



Neutral Citation No. [2022] EWHC 1274 (SCCO)

Case No: T20197382

SCCO Reference: SC-2021-CRI-000156

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 18/05/2022

Before:

COSTS JUDGE ROWLEY

REGINA

v

KHAN

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

Appellant: SAK Solicitors

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by SAK solicitors against the decision of the determining officer to calculate the appellant's fees on the basis of there being a trial and retrial under the Criminal Legal Aid (Remuneration) Regulations 2013.
2. The solicitors were instructed on behalf of Kamran Khan who, together with two others, originally faced a four-count indictment concerning an attack on Mr Sohail Khan on 11 September 2019. In addition to one count of wounding with intent, there were charges of robbery, damaging property and having an offensive weapon.
3. All three defendants pleaded not guilty and their trial began on 16 March 2020 before Recorder Silverton. Unfortunately, after three days, the jury was discharged owing to two of the defendants having been advised to self-isolate due to Covid 19.
4. The second trial began on 5 October 2020 before the Recorder of Bradford, HHJ Mansell QC. One of the co-defendants had pleaded guilty and so only two defendants were standing trial. The counts were reduced to the one offence of wounding with intent. The complainant's evidence was introduced by the Prosecution via a hearsay notice notwithstanding the defendants' challenge to its admissibility.
5. Following Kamran Khan's conviction, the solicitors claimed fees for two trials. The determining officer originally only allowed one trial fee but, during the redetermination process, the determining officer allowed a trial fee and a retrial fee. The solicitors continue to seek two full trial fees on this appeal.
6. If the first trial had begun as it did, but one of the defendants decided to plead guilty during the trial and the prosecution reduced the counts pursued to the single wounding with intent offence, there could be no realistic argument that the nature of the trial had changed. The same would be true in my view in respect of the method by which the complainant's evidence was adduced. In such circumstances a fee for a single, continuous trial would have been appropriate.
7. There have been numerous decisions at costs judge level to indicate that in some circumstances the changes between the first and second trials are such that it would be appropriate for a trial fee and a retrial fee to be paid, rather than a single fee. This would be in accordance with paragraph 13 of schedule 2 to the 2013 Regulations which states:

“13. – Retrials and Transfers

(1) Where following the trial and order is made for a retrial and the same litigator acts for the assisted person at both trials the fee payable to that litigator is –

(a) in respect of the first trial, a fee calculated in accordance with the provisions of this Schedule; and

(b) in respect of the retrial, 25% of the fee, as appropriate to the circumstances of the retrial, in accordance with the provisions of this Schedule.

...”

8. Under the current provisions, a trial and retrial fee is cumulatively more advantageous to the solicitor than a single trial fee for the total number of days involved. The difference between the two possible fees explains the motivation for appeals on which costs judges have given their decisions. All of the factors prayed in aid by the solicitors in this appeal – the changing of the judge; the time between the two trials; the number of defendants; the change in the indictment; the method of the complainant’s evidence being given – are all factors which cumulatively would tend to suggest that a trial and retrial had occurred rather than a single, continuous trial.
 9. In order for there to be two full trial fees, there have to be trials which involve different offences set out on different indictments. As the determining officer records in his written reasons, one such possibility is where an indictment is severed so that two separate trials can take place.
 10. Mr Shufqat Khan of counsel appeared via Teams on the appeal before me. Cognisant of the position I have just described, and which was the focus of the Legal Aid Agency’s written submissions, Mr Khan sought to argue that the circumstances were sufficient to amount to the defendant facing a fresh indictment at the second trial. Despite his best efforts, however, I have no doubt that this high threshold has not been reached in this case.
 11. The solicitors also rely upon a quotation from the second trial judge in the court log as follows:

“In my view, this was clearly a new trial of the allegations, with an amended indictment from that put before the first jury, held some months after the first aborted trial”
- However, this only assists in an argument as to whether there was a single trial or a trial and retrial. Regrettably, when judges speak of there being a new trial, solicitors interpret this as being an entitlement to a full trial fee. It may be that the trial judge also believes that to be the case, but this is one of the situations where the remuneration regulations clearly differ from what might be described as ordinary language.
12. This appeal, as with almost all such appeals, does not do any more than confirm that a second, retrial fee is payable. The litigators are in a worse position than advocates in being unable to decide which of the two trials should be claimed at the full rate and which the discounted rate. Nevertheless, the regulations are clear as to how the payment should be calculated.
 13. Accordingly, this appeal fails.