. If the LAA report has split pages relating to each indictment, then only the split PPE can be paid. If the LAA report makes no mention of the pages being for one indictment or the other, then 10,000 page can be authorised. The LAA Report provided is for the murder trial, thus refused.
>
> The issue in this case is that the solicitors have claimed the full LAA Report & EPPE for both indictments, however the page claimed have already been authorised for the murder and robbery offences. There is no sufficient justification provided as to why the duplicates pages and data should be considered as PPE for the drugs offences…
>
> … The basic position under the Regulations is that electronically served evidence is not included in the number of pages of prosecution evidence. However, the Determining Officer can decide to include this evidence taking into account the nature of the document and any other relevant circumstances… the duplication of data was a factor that the determining officers reasonably gave considerable weight to in their assessment of both the litigator and advocate claims.
>
> The Respondent submits that it is uncontroversial that duplicates should not be included in the PPE…"

The Appellant's Submissions

13. Mr Wells for the Appellant points out that the Determining Officer has accepted that there were two distinct indictments against the Defendant and therefore two cases, each of which entitles the Appellant to a separate fee.

14. The Appellant does not now argue that any of the EPPE should count towards the PPE total for the drug indictment, but does seek payment on a paper PPE count of 7,185, the number of served pages of witness statements and exhibits. A PPE count of zero cannot, says the Appellant, be right, because at least some of the served evidence related to the drug indictment. There is no provision in the Regulations for splitting the PPE

in the way contended for by the Determining Officer: the Graduated fee scheme was designed to allow for "swings and roundabouts", not for that kind of forensic analysis.

15. In fact, evidence served in relation to the murder indictment will also, says the Appellant, have had a bearing upon the drug indictment. On sentencing in the drug indictment the court will have treated as relevant, in accordance with the sentencing guidelines, the value of the cannabis in the Defendant's possession; whether there was any link to the larger cannabis drugs operation/factory in Kent, indicative of the Defendant being a member of an organised crime gang; alternatively, whether he was acting alone as a drug dealer; and whether the evidence in relation to the murder indictment indicated that the Defendant had a significant, higher or lesser role.

The Lord Chancellor's Submissions

16. Ms Quarshie for the Lord Chancellor accepts that, for the purposes of the 2013 Regulations, there have been two cases against the Defendant in respect of which the Appellant is entitled to two fees. She says however that the Appellant's case appears to be that the same 7,185 pages of paper PPE was served in both cases. It is not clear why the Crown would serve or rely upon evidence from a murder and manslaughter case in a drug case. It is for the Appellant to demonstrate what evidence was served in the drug case.

17. If 7,185 pages of paper PPE was served in the drug case, then it is the Lord Chancellor's position that it should not, in any event, be included in the PPE count for the purposes of calculating the fee due to the Appellant for that case. To do so would lead to an absurdity, because it would mean the Appellant is paid for reviewing evidence in the drug case which they had already been paid to review in the murder case.

18. That absurd outcome, says Ms Quarshie, would entitle the Appellant to a graduated fee of £17,361.84, as opposed to the Determining Officer's assessment of £767.44 based on a PPE count of zero.

19. I am referred to a number of authorities on the legitimacy of construing legislation to avoid an absurd outcome, including *Project Blue Ltd v Revenue and Customs Commissioners* [2018] UKSC 30*; R (Edison First Power) v Central Valuation Officer* [2003] 4 All ER 209 and *Re British Concrete Pipe Association's Agreement* [1983] ICR 215 at 217. *more restricted meaning."*

20. In practice, Costs Judges have, says Ms Quarshie, applied a purposive interpretation to the operation of the Graduated Fee Scheme. In *R v. Thomas* [2022] EWHC 2842 (SCCO) and a number of similar cases, they have recognised that under the DCS (which does not lend itself to handwritten or typed amendments) an indictment can only be amended by staying or quashing it and replacing it with another. It does not follow that there has been more than one case, and in consequence an entitlement to more than one Graduated fee: the reality is that there has only ever been one indictment.

