



SENIOR COURTS  
COSTS OFFICE

SCCO Ref: 93/19

Dated: 2 October 2019

**ON APPEAL FROM REDETERMINATION**

**REGINA v BALDIP PLAHA**

CROWN COURT AT CANTERBURY

APPEAL PURSUANT TO SCHEDULE 1 OF THE CRIMINAL LEGAL AID  
(REMUNERATION) REGULATIONS 2013

CASE NO: T20170399

LEGAL AID AGENCY CASE

DATE OF REASONS: 1 MARCH 2019

DATE OF NOTICE OF APPEAL: 19 MARCH 2019 (received)

APPLICANT: Mr C Meredith  
Furnival Chambers  
DX 72  
LONDON

The appeal has been successful and in addition to the sums due to the Appellant as a result of this decision, I award the Appeal fee of £100.00 plus £300.00 towards costs (including transcription fee).

**COSTS JUDGE  
JENNIFER JAMES**

## REASONS FOR DECISION

### Background to the Case

1. The issue arising in this appeal is as to whether the fee payable to Appellant Counsel under the Criminal Legal Aid (Remuneration) Regulations 2013 for his representation of the Defendant should be on the basis that the case proceeded to trial or not; if not, it is to be regarded as two days of ineffective trial prior to a 'cracked trial' on the third day, for the purposes of the payment of the fee. Pursuant to Schedule 1 of the 2013 Regulations the fees payable to Advocates for cases which proceed to trial are different from those applicable to ineffective hearings prior to a 'cracked trial'.
2. The matter was heard as long ago as 16 May 2019 but the delay since then has been due to Counsel obtaining a transcript of the proceedings on Day 1 (as he saw it) for the purpose of this Appeal.
3. The Defendant was represented by the Appellant in respect of an indictment for fraud. On 3 September 2018 the case was listed to begin before His Honour Judge Hopmeier; the learned Judge was specifically asked whether the trial had begun on that day to which the reply was yes. However, the Court Log does not reflect this and therefore the only evidence for this was Counsel's recollection.
4. On 4 and 5 September 2018 there were further Hearings; on 5 September 2018 one of the [other] Defendants pleaded to various counts on the indictment. The Prosecution at that point in the trial, decided to review matters and did not proceed against the remaining Defendants, including Mr Plaha, the Defendant in this case. The LAA has treated 3 and 4 September 2018 as ineffective trial dates and 5 September 2018 as a cracked trial. The Written Reasons give the cracked trial date as 3 September 2018 but that is clearly a typographical error; the trial cracked when one Defendant changed his plea, which was on 5 September 2018.

### Case Law and guidance

5. As noted by Spencer J in *Lord Chancellor v Ian Henery Solicitors Limited* [2011] EWHC 3246 (QB) there is no definition of the word "trial" in the relevant provisions. There is, however, a definition of "cracked trial". The definition is the same in Schedule 1 (for the advocates' graduated fee scheme) and the material part of the definition is as follows:

*"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 1 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;*

....

6. In *Henery* at [96] Spencer J gave the following guidance as to whether or not a trial has begun:

- (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 (R v Maynard, R v Karra).*
- (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 (Meek and Taylor v Secretary of State for Constitutional Affairs).*
- (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 this (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).*
- (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 (R v Dean Smith, R v Bullingham, R v Wembo).*
- (6) *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) *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, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment.”*

7. To expand on Principle 5, the **R v Bullingham** 2011 judgment states:

- i. *The LSC’s contention that as no jury was sworn, the trial could not have started, is wrong since it is plain from the authorities that the swearing of the jury is not the conclusive factor in deciding under the scheme when the trial begins.*
- ii. *Even if a jury is sworn, the trial will not start unless it begins “in a meaningful sense”, that is to say otherwise than for the mere convenience of the jurors or so that the legal representatives will be paid a trial fee rather than a cracked trial fee.*

- iii. *If the jury is sworn and the prosecution opens its case only for the defendant to change his plea, a trial, not a cracked trial fee is payable.*

*Where...no jury is sworn, but the judge directs that there will be a voir dire involving substantial argument which may affect the evidence that the prosecution can use in the case, the trial starts when he gives that direction.*

8. The Appellant contends that this was an effective trial on all three days and that the learned Judge definitely confirmed on Day 1 that the trial had started.

