SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000146

Dated: 12th January 2021

ON APPEAL FROM REDETERMINATION

REGINA v AYOMANOR

CROWN COURT AT TRURO

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20180152

LEGAL AID AGENCY CASE

DATE OF REASONS: 20th May 2020

DATE OF NOTICE OF APPEAL: June 2020

APPLICANT: UK Law, Solicitors

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

The appropriate additional payment, to which should be added the sum of £500.00 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

MARK WHALAN
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. UK Law 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 Graduated Fees Scheme ('LGFS').

2. There are two disputed issues. First, the Appellants challenge the decision to allow only one graduated fee when, they submit, there were two cases. Second, they challenge the Respondent's decision to reduce the number of pages of prosecution evidence ('PPE') in the claim. The Appellants submitted a claim for 10,000 PPE, including 7840 pages of electronic datum in exhibit KRD/7. The Respondent has allowed 3679 PPE, comprising 199 pages of statements, 2088 pages of exhibits and 1392 pages of electronic evidence. 6321 PPE accordingly remain in dispute.

Background

3. The Appellants represented Mr Akpomiemie Kelvin Ayomanor ('the Defendant') who was one of two co-defendants charged at Truro Crown Court on a number of offences of fraud and money laundering.

4. It was alleged that Elizabeth Sopher, a 75 year old woman had been duped by a man called "Anthony" in Ghana into sending sums of money to him following a long exchange of e-mails, as a result of which Ms Sopher was tricked into believing that "Anthony" cared for her and wanted to support her financially. He said he was wealthy and would transfer a fortune to her if she would help him with his tax bill.

5. The case against both defendants was that whilst they were not the person who sent the e-mails to Ms Sopher, they were involved in receiving the money transferred by her, some of which was paid into the co-defendant's bank account. The co-defendant, Adeleye Martins Kehinde was arrested on 20th February 2018 at Hatfield University Halls. The Defendant was arrested on 6th March 2018 in Middlesbrough.

6. A mobile phone was seized from the co-defendant and electronic datum was downloaded from the handset. This material was exhibited as KRD/7 and the prosecution reled on various texts and other messages referring to money transfers. The prosecution also relied on a number of photographs or images recovered from the phone (depicting cash and other luxury goods), which were alleged to demonstrate the defendants' criminal lifestyle.

7. The defendants were arraigned at Truro Crown Court on 14th September 2018. They entered not guilty pleas on an indictment alleging six counts of fraud and converting criminal property. The trial was listed on 4th February 2019. On that date the prosecution sought to proffer a seventh count of fraud. The court log refers to an 'expanded indictment' and the defendants entered not guilty pleas to the seventh count. Later that day, after some exchange between counsel and the trial judge, HHJ Carr, the trial was adjourned.

8. On 5th August 2019 the trial was re-listed before HHJ Linford. Reference was made to historic changes in the indictment and at 10:43 the judge stated "I will stay the previous versions until the end of the trial when they will be quashed". A jury was sworn in but later that day the trial was stopped when the co-defendant's defence team became professionally embarrassed.

9. The trial was re-listed on 16th March 2020, again before HHJ Linford. Again, the prosecution apparently made changes to the indictment, and the defendants again entered not guilty pleas. It seems clear from the Court Log that the judge's approach was to allow the Crown to proffer a new indictment (which in the proceedings was called the "second indictment"), while staying the original indictment and quashing it at the end of the trial. The hearing continued until 19th March 2020 when the trial was halted following the introduction of the Government's emergency measures in the Covid-19 pandemic. An e-mail exchange between the Appellants and Truro Crown Court suggests that before he adjourned the trial HHJ Linford formally quashed the original indictment.

10. It seems likely, on the best information available to the parties in December 2020, that this matter is still outstanding and that the defendants will ultimately

stand trial again when the Covid-19 response allows the hearing to proceed safely.

The Regulations

11. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') apply to this appeal. Reference is made to paragraphs 1 and 20 (re PPE and Special Preparation) and 27 (re the definition of a 'case') of Schedule 2 to the 2013 Regulations.

