



Neutral Citation No. [2024] EWHC 108 (SCCO)

Case No: T20207588

SCCO Reference: SC-2022-CRI-000056

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 23rd January 2024

Before:

COSTS JUDGE WHALAN

R

v

ROBERT BRAZENDALE

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

Appellant: Mr Oliver Cook, Counsel

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 Appellant.

COSTS JUDGE WHALAN

Introduction

1. Mr Oliver Cook, Counsel ('the Appellant') appeals against the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim submitted under the Advocate's Graduated Fees Scheme ('AGFS'). The issue for determination is whether the Appellant is entitled to be paid two separate fees (trial + cracked trial), as claimed, or one fee (trial), as allowed.

Background

2. The Appellant represented Mr Robert Brazendale ('the Defendant'), who appeared at Manchester (Crown Square) Crown Court charged with various offences including conspiracy to murder, firearms and the supply of class B/C drugs.
3. On about 23rd December 2020, the prosecution uploaded an Indictment (identified subsequently as B1), to the Digital Case System ('DCS'). It charged a single count, which alleged that the Defendant had conspired with three others (Khan, Zaheer and Patel) to possess firearms and ammunition with intent to endanger life.
4. A Plea and Trial Preparation Hearing ('PTPH') was listed on 15th January 2021. At that short hearing (12 minutes), the Defendant was not arraigned – it seems that he had been recently extradited and was settling into the prison system – and the PTPH was adjourned until 12th February 2021. That listing was ineffective (because of Covid), and so the PTPH finally took place on 26th February 2021.
5. Prior to that hearing, on about 11th February 2021, the prosecution uploaded another Indictment (B7) to the DCS. On that indictment, Khan, Zaheer and Patel were listed as co-Defendants and not just the Defendant's co-conspirators. It charged two counts. Count 1 reproduced the single count of B1. Count 2 alleged that between 14th April and 21st April 2020, the Defendants had conspired together and with others to transfer prohibited firearms and ammunition.

6. On 26th February 2021, the Defendant was arraigned on Indictment B7. He pleaded NG to count 1 but G to count 2. These pleas were not acceptable to the prosecution and so the case was set down for trial.
7. The trial began on 16th November 2021. By this stage, the prosecution had proffered and uploaded to the DCS another consolidated Indictment (identified as B8). The Defendant was now charged with four co-defendants, Zaheer (as before) and three new parties, Moore, Waring and Coleman. The Indictment alleged six counts. The Defendant was charged on counts 1, 3 and 4. Count 1 alleged that the Defendant had between 3rd and 21st April 2020 conspired with others to murder Tyler Lomas. Count 3 reproduced essentially the allegation cited in B1. Count 4 reproduced the charge at count 2 on B7. Notably, however, Khan and Patel appeared as co-conspirators and not co-defendants.
8. Having proffered Indictment B8, the prosecution applied to stay all the previous iterations of the Indictment, including B1 and B7. Kerr J acceded to this application and stayed these indictments on 26th November 2021.
9. As the trial progressed, a new version of the Indictment emerged (B10). It alleged seven counts, with the Defendant being charged on counts 3 and 4. He was re-arraigned on these counts. The prosecution offered no evidence on 3 and he pleaded (effectively repeated) his plea of G to count 4. It is not clear entirely when the prosecution acceded to this formula; the Defendant's trial continued until 25th November 2021 and the hearing may have continued thereafter vis-à-vis the other co-defendants.
10. The Defendant was sentenced to 11 years 3 months' imprisonment on 4th February 2022.

The Regulations

11. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended, apply to this appeal. Reference is made by the parties to paragraph 27 (re the definition of a 'case') of Schedule 2 to the 2013 Regulations.

Cases

12. This ‘two-fees’ issue has generated in recent years a significant body of jurisprudence. I am referred to R v. Hussain [2011] 4 Costs LR 689, R v. Ayomanor [2020], SC-2020-CRI-000146, R v. Sharif [2014] SCCO Ref: 168/13, R v. Arbas Khan [2019] SCCO Ref: 219/18, R v. Gary Moore [2022] EWHC 1659 (SCCO), R v. Wharton [2021] SC-2021-CRI-000195 and R v. Thomas [2022] EWHC 2842 (SCCO).

