Neutral Citation No. [2024] EWHC 1700 (SCCO)

Case No: T20237111

SCCO Reference: SC-2024-CRI-000024

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 1 July 2024

Before:

COSTS JUDGE LEONARD

R
v
AHMED

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

Appellant: **Khan Solicitors**

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

COSTS JUDGE LEONARD

1. This appeal is governed by the Graduated Fee provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 10 March 2023, and the 2013 Regulations apply as in force at that date.

2. The Appellant has requested a short extension of time for this appeal, which is granted.

3. The issue on this appeal is whether the Appellant solicitors, who represented Javed Ahmed ("the Defendant") in the Crown Court at Preston, should be paid the Graduated Fee appropriate to a trial that has started, or to a cracked trial (as defined below). The Appellant has been paid for a cracked trial, but maintains that a trial fee is payable.

4. Schedule 2 to the 2013 Regulations governs payment to Litigators under the Graduated Fee Scheme. Paragraph 1(1) of Schedule 2 provides definitions that are pertinent for the purposes of this appeal:

> "…'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…"

5. "Trial" is not defined in the 2013 regulations, and in many cases (including this one) the question of whether a trial fee or a cracked trial fee is payable will depend on whether a trial had begun in a "meaningful sense", the test identified by Mr Justice Spencer in *Lord Chancellor v. Henery* [2011] EWHC 3246 (QB).

6. Whether that is so will depend upon the facts of the case. At paragraph 96 of his judgment Spencer J set out the principles by reference to which a court can determine the question:

> "(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…
> (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…
> (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…
> (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…
> (6) If… 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… in the light of the relevant principles explained in this judgment."

The Background

7. The Defendant had pleaded not guilty to three counts of conspiracy to supply Class A drugs. The first count was of conspiracy to supply 10 kg of cocaine over about a month, between 22 February 2022 and 23 April 2022. The second was of conspiracy to supply diamorphine over a 12-month period between 3 March 2022 and 8 March 2023. The third was of conspiracy to supply crack cocaine over the same 12-month period. The amount of class A drugs involved in counts two and three was, I understand, about 20 kg.

8. Trial was listed for 4 September 2023. The original time estimate had been six weeks, but by the date of trial, that had been reduced to three weeks due to co-defendants entering guilty pleas, so that only three defendants now faced trial.

9. I understand from the Appellant that on the trial date, the Defendant's case was listed for 10 a.m. It was adjourned with the trial Judge's approval for discussions to take place between the Prosecution and the Defence. Among the matters discussed were Prosecution telecommunications evidence and CCTV evidence of the Defendant "topping up" telephones which he said were not his. The subject of the discussions (as I understand it from the materials and submissions offered by the Appellant for the

hearing of the appeal) was whether that evidence, in particular telephone evidence derived from telephones not in the Defendant's name, could be attributed to him.

10. The outcome of the discussions was that a basis of plea was agreed. Count 1 was not pursued by the Prosecution. The period of the conspiracy for counts 2 and 3 was reduced from 12 to 3 months, the amount of class A drugs involved and the appropriate sentence being reduced accordingly. The Defendant's guilty plea was entered at 2.40 p.m. and the case adjourned for sentencing.

Submissions

11. The question in this case is whether the Appellant can rely upon subparagraph (6) of paragraph 96 of the judgment Spencer J in *Lord Chancellor v. Henery*, in which he indicated that if 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.

12. In this case, a jury was neither selected nor sworn. The Appellant, nonetheless, relies upon the decisions of Costs Judge Whalan in *R v Coles* (SCCO 51/16, 15 March 2017) and *R v Pipe* [2024] EWHC 106 (SCCO) in arguing that the trial did begin any meaningful sense.

13. That is because, says the Appellant, the parties (as in *R v Coles*) were engaged in significant discussions of evidential import over a period during which the jury would normally have been sworn and the Prosecution case opened. As a result (as in *R v Coles*) there was an agreed change to the factual substance of the case against the Defendant, resulting in a significantly reduced sentence.

Conclusions

14. It seems tolerably clear that in *Lord Chancellor v. Henery* Spencer J, in using the words " the court is dealing with substantial matters of case management", had it in mind that (at a stage where at least a jury had been selected) the trial Judge would be called upon to make some sort of ruling or rulings. In *R v. Wood* (SCCO 178/15) Costs Judge Simons found that this was a prerequisite to the finding contended for in this case by the Appellant. On the logic of *R v. Wood,* this appeal could not succeed.

15. Costs Judges' decisions are, however, not binding. Costs Judge Whalan, in *R v Cox* and *R v Pipe*, and Costs Judge Rowley in *R v Sallah* (SCCO 281/18, 18 March 2019) took the view that the resolution of substantial matters of case management by the parties at the direction of or with the approval of the trial Judge, could justify the conclusion that the trial had begun in a meaningful sense.

16. In my view the decision of Costs Judge Simons in *R v. Wood* is very much in line with the guidance of Spencer J in *Lord Chancellor v. Henery*. It does not necessarily follow that decisions such as *R v Cox*, *R v Pipe* and *R v Sallah* are not. The point of those judgments, as I understand it, is that there will be circumstances in which there is no real distinction to be drawn between substantial case management undertaken by the court and substantial case management delegated to the parties by the court.

17. I have made some efforts to understand the basis upon which this may be said to be such a case, and I have not found the Appellant's answers persuasive. My understanding at the hearing of this appeal was that what was under discussion on 4 September 2023 was the strength the evidence against the Defendant on count 1, not any formal point as to the admissibility of any evidence that, absent agreement, would require a ruling. If that is right, what actually happened on 4 September 2023 is that the Prosecution and the Defence negotiated a basis of plea by reference to the perceived strength of the evidence against the Defendant. That cannot justify the conclusion that a trial had started in a meaningful sense.

18. In order to avoid any misunderstanding, in the course of preparing this judgment I had my clerk relay my further enquiry as to exactly what issues, on the Appellant's case, would have been put to the trial judge for a ruling had the parties not reached an agreement on 4 September 2023. The Appellant's answer was:

> "The contentious evidence included; telecommunications, call data, cell site, attribution evidence, the evidential basis of communication charts and schedules… If agreement had not been achieved then the arguments in relation to the admissibility of the evidence, as to whether the evidence could be relied upon or excluded, would have been made before the trial judge for a ruling."

19. The difficulty with this answer is that there is nothing remotely unusual about any of the categories of evidence described, which are typical of a case of this nature. What it is (if anything) about which part of that body of evidence (if any) that might have been put to the trial judge for "substantial" case management, remains wholly unclear.

20. Bearing that in mind (and bearing in mind that a jury had not been selected, as envisaged in *Lord Chancellor v. Henery*) my conclusion is that the Appellant has not demonstrated that a trial had begun in a meaningful sense. The appeal must be dismissed.