Neutral Citation No. [2022] EWHC 1539 (SCCO)

Case No: T20217026

SCCO Reference: SC-2022-CRI-000007

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 31 May 2022

Before:

COSTS JUDGE ROWLEY

REGINA
v

BARNES

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

Appellant: Cunninghams Solicitors

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Cunninghams solicitors against the decision of the determining officer to categorise the fee payable as being a cracked trial fee under the Litigators Graduated Fee Scheme.

2. The solicitors were instructed on behalf of Christopher Barnes who faced a two-count indictment regarding charges of conspiracy to supply Class A drugs. He was described by the trial judge as a minor player in the conspiracy. Another minor player, Mr Bowden, was also on trial. All of the main players had previously entered pleas and were awaiting sentencing.

3. Barnes pleaded not guilty to the two offences at a plea and trial preparation hearing on 15 April 2021. The trial was originally due to commence on 4 October 2021 but was put back to 6 October 2021. It is clear that this was due, at least in part, to the prosecution's difficulty in securing the attendance of a Mr Litton who had produced evidence whilst a serving police officer but who had subsequently retired. Mr Litton took the view that he was no longer a competent witness and was refusing to give evidence. He had, amongst other things, indicated that he had not been warned and that he was on holiday. The adjournment of the case to 6 October enabled the prosecution to make enquiries about the warning of the witness.

4. On the morning of 6 October 2021, counsel for the prosecution sought to adjourn the trial so that a different expert could be instructed in place of Mr Litton. The judge indicated that he was not keen for this to occur and adjourned briefly so that counsel could take instructions from the CPS. It would appear that at this point the Crown offered to accept guilty pleas to lesser offences but Mr Barnes confirmed that he wished to stand trial. On resumption before the judge, the prosecution offered no evidence against Mr Barnes.

5. The solicitors claimed a graduated fee based on a one day trial. The determining officer decided that the fee should be based on a "cracked trial." The Criminal Legal Aid (Remuneration) Regulations 2013 define a cracked trial as follows:

> "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;

6. The determining officer's conclusion was that this case simply fitted squarely within (a)(i) and (a)(ii)(aa) since Mr Barnes pleaded not guilty at the PTPH and then the prosecution offered no evidence.

7. The solicitors say that things are not so simple. They rely upon the decision of Spencer J in Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB). At paragraph 96 of his judgment, he gave guidance on the issue of when a trial is to be considered to have commenced:

> "(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) The trial will not have begun, even if the jury has been sworn (and whether or not the Defendant has been put in 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 & Fowler, R v Sanghera, The 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 purposes of

> the Graduated Fee Schemes. It would 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 begun, 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".

8. In this case it is common ground that no jury was empanelled or sworn. The solicitors' argument is that, in line with paragraph 6 of the guidance, a trial may have begun in a meaningful sense if the court has dealt with substantial matters of case management, notwithstanding the absence of any swearing in of the jury.

9. Mr David Caplin, a partner at Cunninghams, appeared on behalf of this firm at the hearing of this appeal. He described the submissions made by the prosecution counsel to the trial judge regarding the difficulty with the witness evidence and the need to adjourn. He drew from that interaction the existence of substantial case management since it involved an important witness for the trial. Anything to do with the witnesses in Mr Caplin's submission was properly described as substantial case management. Sitting times and dates were examples he gave of case management matters that would not be considered substantial.

10. Mr Caplin pointed to the transcript that he had been able to obtain in respect of this case. From that transcript it was clear that the prosecution's decision to offer no evidence had not been determined prior to the application to the judge for an adjournment. Consequently, the case management regarding the prosecution witness had to be described as substantial because it involved the prosecution being abandoned after the judge had made his decision on the prosecution's application.

11. Mr Caplin also relied upon a decision of mine in R v Sallah (281/18) in which I concluded that the Henery guidelines were satisfied in a case where the prosecution ultimately offered no evidence. Mr Caplin described Sallah as perhaps being the most relevant decision on this issue given the factual similarities. As the Application Notice describes it, in Sallah, "all parties attended for the first day of trial and prior to a jury being sworn witness difficulties were addressed by the parties which ultimately resulted in no evidence being offered by the Crown."

12. As was pointed out by Mr Caplin, there was no judicial involvement in Sallah. Therefore, it could be said that the subject matter of this appeal went further than in Sallah given the involvement of the judge.

13. Mr Jonathan Orde appeared on behalf of the Agency and submitted that, looked at objectively, the trial in this case had not begun in any meaningful sense. The case was called on for hearing on 6 October 2021 and the parties made submissions in front of the judge for approximately 20 minutes. The prosecution applied for an adjournment and the defence opposed that request. After a 40-minute adjournment, the prosecution returned and offered no evidence. Mr Orde relied upon a formal ruling by the judge on the adjournment which balanced the further delays to an already old case and what

he described as the "unsatisfactory grounds for the application in the first place" against the public interest of the defendants facing trial. The balance came down in favour of the defendants and so the application was refused, and the judge entered formal not guilty verdicts on discharge the defendants.