Conclusions

21. I am unable to accept that I should reinterpret the 2013 Regulations in order to avoid

what the Lord Chancellor characterises as an absurd result in this particular case. Having accepted that the Appellant is entitled to two fees for two cases, the Lord Chancellor does not offer any viable alternative interpretation that could justify formulating the fee payable for the drug indictment on a different basis than the fee payable for the murder indictment. Nor, as far as I can see, could such an interpretation exist. What I am really being asked to do is to disapply the 2013 Regulations in order to prevent the Appellant from receiving what the Senior Costs Judge referred to in *R. v Hussain* [2011] 4 Costs L.R. 689 as (from a lay point of view) "something of a windfall".

22. This case is not, in my view, comparable to *R v. Thomas* and similar decisions where a sensible interpretation of the 2013 Regulations was required if they were not to be rendered unworkable, and where the conclusion reached was not at odds with the wording of the 2013 Regulations.

23. Costs Judges have, over the years, had to reject many appeals based upon the contention that the 2013 Regulations (and the regulations that preceded them) should be reinterpreted where they do not adequately reward work done. Their answer has consistently been that the court does not have the power to rewrite the 2013 Regulations, which must be applied mechanistically. It follows that in some circumstances litigators or advocates may be more generously rewarded for their work than in others (the "swings and roundabouts" effect mentioned by the Appellant). This case is no different.

24. As Lord Millet made clear in *R (Edison First Power) v Central Valuation Officer*, the extent to which it could be right to depart from a straightforward, literal construction of the 2013 Regulations depends on the degree to which that construction produces an unreasonable result. Normally, litigators in the position of the Appellant would be entitled only to one fee. This is an exceptional case, brought about (it would seem) by poor case management on the part of the Crown. Such exceptional cases do not justify an attempt to reinterpret the 2013 Regulations.

25. Given that the 2013 Regulations do not lend themselves to reinterpretation in the way contended for by the Lord Chancellor, it seems to me that the Determining Officer's approach was wrong in principle. It cannot be right to determine the PPE count for the drug case at zero when witness statements and exhibits have, in that case, demonstrably been served on paper by the prosecution.

26. Whether those documents had already been included in the PPE count for the murder indictment is beside the point. The 2013 regulations do not permit paper evidence served in a given case to be excluded from the PPE count on the basis that it duplicates paper evidence served in another case. In any event the PPE figure for the murder case was capped. On the evidence I have seen it is unlikely that the Appellant derived any benefit from the inclusion, in the murder case PPE count, of documents relating to the drug case.

27. The question then is: what is the correct PPE count for the drugs case? In my view the Appellant has done everything necessary to demonstrate that.

28. As I have said, the Crown overlooked the drug indictment until the end of the murder

trial. In the normal course one might have expected an application to be made at an early stage for the joinder of the murder and drug indictments and for the Defendant then to have been arraigned on the murder, manslaughter, conspiracy and drugs counts at the same time. Alternatively the Crown could at least have distinguished between the evidence served in the drug case and the evidence served in the murder case.

29. It would appear that the Crown did neither, but proceeded as if the murder indictment and the drug indictment had been joined when they had not. Accordingly no distinction was drawn between the evidence served in the murder case and the evidence served in the drug case.

30. Given that the same paper evidence was served, without any distinction being made, in both cases, then applying the 2013 regulations, the paper PPE count for the murder case and for the drug case must be the same.

31. I do not mean that all of the served paper PPE was relevant to the drug case. It seems fairly obvious (although, on the available information, it is impossible to be precise) that most of it was not. Nor do I find persuasive the Appellant's attempts to link the evidence in support of the murder case with the evidence to be considered by the court for sentencing purposes in the drug case. Relevance, however, is not to the point for a paper PPE count. On the wording of the 2013 Regulations, the only question is whether 7,185 pages of paper PPE was served, and plainly it was.

32. The Appellant is however right to abandon the claim for EPPE, which would only be included within the PPE count for the drug case if, in all the circumstances, that would be appropriate. In that context it must be correct, as the Determining Officer did, to take account of the duplication factor (not to mention the fact that the EPPE would have had little or no bearing on the drug case) so as to exclude it from the PPE count.

33. For those reasons, this appeal succeeds.

Costs

34. The Appellant has claimed costs of £1,500 for this appeal. That figure seems to me to high, bearing in mind that the first hearing of this appeal had to be adjourned as a result of the Appellant's wishing to rely upon documentary evidence that it had not supplied either to the court or the Respondent. Nor is this a particularly complicated appeal. Given that costs awarded for successful appeals under the 2013 Regulations are normally based on a reasonable expenditure of time at the rates payable for special preparation, I can allow £750.