Neutral Citation No.[2022] EWHC 1538 (SCCO)

Case No: T20207228

SCCO Reference: SC-2021-CRI-000152

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30 May 2022

Before:

COSTS JUDGE LEONARD

REGINA
v
WILLIAMSON

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

Appellant: **(Carson Kaye, Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal is governed by the Graduated Fee provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 9 September 2020, and the 2013 Regulations apply as in force at that date.

2. The issue on this appeal, as with the Appellant solicitors' appeal in *R v Koroma* (the two appeals having been heard together) is whether the Appellant solicitors, who represented Neil Williamson ("the Defendant") in the Crown Court at Kingston, should be paid the Graduated Fee appropriate to a trial that has started, or to a cracked trial. The Appellant has been paid for a cracked trial, but maintains that a trial fee is payable.

3. The matters in issue on this appeal are similar to those in *R v Koroma*, and a number of my conclusions are common to both cases. For ease of reference, I have where appropriate repeated my observations and conclusions in each case to avoid the necessity of reading both judgments together.

4. Schedule 2 to the 2013 Regulations governs payment to Litigators under the Graduated Fee Scheme. Paragraph 1(1) of Schedule 2 provides definitions that are pertinent for the purposes of this appeal:

> "…cracked trial" means a case on indictment in which—
>
> (a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea 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 first hearing at which he or she entered a plea; or
> >
> > (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which he or she entered a plea,
>
> declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea…"

5. "Trial" is not defined in the 2013 regulations, and in many cases (including this one) the question of whether a trial fee or a cracked trial fee is payable will depend on whether a trial had begun in a "meaningful sense", the test identified by Mr Justice Spencer in *Lord Chancellor v. Henery* [2011] EWHC 3246 (QB).

6. Whether that is so will depend upon the facts of the case. At paragraph 96 of his judgment Spencer J set out the principles by reference to which a court can determine the question:

> "(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…
> (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…
> (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…
> (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…
> (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… in the light of the relevant principles explained in this judgment."

The Background

7. The Defendant faced six counts on an indictment. They were Conspiracy to supply class A drugs (Count 1); Conspiracy to supply class B drugs (Count 2); Possession of a controlled drug of class B with intent (Count 10); Possession of criminal property (Count 11); Conspiracy to supply class A drugs (Count 13); and Conspiracy to commit grievous bodily harm (Count 14).

8. The Defendant initially pleaded not guilty to all counts and a trial was fixed along with a co-defendant, Joseph Gisby, for 8 November 2021 before HHJ Coello. On that date, all parties were represented and the case was called on at 10.31 am. Joseph Gisby was however unable to attend. A member or members of his family had tested positive for Covid-19 and he was awaiting PCR test results. The Prosecution also informed the court that the main Prosecution witness had contracted Covid-19 and would not be able to attend court until 15 November.

9. A jury was selected but not sworn or put in charge of the case. It would appear from the court log that at 11:46 am the case was adjourned to the following morning, but it would appear that not long afterwards the Prosecution offered the Defendant a deal that was accepted. The agreement was that the Defendant would plead guilty to Counts 1 and 11. Counts 2, 10, 13 and 14 would be left to lie on the file. It was agreed that the quantity of cocaine with which the Defendant was involved in respect of Count 1 was no more than 2 kilograms; in respect of the offending, he was a customer of the wider conspiracy rather than a controlling member of it, so that he had a "significant role " within the Sentencing Guidelines; and that £3,000 recovered from him emanated from his conduct in respect of Count 1 and not from any separate offending.

10. The case resumed at 2:55 pm, and by 3 pm the Defendant had as agreed pleaded guilty to counts 1 and 11, the remaining counts to lie on file.

11. The Appellant argues that substantial matters of case management were addressed after the jury was selected. Following the adjournment at 11:46 am, the Defence was engaged in detailed discussions with the prosecution about the state of the evidence, the way the prosecution case was put and matters that went far beyond ordinary housekeeping. The outcome was that the Defendant escape the possibility of being convicted on charges, such as the Previous Bodily Harm conspiracy, which involved very serious criminality.

12. As in *R v Koroma,* the Appellant relies upon *R v Coles* (SCCO 51/16), *R v Keville* (SCCO 232/19) and *R v Atlass-Gomez* (SCCO 198/19).

