



Neutral Citation No. 2023] EWHC 2511 (SCCO)

Case No: T202072254

SCCO Reference: SC-2023-CRI-000002

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 6 October 2023

Before:

COSTS JUDGE LEONARD

R

v

SIMMONDS

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

Appellant: Sternberg Reed LLP (Solicitors)

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

COSTS JUDGE LEONARD

1. This appeal concerns the classification of an offence under Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013, as in force on 25 September 2020, the date of the relevant Representation Order. A short extension of time was requested for the appeal and is granted.
2. Schedule 2 sets out the terms of the Litigators' Graduated Fee scheme, by reference to which are calculated the fees to be paid from Legal Aid funds to defence litigators such as the Appellant firm, which acted for Katie Simmons ("the Defendant") in a prosecution before the Crown Court at Basildon.

The Background

3. According to a copy of the indictment filed by the Appellant, the Defendant faced two counts:

"Count 1...

CONSPIRACY TO COMMIT BURGLARIES WITH INTENT TO STEAL, Contrary to section 1(1) of the Criminal Law Act 1977...

THOMAS DAVIS, ALAN JOHN CLOUGH, STEVEN DON WATTS, HARRY THOMAS FENWICK, KATIE SIMMONDS and SAMANTHA LOUISE TAYLOR between the 31st day of December 2015 and the 14th day of September 2016 conspired together to commit a series of burglaries with intent to steal therein...

Count 5...

ENCOURAGING OR ASSISTING THE COMMISSION OF ONE OR MORE OFFENCES, BELIEVING ONE OR MORE WOULD BE COMMITTED, contrary to section 46 of the Serious Crime Act 2007...

KATIE SIMMONDS and SAMANTHA LOUISE TAYLOR between the 31st day of December 2015 and the 14th day of September 2016 did an act, which was capable of encouraging or assisting the commission of one or more of a number of offences, namely, burglary of premises believing that one or more of those offences would be committed and that her act would encourage or assist the commission of one or more of them..."

4. Counts 2, 3 and 4 were, respectively, of the theft of a Ford Fiesta by co-defendants Davis and Clough; of aggravated vehicle taking (of a BMW) against co-defendant Davis; and of burglary (of jewellery) against co-defendant Clough.
5. The Defendant entered a guilty plea to count 5. The Crown offered no evidence on count 1.

The Offences on the Indictment

6. Section 1(1) of the Criminal Law Act 1977 says:

“... Subject to the following provisions of this Part of this Act, if a person agrees with any other person or persons that a course of conduct shall be pursued which, if the agreement is carried out in accordance with their intentions, either—

- (a) will necessarily amount to or involve the commission of any offence or offences by one or more of the parties to the agreement, or
- (b) would do so but for the existence of facts which render the commission of the offence or any of the offences impossible,

he is guilty of conspiracy to commit the offence or offences in question.”

7. Section 9 of the Theft Act 1968 defines the offence of Burglary:

“(1) A person is guilty of burglary if—

- (a) he enters any building or part of a building as a trespasser and with intent to commit any such offence as is mentioned in subsection (2) below; or
- (b) having entered any building or part of a building as a trespasser he steals or attempts to steal anything in the building or that part of it or inflicts or attempts to inflict on any person therein any grievous bodily harm.

(2) The offences referred to in subsection (1)(a) above are offences of stealing anything in the building or part of a building in question, of inflicting on any person therein any grievous bodily harm therein, and of doing unlawful damage to the building or anything therein.”

8. Section 47 of the Serious Crime Act 2007 defines the offence of encouraging or assisting crime:

(1) A person commits an offence if—

- (a) he does an act capable of encouraging or assisting the commission of one or more of a number of offences; and
- (b) he believes—
 - (i) that one or more of those offences will be committed (but has no belief as to which); and
 - (ii) that his act will encourage or assist the commission of one or more of them.

(2) It is immaterial for the purposes of subsection (1)(b)(ii) whether the person has any belief as to which offence will be encouraged or assisted.

