Neutral Citation No. [2025] EWHC 89 (SCCO)

Case No: T20217151

SCCO Reference: SC-2024-CRI-000085

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 21st January 2025

Before:

COSTS JUDGE WHALAN

R
v
JONATHAN BADIBANGA

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

Appellants: Stokoe Partnership 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, should accordingly be made to the Appellants.

COSTS JUDGE WHALAN

Introduction

1. Stakoe Partnership Solicitors ('the Appellants') appeal 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'). The issue for determination is whether the fee should be paid as a trial, as claimed, or as a guilty plea, as allowed.

Background

2. Mr Jonathan Musangu-Badibanga (the 'Defendant') was charged at Isleworth Crown Court with four co-defendants on an indictment alleging two counts of Conspiracy to supply Class A drugs, namely cocaine and diamorphine.

3. On 21st July 2021, at the Pre-Trial Separation Hearing, the Defendant entered guilty pleas to both counts on the indictment. Another co-defendant also pleaded guilty. Three co-defendants pleaded not guilty but were convicted at trial.

4. On 13th December 2022, sentencing took place for all five defendants.

5. There was a dispute as to the severity of the Defendant's criminality, although it was common ground he occupied a senior position in an organised crime network. The prosecution submitted that the Defendant should be sentenced as a Category 2 offender, which has a starting point of 11 years custody. The defence, in contrast, submitted that he was a Category 3 offender, the usual category applicable to 'street dealing', and this has a starting point of 8 years 6 months custody. Both sides instructed expert witnesses whose reports were before the court at sentencing. The defence expert, Dr Simon Harding, also attended court, although he was not called to give evidence by HHJ Connell. At the sentence hearing, the judge made various findings of fact consistent with the conclusion that the Defendant was a Category 3 offender, and he was sentenced to 6 years and 8 months imprisonment.

Claim

6. The Appellants claimed a 2-day trial fee, for the hearings on 21st July 2021 and 13th December 2022. They argue that the hearing before HHJ Connell constituted a trial of facts and rely on R v. Newton [1983] Crim LR 198. The Respondents, in contrast, assess the claim as a guilty plea.

The Regulations

7. The applicable regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') as amended.

8. Paragraph 1(1)(a) of Schedule 2 to the 2013 Regulations defines 'cracked trial'. Paragraph 2(4) of Schedule 2 states that:

> *Where following a case on indictment a Newton hearing takes place –*
>
> *(a) for the purposes of this Schedule the case will be treated as having gone to trial;*
> *(b) the length of the trial will be taken to be the combined length of the main hearing and the Newton hearing.*

Paragraph 1 of Schedule 2 also defines a Newton hearing as:

> *…a hearing at which evidence is heard for the purposes of determining the sentence of a convicted person in accordance with the principles of R v. Newton 77 Cr. App. R.13 CA.*

Case Guidance

9. In R v. Hada [2016] SCCO Ref: 11/15, it was held that a Newton hearing may be deemed to have taken place even if there is no hearing where live evidence is called, but in circumstances where evidence is read and/or contrasting submissions are made on that evidence. In R v. Morfitt [2016] SCCO Ref: 55/16, it was held, inter alia, that the fact that the case is listed and prepared as a Newton hearing are relevant considerations, although not determinative of the issue. In R v. Sheaq [2023] EWHC 3483 (SCCO), it was held that a distinction should be drawn between cases where the judge had been called upon to make a finding of fact, which would constitute a Newton hearing, and those instances where undisputed facts lead to one or other different

interpretations, inferences and, in turn, different conclusions on sentencing, which would not equate to a Newton hearing.

10. The parties rely on a number of other reported cases where Costs Judges reach contrasting conclusions, dependent upon the particular facts of each case. I am directed to R v. Makengele [2019] SC-2019-CIR-000072, R v. Aduniji [2024] EWHC 1320 (SCCO), R v. Barton [2024] EWHC 1328 (SCCO), R v. James [2024] EWHC 1753 (SCCO) and R v. Cobb [2024] EWHC 1323 (SCCO).

