Neutral Citation No. [2024] EWHC 107 (SCCO)

Case No: T20200575

SCCO Reference: SC-2021-CRI-000092

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
STANLEY CAVE

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

Appellants: Virdee Solicitors

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

The appropriate additional payment, to which should be added the £100 paid on appeal.

COSTS JUDGE WHALAN

Introduction

1. Virdee Solicitors ('the Appellants') appeal against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Litigator's Graduated Fees Scheme ('LGFS').

2. The Appellants challenge the Respondent's decision to reduce the number of pages of prosecution evidence ('PPE') in the claim. The Appellants submitted initially a claim for 10,000 PPE, representing the regulatory cap on the 13,988 pages served by the prosecution. On appeal, the Appellants limit the claim to 7354 pages of PPE. The Respondent has allowed 2880 PPE, comprising 51 pages of statements, 1015 pages of exhibits, 3 pages of streamline forensic reports and 1811 pages of electronic datum.

Background

3. The Appellants represented Mr Stanley Cave ('the Defendant'), who was charged with one co-defendant at Snaresbrook Crown Court on an indictment alleging three counts of supplying a Class B drug (cannabis), and having an article with a blade or point (a Stanley knife). It was alleged that the Defendant and another were involved in selling cannabis pursuant to a business partnership. The Defendant denied this, stating that he was a long term and heavy cannabis user only. Upon his arrest, a small quantity of cannabis was discovered in the boot of the Defendant's car. A mobile telephone was seized and the datum was downloaded and exhibited as JEK2. It is clear that this material supplied most of the evidence cited by the prosecution at trial.

4. The Determining Officer, assessing the electronic telephone datum at JEK2, allowed the following pages to be included in the PPE count: contacts (95), calls (120), notes (97) and messages (1002). The datum also included 4971 pages of 'images' or 'pictures'. Noting that the prosecution had extracted and relied on 188 images (along with a number of videos), to demonstrate that the Defendant was a drug dealer, the DO acknowledged this category of electronic evidence was relevant potentially to the PPE. Noting also, however, that most of the photographs were of friends/family, celebrities, commercial material or comprising icons or emojis, he/she allowed 10% of the total –

497 pages – in the PPE count. The Appellants challenge this assessment, submitting that the total page count for images/pictures should be included in the PPE.

The Regulations

5. The Representation Order is dated 3rd June 2020 so the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') as amended, apply.

6. Paragraph 1 of Schedule 2 to the 2013 Regulations provides (where relevant) as follows:

> "*1. Interpretation*
>
> …
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*
>
> *which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.*
>
> *(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.*
>
> *(5) A documentary or pictorial exhibit which –*
>
> *(a) has been served by the prosecution in electronic form; and*
>
> *(b) has never existed in paper form,*
>
> *is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances*".

7. It is noted additionally that the Definitions and Scope, Interpretation section in Part 1 of Schedule 2 includes additionally the 'PPE Cut-off' of 10,000 pages.

Case Guidance

8. Authoritative guidance was given in Lord Chancellor v. SVS Solicitors [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at para. 50):

> "*(i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.*
>
> *(ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.*
>
> *(iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.*
>
> *(iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispense with the need for service of a notice of additional evidence, before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.*
>
> *(v) The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary pre-condition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages could be excluded from the count of PPE merely because the notice had for some reason not reached the court.*
>
> *(vi) In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of*

service cannot of itself necessarily exclude material from the count of PPE.

(vii) *Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore served an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues would depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.*

(viii) *If – regrettably – the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Office (or, on appeal, the Costs Judge) will have to determine it in the light of the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) will be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) will be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.*

(ix) *If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures the public funds are not expended inappropriately.*

(x) *If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE,*

a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.

(xi) *If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply.*"

9. I am referred additionally to the decisions in R v. Sereika, R v. Marku and R v. Said, cited without reference in the Written Reasons.

The submissions

10. The Respondent's case is set out in Written Reasons dated (incorrectly) 5th January 2024. This document dates, on my understanding of the file, from about July 2021. The Appellants' case is set out in detailed, typed Grounds of Appeal submitted on 13th July 2021. The Appellants had declined an oral hearing and requested that the appeal be determined on the papers.

11. It should be evident from the chronology set out above that this appeal was filed historically but overlooked subsequently by the administration at SCCO. I apologise for the SCCO for the delay in producing this determination.

My analysis and conclusions

12. The Respondent, in summary, relies on the proposition that it is unreasonable to include all images/pictures in the PPE count, as the majority are clearly identifiable as irrelevant. Thus, images like icons, emojis, graphics and logos should be excluded automatically. Other photographs, such as those of family, friends, locations, those representing celebrities or commercial content, should similarly be discarded as irrelevant. Given that the prosecution relied on some images downloaded from the Defendant's phone, the DO considered that a 10% allocation was reasonable.

13. The Appellants, in contrast, submit that the prosecution's reliance on photos downloaded from the Defendant's phone obliged them reasonably to look through and consider the entirety of the images/photos file, with the result that all 4971 pages are relevant and should be included in the PPE count.

14. Two points complicate this assessment. First, the DO understood that "over 50 pictures were relied upon by the Crown", while the Appellants suggest that "188 pictures were specifically identified by the Crown as relevant and showed the Defendants were clearly involved in selling cannabis and advertising this illegal business activity". Assuming that the Appellants' submission is correct, it would appear that the Crown's incidence of reliance was greater than that understood by the DO. Second, while it is common ground that some of this datum is irrelevant and should not be included in the PPE count, it is not clear entirely whether the 4971 pages identified included or excluded some of the categories like emojis, icons etc. The Appellants' Grounds, when conceding the exclusion of irrelevant categories, while promoting the inclusion of the entirety of the 4971 pages, suggest that this part of the count is limited to pictures.

15. While the precise breakdown of the electronic datum is difficult necessarily for me to unravel on an appeal to be heard on the papers, it seems to me that the DO's assessment was, on the facts of case, too conservative. Clearly the Crown relied on a comparatively large number of photographs to support the prosecution. I accept that the number is in the region of 188, which appears to be significantly more than the total understood by the DO. At the same time, it would not be reasonable to include the entirety of the photographic datum, as much of this material would be not only irrelevant, but quickly (even instantly) recognisable as such. Doing the best I can, I find that 50% of the images/photographs from a total of 4971 should be included in the PPE. The appeal is allowed to this extent.

Costs

16. The Appellants have been successful (in part) and should have returned the £100 paid on lodging the appeal. There is no other claim and/or assessment of the Appellants' costs.

TO:

Virdee Solicitors
Office 221C
239 Kensington High Street
London W8 6SA

COPIES TO:

Determining Officer
Legal Aid Agency
Nottingham

DX 10035 Nottingham

The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.