Neutral Citation No. [2024] EWHC 3570 (SCCO)

Case No: T20237053

SCCO Reference: SC-2024-CRI-000074

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 2 October 2024

Before:

COSTS JUDGE ROWLEY

R
v

UMAR HUSSAIN

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

Appellant: Hurrairah Harris Solicitors

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

The appropriate additional payment, to which should be added the sum of £1,000 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Hurrairah Harris solicitors against the decision of the determining officer to calculate the graduated fee based on a cracked trial under the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The solicitors were instructed on behalf of Umar Hussain in respect of a two count indictment concerning a conspiracy to supply Class A drugs. In essence, it was said that Hussain and one other conspired together to supply the drugs using a number of others as "street level" dealers.

3. Hussain pleaded not guilty to the two counts on the indictment and his trial was listed for 27 November 2023. On that date, the Crown made two applications which, according to the court log apparently lasted between 10:57am and 12:50pm. They are described as follows:

> "Prior to the jury being sworn the prosecution made a bad character application and a s74 application to adduce the co-defendants' guilty pleas. The applications were made and the case was subsequently adjourned whilst the judge considered the applications. The judge then returned and gave his rulings and read them into the record. The judge granted both the s74 application and the bad character application."

4. That description is set out in a letter to the determining officer by the solicitors in response to the original determination. Although the letter does not describe whether the quotation is taken from an email or similar, or whether it is a note of a telephone conversation, there does not appear to be any dispute that it accurately reflects the court log.

5. The trial judge, HHJ Parry, determined both applications in the prosecution's favour. Consequently the co-defendants' guilty pleas to offences on the same indictment and Hussain's guilty plea to a separate conspiracy which followed the events of the conspiracy before the court, could be referred to in the Crown's opening and thereafter. In the light of this development, Hussain decided to plead guilty to both counts.

6. The solicitors claimed a one day trial fee but, having considered the court log, the determining officer decided that a cracked trial fee was appropriate. That position remained throughout the reconsideration and written reasons procedure. In the written reasons, the determining officer refers to the well-known guidance of Spencer J in the Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB). In paragraph 96 the judge sets out a number of relevant principles. In this appeal it is subparagraph six that is relevant, namely:

> "If, in accordance with modern practice 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. As the determining officer points out, subparagraph seven often requires a retrospective view to see how events unfolded to determine whether there had been a trial in any meaningful sense. The nub of her written reasons are as follows:

> "Having undertaken such a review, the determining officer is unable to identify, from the events that took place, that a trial took place in a meaningful sense. There were case management issues dealt with over 27/11/23, but the question to be determined is whether or not they were so substantial as to indicate that the trial had started in a meaningful way. The determining officer does not consider that they were."

8. There is no elaboration on the view taken by the determining officer regarding the nature of the case management involved. She does distinguish the case of R v Sallah but that is not a case on which, it seems to me, the appellant relies. In passing, I note that the determining officer has placed something of a gloss on the test so that it has to be "so substantial" rather than simply "substantial". I am not sure that the determining officer was intending to suggest that there are levels of substantiality e.g. "very substantial" but if that is the case then I do not accept that is the guidance that has been given by Spencer J.

9. In order for case management to be substantial, it must literally involve something of substance rather than something trivial or perhaps in this situation, something which might be better described as "housekeeping" or "administrative.". The judge in this case retired, I am told, for about half an hour before returning in order to give his decisions and read them into the court record. The timings given by the court suggest that nearly two hours were involved in dealing with the two applications.

10. Mr Shufqat Khan, who appeared on behalf of the solicitors at the hearing of the appeal, informed me that the relevance of the guilty pleas by Hussain to a separate conspiracy also went to evidential matters in that the same phone was used in both conspiracies and would therefore cause difficulty to Hussain in disputing the attribution of the phone in the present case.

11. Whilst that adds further weight to the applications, it seems to me that, in any event, as a rule of thumb, any application which requires the judge to retire to consider the ruling to be given, is going to be an application of substance. Dealing with two such applications, in my view, is clearly work which demonstrates that substantial matters of case management were dealt with.

12. Mr Khan also made the point that bad character applications are usually made at the end of the prosecution's case so that the court can weigh up whether it is simply an attempt to bolster an otherwise weak case. Applications usually made during the trial seem to me to be obvious candidates for a description of involving a substantial matter of case management. As the decision in Henery mentions, failing to allow substantial applications to be dealt with in this way for remuneration purposes, risks defendants' legal teams simply waiting until the trial has clearly begun before making applications.

13. In this particular case, the applications were made by the Crown and so the defendant had no opportunity to determine when the application should be heard. I was told that

all of the other defendants had pleaded guilty prior to this trial taking place and it seems likely to me that the prosecution were optimistic that if their applications were successful, the defendant would change his plea to guilty thereby reducing the length of the trial.

14. Be that as it may, I have no doubt that the Henery test has been established in this case and that substantial matters of case management were dealt with by the judge and that as such the trial had begun in a meaningful sense.

15. Accordingly this appeal succeeds and the solicitors are entitled to a contribution to their costs.