14. It was Mr Orde's primary submission that, unless the jury was sworn, the prosecution opened the case and some evidence was called, then a trial has not actually taken place. The "substantial matters of case management" test only applied to determining whether the length of the trial that had actually taken place ought to be lengthened to include some preliminary days prior to the jury being sworn et cetera. The elevation of it into some form of freestanding test distorted the guidance given in Henery. The appropriate test should simply be whether the trial had begun in a meaningful sense. Several costs judge decisions which concentrated on the case management rather than the trial had, in Mr Orde's submission, erred in applying the guidance.

15. I heard this appeal on the same day as a case called R v Doyle (SC-20220-CRI-000040) where fortuitously Mr Orde also appeared and ran the same point regarding the application of the Henery guidance. I have dealt with those submissions at rather more length in the Doyle case and I do not propose to deal with them here. There is no need to do so because I am clear that the solicitors have not established that the case began in any meaningful sense and so there is no need for me to consider whether there is a distinction between the two phrases used by Spencer J in Henery in this case.

16. In response to Mr Orde's submissions about the meaningfulness of the events on the morning of 6 October 2021, Mr Caplin questioned what happened in the counterfactual situation of the case being put over to the following day rather than there being a 40-minute adjournment? If the case had been effective the next day, then, in Mr Caplin's submission, the hearing on 6 October 2021 would undoubtedly have counted towards the trial length. The fact that the Crown decided to offer no evidence should make no difference to the categorisation of that day as being the first day of trial.

17. Mr Caplin said that the circumstances in this case were distinct from a situation where the Crown had already decided to offer no evidence (or the defendant had decided to plead guilty) on the day. In those cases, a cracked trial fee would be the correct fee.

18. The guidance given by Spencer J in Henery is now over 10 years old and its reference to "modern practice" needs to be given some latitude, particularly given the events of the last two years. Courts, and those who practice within them, have had to adapt to deal with cases effectively in extremely difficult circumstances. The need, for example, to keep juries socially distanced for as long as possible has led to courts making decisions about what can be dealt with before the jury is involved. Furthermore, matters such as the preparation at the last minute of jury bundles and the editing of evidence appears to be the usual, "modern" practice rather than something out of the ordinary.

19. In these circumstances, it is easy to see the hard work of the prosecution and defence teams as being part of the trial itself. But that does not appear to me to be the intention of the Henery guidance, nor a reflection of the cases analysed in that decision. The use of the word "substantial" by Spencer J in relation to case management, must mean

more than the expected pre-trial preparation regarding matters such as bundles and evidence. A lot of case management decisions by the court are important for the running of the case but they do not, in my judgment, amount to substantial matters which would amount to the trial having started, even in the absence of a jury.

20. In the case of Sallah, the defence counsel served a 10-page skeleton argument dealing with a number of issues of admissibility of the evidence. The prosecution counsel took instructions and decided that there was a risk that two of the prosecution witnesses had been inadvertently influenced in their identifications and as such the prosecution counsel did not feel that their evidence could be advanced. The remaining evidence in that case concerned CCTV footage and the Crown took the view that that was insufficient on which to base the prosecution. Consequently, no evidence was offered.

21. The abandonment of the case in Sallah arose from the adversarial nature of the intended trial and the defence challenging the appropriateness of the evidence expected from the prosecution. If the prosecution had not been persuaded of the strength of the defence argument, then the judge would undoubtedly have had to deal with that matter in the manner contemplated by the cases referred to in Henery.

22. By contrast, in this case, the issue was entirely the reluctance of a witness to continue to give evidence having retired from the police force. There was no argument from the defence as to the quality of that evidence. Having heard the judge's comments regarding the possibility of an adjournment, Mr Barnes' counsel (and indeed Mr Bowden's) understandably weighed in to indicate that they were ready for trial and that the case should proceed. It seems to me that those submissions are of a very different order from the arguments put forward in Sallah as to the quality of the prosecution's evidence and as to whether it could be relied upon as a result.

23. The issue is whether the issues of case management involved are substantial? In my view the efforts of the respective parties' counsel in Sallah justified that description, but it seems to me clear that this is not the case here. Shorn of the comments of the defence counsel regarding trial readiness and the length of time before any adjourned case could come on for hearing, the only matter before the court was the prosecution's attempt to adjourn the trial to a later date in order to obtain evidence from a different witness. Such an application to adjourn cannot in my view possibly be sufficient to amount to a substantial case management issue. As such, I reject Mr Caplin's argument that anything relating to a witness and their evidence must be substantial.

24. The definition of a cracked trial requires the case either not to proceed to trial or the prosecution to offer no evidence where the defendant has previously pleaded not guilty. It seems to me that this case did not proceed to trial, as defined by Henery and the prosecution has offered no evidence. As such this case clearly fits within the definition of a cracked trial fee and so I uphold the determining officer's conclusion.

25. Accordingly, this appeal fails.