(3) If a person is charged with an offence under subsection (1)—

- (a) the indictment must specify the offences alleged to be the “number of offences” mentioned in paragraph (a) of that subsection...”

The Rules

9. The Graduated Fee payable to a litigator for a case that does not go to trial is calculated by reference to a number of factors set out in Part 2 of Schedule 2, including the classification of “the offence with which the assisted person is charged” (paragraph 5).
10. Classification is determined by reference to the following provisions of Schedule 2.
11. The LGFS Table of Offences is to be found at Part 7 of Schedule 2. Class A covers homicide and related grave offences; Class B offences involving serious violence or damage and serious drug offences; Class C lesser offences involving violence or damage and less serious drugs offences; Class D sexual offences and offences against children; Class E burglary; Classes F G and K other offences of dishonesty; Class J serious sexual offences; and Class I offences against public justice. Class H covers “miscellaneous other offences”.
12. Some offences of dishonesty, including theft, fall into Class G if the value involved exceeds £30,000, Class K if the value exceeds £100,000 and Class F otherwise.
13. Paragraph 3 of Schedule 2, under the heading “Class of Offences” reads, insofar as relevant:

“(1) For the purposes of this Schedule—

(a) every indictable offence falls within the Class under which it is listed in the LGFS Table of Offences and, subject to sub-paragraph (2), indictable offences not specifically so listed are deemed to fall within Class H;

(b) conspiracy to commit an indictable offence contrary to section 1 of the Criminal Law Act 1977 (the offence of conspiracy), incitement to commit an indictable offence and attempts to commit an indictable offence contrary to section 1 of the Criminal Attempts Act 1981 (attempting to commit an offence) fall within the same Class as the substantive offence to which they relate;

(c) where the LGFS Table of Offences specifies that the Class within which an offence falls depends on whether the value involved exceeds a stated limit, the value must be presumed not to exceed that limit unless the litigator making the claim under regulation 5 proves otherwise to the satisfaction of the appropriate officer;

(d) where more than one count of the indictment is for an offence in relation to which the Class depends on the value involved, that value must be taken to be the total value involved in all those offences, but where two or more counts relate to the same property, the value of that property must be taken into account once only...

(2) Where a litigator in proceedings in the Crown Court is dissatisfied with the classification within Class H of an indictable offence not listed in the LGFS Table of Offences, the litigator may apply to the appropriate officer, when lodging the claim for fees, to reclassify the offence.

(3) The appropriate officer must, in light of the objections made by the litigator—

(a) confirm the classification of the offence within Class H; or

(b) reclassify the offence,

and must notify the litigator of the decision.”

The Appellant’s Submissions

14. The Appellant made a claim for payment on the basis of a class K offence. The Determining Officer noted that by virtue of Schedule 2 paragraph 3(b) of the 2013 Regulations, the offence of conspiracy at count 1 falls within the same class as the substantive offence and that the offence being assisted or encouraged at Count 5 was burglary. On that basis the Determining Officer concluded that the appropriate class in each case was class E.
15. The Appellant says that the prosecution case involved a conspiracy to burgle dwellings between 31 December 2015 and 14 September 2016, involving the theft of jewellery, cash and vehicles. The conspiracy consisted of 43 offences of burglary spanning three counties. The total value of the conspiracy was £356,796, including £149,526.00 from the theft of vehicles alone. The Appellant has produced a table listing the vehicles concerned, and their value.
16. The burglaries and thefts were committed by the male defendants with the two female defendants being responsible for driving co-conspirators to and from the venue and handling stolen goods. The Prosecution case against the Defendant was that she was in communication with each defendant but in particular the lead defendant, Davis.
17. The Appellant accepts that for an offence of conspiracy, the offence classification table provides that the correct classification is that of the substantive offence. However, Section 1 of the Criminal law Act 1977 against which the Defendant was charged refers to a conspiracy to commit “the offence or offences in question”. Notwithstanding the wording of count 1 on the indictment, the “offences in question” involved burglary with intent to steal and theft of high value motor vehicles, handling stolen goods and dishonesty to commit said offences.
18. The main aim of the conspiracy was the theft of vehicles, an offence under section 1(1) of the Theft Act 1968 and a class F, G or K offence depending on the value. Every burglary with intent to steal, says the Appellant, has the elements of theft or attempted theft made out in law. The conspiracy at Count 1 includes, at its heart, a conspiracy to steal. It is perverse, argues the Appellant, to suggest that conspiracy to burgle can only be paid as a class E but a conspiracy to steal could fall into a range of categories depending on value.