The submissions

12. The Respondent's case is set out in Written Reasons dated 20th May 2020 and in Written Submissions drafted by Mr Michael Rimer and dated 7th December 2020. The Appellants' case is set out in detailed Grounds of Appeal. Mr Singh, a Costs Clerk representing the Appellants and Mr Rimer, representing the Respondent, attended the telephone hearing on 11th December 2020..

My analysis and conclusions

Indictments and graduated fees

13. The Respondent, in summary, relies on the submission that while the indictment "was amended at least twice", each version was, in reality, the same indictment. In other words, "the indictment upon which the matter eventually proceeded to trial was simply an amended version of an existing indictment" (Rimer, para. 47). This was accordingly a case of "house-keeping", whereby the original indictment was changed subsequently to include an additional court. Accordingly, "the facts overwhelmingly point to the fact that whilst it may appear that administratively, there were two (or three) indictments, in reality there was one indictment which was amended by the addition of a new count one" (Rimer, para. 54).

14. The Appellants, in summary, submit that on the mechanistic application of the LGFS, they are entitled to a second fee. It is possible to amend an indictment or join two or more indictments and reach the conclusion that there was still only one indictment, with one graduated fee payable. Where, however, an

indictment is superseded by a second indictment, whereupon the original version is quashed, there are two indictments and so two fees are payable.

15. I am referred by the parties to the cases of R v. Hussain and Others [2011] 4 Costs LR 689, R v Sharif [2014] SCCO Ref: 168/13 and R v. Arbas Khan [2019] SCCO Ref: 219/18.

16. In Hussain, Costs Judge (now Senior Costs Judge) Andrew Gordon-Saker held that where "there were two indictments which were not joined, then there must be two cases and two fees". He recognised that solicitors could thereby obtain "something of a windfall", as in reality there "was really only one case", but acknowledged that "the regulations have to be applied mechanistically" (para. 18).

17. In Sharif, Costs Judge Campbell acknowledged (para. 9) that indictments could be "tidied up" in a process of "house-keeping", but stated that this did not occur when an indictment was "effectively amended by substituting a new one for an old one". In other words, when an original indictment was quashed, it ceased to exist, so that the new indictment would be "substituted in its place". This does not comprise amendment as when the original indictment is quashed, there was nothing to amend.

18. In Khan, Costs Judge Brown acknowledged (para. 19) that two indictments could "be joined without the necessity to create a new indictment". Such a joinder "operated by way of an amendment to an existing indictment".

19. The principles to be taken and applied from these cases are, in my view, as follows. An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, a count or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. Where, however, the changes to an indictment involve the addition of a party, or count or both in circumstances where a new indictment is drafted and the original version is stayed and/or quashed, the effect (and mechanistic application of the regulations) is that there are two indictments, two cases and, in turn, two fees payable.

20. Since the oral hearing on 11th December 2020, Mr Rimer has drawn my attention to the recent decision of Costs Judge Leonard in R v Nash [2020] 17th December, SC-2020-CRI- 000177, where the disputed issue was similarly whether or not one or two fees were payable. Master Leonard's conclusion, on the facts of that case, was (at para. 28) that there was only one indictment and so only one fee was payable. This case is a good example of the second alternative discussed at paragraph 19 above, that two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment. In Nash, the trial judge, HHJ Khokher, had formally ordered a joinder of two indictments, for the purpose of allowing three defendants to be tried together on the same count of causing grievous bodily harm. This is distinguishable from the facts in this case where the court record makes no reference to joinder.

21. This was not, it seems to me, a case where the indictment was either amended or where a second indictment was drafted and then joined to the original version. Although the detailed Court Log and e-mails passing between the Appellants and Truro Crown Court do not combine to form a perfect record of proceedings, it should be acknowledged that this was (and continues to be) a difficult case prosecuted in exceptionally difficult circumstances. I am left nonetheless in no real doubt that the original indictment was, perhaps after some amendment, ultimately stayed and quashed by the trial judge, in favour of another indictment that was produced in substitution for the original version. This was not a case of amendment or joinder, nor can it be described as mere 'house-keeping', but rather a case of two indictments, the latter being a substitute for the former when the former was quashed.

22. It follows that the appeal is allowed on the first issue and that the Appellants are entitled to two fees.

PPE

23. It is common ground that the electronic datum exhibited in KRD/7 was 'served' pursuant to para. 1(2)/(3) of Schedule 2 to the 2013 Regulations.