## **Decision**

9. In its Submissions for the Hearing, the LAA stood by the Determining Officer's position, but accepted that confirmation of the trial Judge's certification, which it had previously sought but Counsel had not provided, would be persuasive and could tip the balance in favour of Counsel's argument. In the absence of such certification, it was right for the Determining Officer to consider whether substantial matters of case management had taken place. Since all discussions were out of court and resulted in agreement between Defence and Prosecution which required no judicial intervention, it was submitted that the circumstances here did not meet the test set by the cases of ***R v Wood*** and ***R v Abdullah***. The fact that the case was prepared to trial, and a trial fee assessed as suitable for the Litigator (which may or may not have been a correct assessment) were not determinative factors. Counsel asserted that if the Litigator had been paid for a trial, which he did not attend, it could not be appropriate for Counsel not to be paid for a trial, which he had attended on all three days.

10. The LAA asserted that, should written confirmation be provided of what happened in Court, at any time between the drafting of submissions and the hearing itself, the LAA would be willing to reconsider its position. However, in such circumstances, and if such confirmation is deemed to be a determining factor, and the appeal is successful, the LAA would request that any application for costs following the appeal take into account its requests for information from Counsel and the lack of response from him.

11. That is something of a two-edged situation in that the above was stated in submissions for the Hearing, that were sent in the day before the Hearing took place. However, Counsel had a lot more than one day's notice of this issue; as long ago as 10 April 2019, my clerk wrote to the parties to state:

*“Master James notes that, since 22 October 2018, the LAA's position has been that if the Appellant is able to obtain from the Court, confirmation that 3 September 2018 was indeed the first day of the trial, then they would pay the claim as lodged. If the Appellant is in a position to obtain that confirmation and avoid the Hearing no doubt he will do so; if he does not then he is on notice that the LAA's position will be, in the absence of such confirmation, which they requested almost 6 months ago, a cracked trial is all that they are obliged to pay.”*

12. Counsel obtained quotes for a transcript and, on 16 September 2019, the transcript itself was received. It is clear from that transcript that upon being asked by Counsel to verify whether this was Day 1 of the trial, and in the specific context of the difference that this would make to Counsel's fee (in other words in the full knowledge of why he was being asked the question) the learned Judge stated, on 3 September 2018 that, “Today is the first day of trial.”

13. Given that Counsel has produced what the LAA demanded of him I am inclined to say, there the matter rests. In addition, it appears that, over the following days, the case developed into what looks very much like **R v Bullingham** “(iii) *If the jury is sworn and the prosecution opens its case only for the defendant to change his plea, a trial, not a cracked trial fee is payable.*” It was not this Defendant who changed his plea, but I do not believe that changes matters. As such, I respectfully disagree with the decision of the Determining Officer. It seems clear that the trial had started in a meaningful sense on 3 September 2018 as the learned Judge certified that it had, and as Counsel's recollection (but not the Court log) rightly had it.

14. It follows that the Appeal has succeeded and I award Counsel his Appeal costs of £300.00 plus £100.00 Appeal fee; I recognise that this is likely to be only a contribution to Counsel's Appeal costs (bearing in mind the Transcript he obtained) but I also bear in mind that the LAA (in October 2018) and this Court (in April 2019) reminded him that if he obtained a transcript, it may be possible to avoid a Hearing. That did not happen and for that I do not believe he should recover more than £300.00, to pay for the transcript and some of Counsel's time, plus a further £100.00 for the Court fee.

TO: Mr C Meredith  
Furnival Chambers  
DX 72  
LONDON

COPIES TO: The Legal Aid Agency,  
DX 10035  
NOTTINGHAM  
(Joe Gallagher)

**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.