The submissions

11. The Respondent's case is set out in Written Reasons dated 21st June 2023 and in the Written Submissions drafted by Ms Francesca Weisman, a Senior Legal Advisor at the LAA, dated 26th November 2024. The Appellants' case is set out in typed Grounds of Appeal and in a Skeleton Argument (undated) drafted by Anjid Jabbar and Antony Lane. Mr Lane, a Solicitor, also attended and made oral submissions at the hearing on 29th November 2024. I am also provided with an Appellants' Bundle (pp 1-194), which contains, at pp 140-159) a transcript of the judge's sentencing remarks.

My analysis and conclusions

12. The Appellants, in summary, submit that the sentencing hearing on 13th December 2022 is a Newton hearing, and that the case should be paid as a 2-day trial. They submit that their case can be properly classified as a Newton hearing, even though it was listed for sentence and no evidence was called. It is of note that the judge had to consider conflicting evidence, including expert evidence, and make various findings of fact relevant to the substantive dispute, namely whether the Defendant should be sentenced as a Category 3 or 2 offender. The starting point distinction between the two categories is significant, corresponding to a difference of at least 2.5 years imprisonment.

13. The Respondent, in summary, submits that while the sentencing judge had some factual issues to determine, the hearing could not be classified as a Newton hearing. The core facts, namely that the Defendant occupied a relatively senior position in a drug-dealing organised crime group, were undisputed. In so far as the judge had to consider and construe the parties' submissions, this went to the question of inference and

interpretation, as opposed to the determining of a factual dispute. The Respondent's submission is summarised at para. 25 of Ms Weisman's Written Submissions:

> Overall, the Respondent submits that while the parties invited the Judge to reach different conclusions when sentencing, those conclusions would have been based on available facts giving rise to different interpretations. No opposing factual accounts were put forward by the parties, and it was more appropriate to say that the defendants invited the Judge not to give weight to the prosecution's interpretation or *lack* of available evidence, rather than introducing competing evidence which could have led to a factual dispute requiring resolution. This could more properly be categorised as argument rather than evidence.

14. It is clear – and indeed common ground between the parties – that a Newton hearing can be classified as such in circumstances where it is not listed explicitly as a Newton hearing, or when proceedings are limited to submissions in circumstances where no live evidence was adduced. Further, it is accepted that the key distinction is that set out in R v. Sheaq (ibid), where CJ Leonard drew a distinction between cases where the judge was called upon to make findings of fact, and those cases where undisputed facts might be subject to different interpretations or inferences which, in turn, could lead to different conclusions on sentencing. Insofar as these cases set out a number of clear points of principle, a determination of this point turns invariably on the facts of each individual case, a reality illustrated by the contrasting conclusions set out in the (now fairly voluminous) case references.

15. I find, on the facts of this particular case, that the hearing on 13th December 2022 constituted a Newton hearing, with the result that the Appellants' LGFS claim should be paid as a trial and not as a guilty plea. This is not a case, it seems to me, where the judge had to merely assist with contrasting interpretations and inferences prompted by relatively settled evidence, but rather the case where the court had to determine substantive disputes of relevant facts. Category 3 in the sentencing guidance has a starting point of 8 years and 6 months, but provides more particularly for a range of 6 years and 6 months to 10 years imprisonment. Category 2 has a starting point of 11 years, but similarly a range of 9 to 13 years custody. If, in my conclusion, the judge had been limited to a single category in the sentencing guidelines, he/she would still have had to determine where in the respective sentencing range this case fell. The court, in other words, would hear contrasting submissions on the evidence, and the facts would have been subject to different interpretations and inferences, both of the prosecution

and the defence. I am satisfied that this would not have been a Newton hearing. In this case, however, the judge had to determine between Category 3 or 2, in circumstances, aside from the sentencing range within each category, there was necessarily a difference (of 2.5 years' imprisonment) in the custodial starting point. This, it seems to me, leads properly to the conclusion that sentencing constituted a Newton hearing, not least because both sides adduced expert evidence on the issue(s). On the facts of this case, therefore, I am satisfied that this case should be allowed.

16. The Appellants' appeal has been successful and should be repaid the £100 appeal fee. No other claim for costs is made.

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