Neutral Citation No.[2022] EWHC 1658 (SCCO)

Case No: T20207245

SCCO Reference: SC-2021-CRI-000163

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 23 June 2022

Before:

COSTS JUDGE WHALAN

REGINA
v
TARIQ AJAIB

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

Appellant:

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

Introduction

1. Mitchells Solicitors LLP ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim under the Litigator's Graduated Fee Scheme ('LGFS'). The issue for determination is whether the fee allowed for the hearing on 7th June 2021 should be paid as a trial, as claimed or as a 'cracked trial', as allowed.

Background

2. Mr Tariq Ajaib ('the Defendant') was arrested as part of a large drugs investigation known as Operation Florence. He was charged, with 25 co-defendants, on an 11-count indictment. The Defendant faced three counts, namely Count 2, conspiracy to supply class A drugs (cocaine), Count 3, conspiracy to supply class B drugs (cannabis) and Count 5, conspiracy to remove criminal property from the UK, comprising vehicles bearing false registration plates.

3. At a PTPH on 25th February 2021, the court provisionally listed the trial to start on 7th June 2021. At a further FCMH on 25th February 2021, the Defendant entered not guilty pleas to all matters against him.

4. On 7th June 2021, the trial listing, the case was called on 10:35 hs. The Judge started the process of jury selection, which was complicated by the fact that a number of people on the jury panel recognised one or more of the defendants. By about 11:29, however, twelves jurors had been selected and the jury was empanelled, but not yet sworn. The Judge then adjourned the case until 12:30. At 12:31, counsel informed the Judge that a co-defendant, Rrahmani, would plead guilty to two counts. The case was adjourned accordingly to 14:15 hs and at 14:17 Rrahmani duly pleaded guilty to these counts. The Defendant's counsel then asked the Judge for time to resolve the matter. The Judge informed counsel that he was content to give time and that the Defendant would receive credit if he pleaded guilty before the jury was sworn. At 14:32 the case was adjourned to 15:00. At 15:17 the Defendant pleaded guilty to count 3, while the other counts were left on the file. The hearing concluded at 15:25 hs and the judge adjourned the case for sentence.

5. The Defendant was sentenced on 21st September 2021 to 4 years and 6 months' imprisonment.

The Regulations

6. The Representation Order is dated 19th June 2020 and so the applicable regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended.

7. The Determining Officer cites paragraph 1(1)(a) of Schedule 2 to the 2013 Regulations, which states:

> "*cracked trial" means a case on indictment in which –*
>
> *(a) a plea and case management hearing take places 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 plea and case management hearing; or*
>
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or*
>
> *(b) the case is listed for trial without a plea and case management hearing taking place…*

Case guidance

8. I was referred by both the Appellant and the Respondent to the guidance in Lord Chancellor v. Ian Henery Solicitors Limited [2011] EWHC 3246 (QB) where Mr Justice Spencer stated (at para. 96) that:

96. I would summarise the relevant principles as follows:

(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 the 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) 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 (R v. Brook, R v. Baker and Fowler, R v. Sanghera, Lord Chancellor v. Ian Henery Solicitors Limited (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 practise 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, as Mitting J. did in R v.

Dean Smith, in the light of the relevant principles explained in this judgment.

9. I am referred additionally to R v. Wembo [2010] SCCO Ref: 193/10, R v. Wood [2015] SCCO Ref: 178/15, R v. Boland [2016] SCCO Ref: 33/16, R v. Dowd [2019] SCCO Ref: 111/18, R v. Barrowman [2019] SCCO Ref: 60/19, R v. Kiasuka-Kiakanda [2020], SC-2020-CRI-000253, R v. Tinkler [2021] SC-2021-CRI-000093 and my decision in R v. Coles [2017] SCCO Ref: 51/16.