13. The Appellant also relies upon the fact that the court log records the trial as effective, both at 12:40 am on 8 November and again at 10:12 am on 10 November.

14. In my judgment in *R v Koroma* I repeated the summary of events given by Spencer J at paragraphs 10-13 of his judgment in *Lord Chancellor v Henery*:

> On the day of trial a grade C fee-earner from the solicitors, a paralegal, attended court to instruct counsel… at 3.05pm the case was called on. The judge confirmed that it was an effective trial. The judge was informed that a prosecution witness (a police officer) was not available, but defence counsel confirmed that he was not required. There was some discussion between counsel and the judge about the lack of defence statements for the other two defendants, and the judge enquired if and when bad character applications were to be made…
>
> At 3.17pm a jury was empanelled and the jurors were sworn. The court log records that the jury was sent home to return at 12 noon the following day, "they are NOT put in charge today, to be put in charge tomorrow". The case was adjourned until 11am the following day…
>
> Next day… the case was called on at 11am and counsel requested more time, which the judge allowed. At 12.40 pm the prosecution applied to add a second count to the indictment, against each defendant, alleging affray.

> The application was granted. At 12.51 pm the judge informed counsel that he would discharge the jury, the court log again recording that the jury had not been "put in charge." No doubt the judge was concerned that the jury had already been waiting for nearly an hour. Once the jury had been discharged, all three defendants pleaded guilty. Their cases were adjourned for sentence…"

15. On those facts, Spencer J found that there had been no trial in any meaningful sense. As in *R v Koroma*, the question is whether, applying the principles he set out, a different conclusion should be reached.

16. Before I explain my conclusions in this case, I should mention one argument raised by Mr Rimer for the Lord Chancellor. It is an argument that I previously addressed and rejected, at paragraph 24 of my judgment in *R v S Mohammed* (SCCO SC-2021-CRI-000090) in these terms:

> "… I do need to address Mr Rimer's argument to the effect that paragraph 96(6) of Lord Chancellor v Henery can apply only to long trials. That is to take Spencer J's reference to the context in which substantial case management commonly takes place before the jury is sworn (a long trial) and turns it into a prerequisite for deciding whether, as a matter of fact, the court has dealt with substantial matters of case management. To my mind that cannot be right. Logic dictates that whether a trial has started will turn upon what has happened at the point when it is said to have started, not by its subsequent length."

17. Perhaps Mr Rimer overlooked the fact that I had already considered that argument and found it to have no merit. On this occasion, he argued that at paragraph 96(6) of his judgment Spencer J was offering a wider guidance which would be of value in relation to the length of trials, rather than on the question of whether there had been a trial or it had cracked. Again, I do not believe that that can be right. Spencer J's guidance was offered specifically with the view to resolving that question.

18. Nonetheless, on the available evidence, I do not believe that the facts of this case justify the conclusion that a trial had begun in a meaningful sense.

19. Mr Rimer argued that the "substantial case management" criterion will only be met if the court itself engages in substantial matters of case management. It seems to me that that must be what Spencer J had in mind. Even so, I do not rule out the proposition that "substantial case management" can be undertaken through discussions between Prosecution and Defence and not necessarily through active intervention by the trial Judge. Proper regard must however be had to the nature of the discussions.

20. "Substantial case management" (*R v Wood* (SCCO 178/15)) will involve significant issues concerning the conduct of the trial which, if not agreed, would fall to be determined by a ruling from the trial judge. Such matters appear to have been discussed and agreed in *R v Coles*.

21. Mr Kaye, representing the Appellant on the hearing of this appeal, was present when the negotiations between Prosecution and Defence took place, so I can accept what he

says about the nature of the discussions that took place. They do not however seem to me to have involved matters of "substantial case management." Critiquing the Prosecution case in the course of negotiating a basis of plea does not meet that description.

22. The fact that the court log records the trial as effective does not seem to me to be decisive, or even particularly significant. The two entries are relied upon by the Appellant form part of a sequence of court log entries regarding the effectiveness of the trial which do not seem to me to be consistent. In *Lord Chancellor v Henery* the trial judge himself had declared the trial to be effective, but that did not prevent Spencer J from concluding that a trial had not begun in a meaningful sense. I can attach no real weight in this case to the court log entries recording an effective trial.

23. For those reasons, this appeal fails.