24. The Respondent, in summary, submits that the Determining Officer exercised the discretion at para. 1(5) correctly. She allowed all the contact, call and message data and, on noting that the prosecution relied on approximately 50 photographs downloaded from the co-defendant's phone, decided to allow 10% of the pages from the image section comprising 460 pages. This percentage constituted a reasonable allowance given that the prosecution rely on a comparatively small extract of the 4500+ pages of images. Mr Rimer submitted that this approach followed that taken and impliedly endorsed in R v. Beckford [2019] SCCO Ref: 204/18, R v. Mucktar Khan [2019] SCCO Ref: 2/18 and R v. Purcell [2019] SCCO Ref: 132/19.

25. The Appellants, in summary, submit that the entire electronic datum on KRD/7 should be included in the PPE count. As the total would then exceed the statutory cap of 10,000, the PPE should be assessed at 10,000. Mr Singh submitted that the approach of the Determining Officer was "wrong both in principle and law". Citing paras. 25 and 26 of the Grounds of Appeal, he stated:

> "25. *Once the evidence has been established as relevant as served by the prosecution, the determining officer is required to apply his discretion to determine whether or not the material should be assessed as pages of prosecution evidence or paid as special preparation. He cannot disallow the material other than to consider it categorisation for remuneration purposes.*
>
> *26. The electronic evidence was served as a report by the prosecution as a section 9 witness statement referencing the exhibit in question. What the determining officer has done is decide incorrectly that only specific parts of the report are PPE and other parts fall under special preparation.*"

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

"*(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.*"

27. I reject the Appellants' contention that the Determining Officer pursued an approach that was wrong in law. As Holroyde J. stated at para. 50(ix) of SVS Solicitors, para. 1(5) of Schedule 2 comprises "an important and valuable control mechanism" pursuant to which the Determining Officer has a discretion as to whether or not he or she considers it appropriate to include it in the PPE count. It is not wrong – and certainly not to the disadvantage of applicants – if electronic datum that is not included in the PPE is considered subsequently for remuneration as special preparation. The issue, in this as in other cases, is whether the Determining Officer exercised correctly that discretion when she decided to exclude 6321 pages of electronic datum from the PPE count and, specifically, whether her approach to the inclusion/ exclusion of images was reasonable.

28. Mr Rimer, at several points in his oral submission on 11th December 2020, pointed out that the 50 or so images relied on by the Crown were included necessarily in the paper statement/exhibit count, so that to include them additionally in the served electronic datum count would constitute a "duplication". But this argument, it seems to me, is incorrect. When, as here, the prosecution extracts images from an electronic download and then exhibits those pictures to a witness statement, it effectively creates a new page or pages, albeit ones depicting the same images. As Nicola Davies J (as she then was) pointed out in Lord Chancellor v. Edward Hayes LLP [2017] EWHC 138 (QB), this does not constitute a "duplication".

29. I find, on the particular facts of this case, that the Determining Officer's approach to the electronic datum exhibiting images was incorrect. The prosecution extracted and relied on 50 or so images of cash and other luxury goods as evidence to support the contention that the defendants were enjoying a criminal lifestyle. It seems to me that this evidential contention can only be

fairly considered and, if appropriate, challenged in the light of the totality of the datum exhibiting photographs. A notional allowance of 10% of the images datum does not, in my conclusion, comprise a reasonable allowance for the purpose of the PPE count. Images cover pages 1582-6184 of the exhibit, a total of 4603 pages, and all this material should be included in the PPE count.

30. I cannot otherwise fault the Determining Officer's exercise of her discretion at para. 1(5). She included properly, as Mr Rimer points out, all the contact, call and message datum. I can see no arguable grounds for including audio or video files, or Thumbnails.

31. On this issue, therefore, the appeal is allowed to the extent that I allow an additional 4143 PPE (4603 – 460 pages already allowed), making a total PPE count of 7822. Mr Rimer has indicated additionally a claim for Special Preparation in respect of the balance of the electronic datum will be considered sympathetically.

Costs

32. This Appellants have been largely successful in a complex appeal and I award costs of £500 (excluding VAT, assuming that it is not payable) plus the £100 lodge on appeal.

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