The submissions

10. The Respondents' submissions are set out in Written Reasons dated 7th June 2021 and in written Submissions drafted by Mr Rimer, a Senior Lawyer at the Government Legal Department, dated 9th June 2022. The Appellant's submissions are set out in grounds attached to the Appellant's Notice and in a document entitled 'Submissions in relation to appeal against costs' (undated). Mr Mitchell, solicitor and Mr Rimer attended and made oral submissions at the hearing on 10th June 2022.

11. The Appellant, in summary, relies on sub-paragraphs 96(1), (6) and (7) of the guidance in Henery (ibid). The solicitors submit that although no jury had been sworn, one had been selected and empanelled, and the court had dealt with substantial matters of case management so that, in turn, there had been a trial in a meaningful sense. Mr Mitchell points to the fact that the parties were at court on 7th June 2021 until 15:25 hs, by which time the prosecution had accepted a guilty plea to the class B cannabis conspiracy, a much less serious offence than the class A cocaine conspiracy. This required a substantial re-drafting of the 147-page case Opening, which had hitherto identified the Defendant as the 'number two' in the conspiracy (i.e. the second most important person of interest among the 26 co-defendants). This substantial shift in the prosecution's case was a product of the time for negotiation directed by the trial judge, who was accordingly managing the process. The Appellant relies heavily on my decision of Coles (ibid), in which I concluded, on the facts of that case, that a trial could have begun in a meaningful sense where the parties were 'engaged in discussions of significant, evidential import, at the direction (or with the permissions) of the trial judge, over a period during which the jury would ordinarily have been sworn and the prosecution case opened'.

12. The Respondent, in summary, acknowledges that the selection and/or swearing of a jury is a relevant factor, but that it is only one factor and is not determinative per se. Mr Rimer argues for a narrow meaning and interpretation of the phrase 'substantial issues of case management' with the result that, in this case, the trial had not begun in a meaningful sense. He submits that 'substantial case management' should be restricted essentially to cases like Bullingham (ibid), where the judge presided over and then determined a voire dire, and Wembo (ibid), where the court heard detailed submissions and arguments as to anonymity orders. No such submissions and/or determination occurred in this case, so it cannot be said that the trial had begun in a meaningful sense.

My analysis and conclusions

13. The guidance at paragraph 96(7) in Henery (ibid) permits a broad, pragmatic determination on a case by case basis. Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun (96(1)).

14. I reject Mr Rimer's narrow interpretation of 'substantial matters of case management' namely the submission that this can only occur within the formality of a voire dire or in circumstances of specific submissions and determination, such as the making (or otherwise) of an anonymity order. Clearly, in my view, criminal trial practice is varied sufficiently to allow 'substantial matters of case management' to occur in other circumstances. Nor, in my view, does 'substantial case management' require contested argument before and/or determination by the trial judge. It seems to me that, as in Coles (ibid), the judge can oversee 'substantial case management' with a comparatively light touch.

15. On the facts of this case, however, I am not persuaded that there was 'substantial case management', leading to the conclusion that the trial had begun in a meaningful sense. Certainly the parties were at court for most of the day and the conclusion was a fairly significant volte face from the prosecution. It seems to me, however, that this was precipitated initially by the change of plea by the co-defendant Rrahmani and that the prosecution's decision vis-à-vis the Defendant, on the candid recollection of Mr Mitchell, caught the defence completely by surprise. I am not satisfied that whatever transpired between about 11:30 hs and 15:30 hs on 7th June 2021 it was sufficient to satisfy the requirements of 'substantial case management'. As the trial had not begun

in a meaningful sense, the Respondent was correct to assess this claim as a cracked trial and not a trial. The appeal is accordingly dismissed.

TO:

Mitchells Solicitors LLP
392 Palatine Road
Northenden
Manchester M22 4FZ

COPIES TO:

Mr Michael Rimer
Legal Aid Agency
102 Petty France
London SW1H 9AJ
DX328 London

Determining Officer
DX 10035 NOTTINGHAM