19. The work done in preparation for the Defendant's trial was akin to that of a conspiracy to steal trial and there would have been no difference in the Appellant's approach to the consideration of the evidence had the Defendant been charged accordingly. Treating the case as theft based and classifying accordingly is the reality based and fair approach to take. In fact, the case bears comparison to large drugs cases and money laundering cases which would be paid as class K cases.
20. Further, count 5 on the indictment (encouraging or assisting the commission of one or more offences contrary to Section 46 of the Serious Crime Act 2007) does not appear on the schedule of offences and is, accordingly, open to reclassification. For the reasons already given it is not appropriate to classify it as a Class E offence. It should be class K.
21. In support of these submissions the Appellant relies upon *Environment Agency v Flannigan, Tones & Abraham* (SCCO Ref: 215/13, 268/13 & 317/13, 12 February 2014, Costs Judge Gordon-Saker) and *R v Briely* (SCCO Ref: 389/12, 28 June 2013).

Conclusions

22. The first point I have to make is that I cannot approach the appeal from the perspective that it is absurd that a conspiracy to commit theft may be remunerated as a class K offence, whereas a conspiracy to commit burglary may not. That is what the 2013 Regulations say, and I cannot rewrite them.
23. My second point (which has been made before by Costs Judges more than once: see for example *R v Martini*, SCCO 58/11, 23 June 2011, Costs Judge Simons) is that I must look to the offences on which the Defendant has been indicted. One does not delve into the background with a view to quantifying payment by reference to offences on which the Defendant has not been indicted.
24. Neither of the counts against the Defendant refer to theft, whether of multiple vehicles are otherwise. They refer only to burglary. That may be because (as Mr Wells, who appeared on behalf of the Appellant, appeared to accept) there was insufficient evidence to charge the Defendant in relation to the vehicle thefts, but in fact there is only one count of theft on the indictment. That is count 2, against Davis and Clough. The vehicle in question, stolen on 5 April 2016, was a Ford Fiesta to which the Appellant's table does not attribute any value, but which could scarcely have been worth £100,000. Count 3 (against Davis) relates to taking a vehicle which was recovered, albeit damaged. It is difficult, in the light of that, to see how one could identify a class K offence within the indictment.
25. Count 1, against all four defendants, is of conspiracy to commit burglaries with intent to steal. As the above extract from the section 9 of the Theft Act 1968 shows, the intention to steal is simply one of the possible components of the offence of burglary. The substantive offence is still burglary. It is not theft. Theft is a separate offence, defined in section 1.

26. The substantive offence by reference to which, in accordance with Schedule 2, paragraph 3(b) to the 2013 Regulations, the conspiracy offence must be classified, is, accordingly, burglary.
27. The offence of burglary is a class E offence and is not open to reclassification. By virtue of Schedule 2, paragraph 3(b), the same applies to a conspiracy to commit burglary.
28. There is, accordingly, no proper basis upon which I can classify the offence at count 1 on the indictment as a class K offence.
29. The offence at count 5, of encouraging or assisting crime, is not listed in the table of offences. Accordingly, it falls by default within class H but is open to reclassification. The question is what the reclassification should be. As required by section 47(3) of the Serious Crime Act 2007, the indictment specifies that the offences which the Defendant was accused of encouraging or assisting were offences of burglary. The appropriate reclassification must accordingly be class E.
30. For those reasons, this appeal must be dismissed.