Neutral Citation No. [2024] EWHC 106 (SCCO)

Case No: T20217161

SCCO Reference: SC-2023-CRI-000067

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 22nd January 2024

Before:

COSTS JUDGE WHALAN

R
v
MICHAEL PIPE

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

Appellants: Martyn Powel Gartside Solicitors

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

The appropriate additional payment, to which should be added the £100 paid on appeal and assessed costs of £1,000.00 (+ any VAT payable), should accordingly be made to the Appellants.

COSTS JUDGE WHALAN

Introduction

1. Martyn Prowel Gartside Solicitors ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim under the Litigator's Graduated Fees Scheme ('LGFS'). The issue for determination is whether the fee allowed for the hearing on 5th and 6th July 2021 should be paid as a trial, as claimed or as a 'cracked trial', as allowed.

Background

2. Mr Michael Pipe ('the Defendant') was charged with one co-defendant at Newport Crown Court on an indictment alleging conspiracy to supply amphetamine, a controlled drug of Class B. After a protracted pre-trial chronology, during which the trial was listed but adjourned because of the Covid pandemic and transferred between Cardiff and Swansea Crown Courts, a two-week trial was listed in July 2021.

3. On 5th July 2021, the first day of the listing, the trial judge was told by counsel for the prosecution and defence that there were some legal matters which required attention, the determination of which might reduce the length of the trial. Neither side, at that stage, anticipated that the case was capable of resolution, and the trial judge was informed that a contested hearing was likely.

4. The prosecution had served on the defence, a 'Timeline document', an 89 page report which included maps, mobile phone downloads, cell sight analysis and other raw datum, which purported to evidence the Defendant's criminality. Parts of this document were contentious and subject to discussion and negotiation between the parties. The Appellants submitted specifically that it contained evidence that was not relevant to the charge against the Defendant and should not form part of the case against him. It seems that this document was the subject of a relatively determined negotiation between the prosecution and the defence. The next day, 6th July 2021, the prosecution indicated to the Appellants that they would accept a plea from the Defendant on a reduced factual basis. Further discussions and negotiations then took place between the prosecution and the defence. The judge, having been made aware that the trial may now be capable of resolution, allowed further time for this negotiation. Eventually,

agreement was reached as to the extent of the involvement of both the Defendant and his co-defendant, and this was set out in a document entitled 'Agreed Basis of Plea' that was signed by all three counsel. The Defendant then changed his plea to guilty.

5. He was sentenced on 24th September 2021, based on the involvement agreed at court in July.

The Regulations

6. 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. Barnes [2022] SCCO EWHC 1539 (SCCO), and my decisions in R v. Coles [2017] SCCO Ref: 51/16 and R v. Lamonby [2024] EWHC 22 (SCCO).

The submissions

10. The Respondent's case is set out in Written Reasons dated (or received on or about) 23rd December 2021. The Appellants' case is set out in the Grounds of Appeal and in a four-page Appeal Submission. I have been provided with two Bundles, an Appeal Bundle (1-72), and a Bundle exhibiting the Timeline document (1-89). Mr Rees KC represented the Appellants at the oral hearing on 19th January 2024. No appearance was made by the Respondents.

My analysis and conclusions

11. The Respondent, in summary, notes that no jury was selected or sworn, and the prosecution case was not opened. At no stage did the trial judge hear or determine any matter of law relating the admissible evidence. There was no voir dire or other legal argument. Accordingly: "There was no evidence that a trial began in any "meaningful sense"".

12. The Appellants, in summary, rely on the guidance at paragraph 96(6) of Henery (ibid), in that the events of 5th/6th July constituted 'substantial matters of case management', with the result that the trial had been begun 'in a meaningful sense'. The 89-page Timeline Document produced by the prosecution was subject to complex and detailed discussion and negotiation over a period of two days. The parties' respective submissions could have been heard and determined by trial judge, who would have decided what evidence could be put before a jury, but it is acknowledged that diligent

advocates would endeavour to agree this to save court time. The negotiations were substantive, producing an agreement that reduced significantly the ambit of the Defendant's criminality. The indictment alleged effectively that he and a co-defendant had received 105-165kgs of amphetamine between 4th January and 21st May 2020. The Agreed Basis of Plea demonstrated receipt of 30kgs. The Defendant, having changed his plea, was sentenced to 48 months' imprisonment. Conviction on the indictment as drafted would probably have led to a sentence of around 6 years.

13. I find, on the particular facts of this case, that the hearing on 5th /6th July 2021 should be assessed as a trial and not a cracked trial, as the court dealt with substantial matters of case management, meaning that the trial had begun in a meaningful sense. Two points, in my view, inform this conclusion. First, it is notable that the hearing lasted for almost two days before the Defendant changed his plea. It seems to me that a period of this length is more consistent with 'substantial' case management as opposed to more general, expected pre-trial preparation. Second, there is, it seems to me, a qualitative difference between the sort of evidential preparation recited in Barnes (ibid), and negotiation that culminated in a substantive change to the case against the Defendant. Amendments to the Timeline, in other words, did not simply vary the evidence admissible in respect of the charge made against the Defendant, but led rather to an agreed change to the factual substance of that charge, resulting in a significantly reduced sentence, after the Defendant had changed his plea. Most cases may require some discussion and amendment to the admissible evidence, but it is not in every such case that these changes lead to an agreed variation to the alleged criminality. This, it seems to me, is the difference in cases like this between 'case management' and 'substantial case management'.

14. For these reasons, this appeal is allowed and I direct that the Appellants' LGFS claim be assessed as a trial and not a cracked trial.

Costs

15. The Appellants have been successful and I award costs of £1000 (+ any VAT payable) along with the £100 paid to issue the appeal.

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