The submissions

13. The Respondent’s case is set out in Written Reasons dated 9th March 2022 and in written submissions drafted by Mr Jonathan Orde, a Lawyer at the Government Legal Aid Department, dated 20th June 2023. The Appellant’s case is set out in Grounds of Appeal attached to the Appellant’s Notice. Mr Cook attended and made oral submissions at the hearing on 13th July 2023.
14. I should note at this stage that the papers supplied to me were probably more compressive and useful than those supplied originally to the Determining Officer. Mr Cook filed an Appeal Bundle (1-40), which exhibited, inter alia, copies of the (no less than) twelve Indictments produced for this case. I am also supplied with the Court Log (1-45).

My analysis and conclusions

15. The Respondent, in summary, submits that a single, trial fee is payable. Mr Orde acknowledges that the initial Indictment (B1) applied only to the Defendant, and that a subsequent, consolidated (joined) Indictment (B7) was proffered, after the judge granted leave to join defendants in February 2021. Thereafter, further iterations of the consolidated Indictment were uploaded, specifically B10 and B11, relevant to the trial in November 2021. None of this, submits Mr Orde, means that “there was a second case” or that the Appellant is entitled to two fees.

16. Mr Orde acknowledges that the 2013 Regulations, as amended, impose a technical regime, the mechanical application of which can produce a ‘swings and roundabouts’ approach to remuneration. He refers correctly, however, to a recent evolution in the reported cases. Historically, the courts tended to apply a mechanical application of the Regulations, so that in Hussain (ibid) (SCJ Gordon-Sakar) and Ayomanor (ibid), one of my decisions from 2020, two fees were allowed on appeal. It was then recognised and conceded that the issue should be revisited in the light of evolving criminal practice, particularly during and after the changes imposed necessarily by the Covid pandemic. The decision of CJ Rowley in Wharton (ibid) was recognised as an important development in the assessment of costs where two fees are claimed. It is clear from that case, that judges in the Crown Court were increasingly adopting a more pragmatic or flexible approach if the prosecution seeks to change an indictment. As such, whether or not the original (or previous) indictment was stayed or quashed, depended very much on the typographical nature and extent of the changes made by the prosecution and the consequent practise selected, often quite informally, by the trial judge. As such, the fact that an original indictment was stayed or quashed was not, of itself, determinative, although it could be cited as an indication as to the creation of a second (or new) case. This was the approach I followed in Gary Moore (ibid) and was followed by CJ Leonard in Thomas (ibid).
17. Mr Orde, therefore, submits that in this case, the evolving procedure was affected undoubtedly by the Covid pandemic, so that the initial consolidation of the indictment (B7), followed by the subsequent consolidation and amendments (B10/11) are not indicative to the existence of a second case, notwithstanding that after the prosecution settled on a final Indictment, the trial judge stayed all previous iterations.
18. The Appellant, in contrast, submits this is a clear case where two fees are payable. The first relevant distinction was between B1 and B7, where an indictment alleging a single count against one Defendant became an indictment alleging two counts against four co-defendants. Alternatively, submits Mr Cook, there is a clear point of departure between B7 and the subsequent B8-11, insofar as three new co-defendants were joined, while two of the original co-defendants were dropped. All this represented substantive changes in the criminality alleged, both in terms of the defendants, the charges faced and the period(s) of offending.

19. I find, on the particular facts of this case, that the submissions of the Appellant should be preferred to those of the Respondent. It is acknowledged by both parties that the prosecution evolved significantly and substantively between February and November 2021. Certainly, there was a notable change between indictment B1 and B7, although the evolutionary process, between December 2020 and February 2021, was comparatively rapid. Of more particular relevance, in my view, is the substantive evolution between B7 (in February 2021) and B8 onwards (from November 2021), where the overall criminality alleged against the co-defendants changed quite radically. It is fair to state, as Mr Orde points out, that the allegations proffered against the Defendant personally were not subject to such distinct changes, although it seems to me that the difference between Zaheer, Khan and Patel as co-conspirators and co-defendants represents a notable change. Overall, however, I am satisfied that the changes made to the Indictment were not technical amendments, but represented a substantial, substantive development in the alleged criminality. The decision of Kerr J to stay the previous indictments is, in this case, a reflection of the fact that the case had evolved to the extent where I could conclude properly that the Defendant was subject effectively to two cases. I find, therefore, that the Appellant's AGFS claim should be assessed as a trial/cracked trial, and not just a trial.

Costs

20. The Appellant has been successful and so the £100 paid to lodge his appeal should be returned. No other claim or application for costs was made.

TO:

Mr Oliver Cook
Libertas Chambers
20 Old Bailey
London EC4M 7AN

COPIES TO:

Determining Officer
Legal Aid Agency
DX 10035 Nottingham

Mr Jonathan Orde
Legal Aid Agency
102 Petty France
London SW1A 9AJ
DX320 London

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.