Neutral Citation No. [2022] EWHC 3355 (SCCO)

Case No: T20197407

SCCO Reference: SC-2022-CRI-000067

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 8/12/2022

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Lawrence
Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

MACKRELL MARSH & Co SOLICITORS

Appellant

-and-

THE LORD CHANCELLOR

Respondent

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

REASONS FOR DECISION

1. The issue arising in this appeal is as to the correct assessment of the number of pages of prosecution evidence when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known and explained in more detail in the decision of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE (subject to a cap of 10,000 pages), and the length of the trial. The dispute in this case concerns the extent to which evidence served in electronic form should count toward the PPE.

2. At the hearing on 2 December 2022 the Appellant was represented by Mr. Mackrell, solicitor for the Appellant, and the Legal Aid Agency ('the LAA') were represented by Mr. Orde, an employed barrister.

3. The Appellant acted under a Representation Order dated 15 October 2019.

4. The Defendant was charged on a 15-count indictment with various firearms offences (including in particular the possession of disguised Tasers) and drugs offences including possession with the intent to supply various classes and types of controlled drug. As I understand it an issue arose as to whether the Defendant intended to supply drugs. In the Determining Officer's written reasons it is said that the Defendant was found guilty following trial on 21 and 22 March 2022 (it appears that the Appellants were in the event entitled to a 'trial fee' there also appears to have an issue to whether a 'cracked fee' was payable - which suggests to me that the Defendant did at some late stage plead guilty – albeit, as I understand it nothing turns on this in this appeal).

5. As part of the investigation into this allegation two mobile telephones were seized. Their contents were downloaded into two 'handset' reports in PDF format.

6. The Determining Officer considered the reports had been served and allowed 3,529 pages of PPE consisting of 435 pages of paper evidence and the balance (3,094) being electronic evidence ('ePPE'). This included a substantial amount of communication data (call logs, contacts, social groups, SMS messages, MMS messages & chats). She allowed *"5% on a broad brush"* basis of the images in the Images section; this equates to 307 pages. The Appellant's sole ground of appeal relates to the Determining Officer's refusal to allow the Images Sections in full, or in a greater amount, as PPE. The Appellant's claim is for 6,164 pages in respect of these sections. The sums at stake are substantial: if entitled to the extra pages, the full amount would be £89,975.11 against a fee as it currently stands, of £37,523.38 (with the option of also claiming a Special Preparation fee).

7. Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all —*
> *(a) witness statements.*
> *(b) documentary and pictorial exhibits.*

(c) records of interviews with the assisted person; and
(d) records of interviews with other Defendants,

which form part of the served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.

(5) A documentary or pictorial exhibit which —

(a) has been served by the prosecution in electronic form.
and
(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances."

8. As Holroyde J makes clear in *SVS*, material which is, as he put it, only disclosed as unused material cannot be PPE. However, it is clear from the judgment that 'service' for the purposes of the regulations may be informal. 'Serve' means served as part of the evidence and exhibits in the case and evidence may be served even though the prosecution does not specifically rely on every part of it.

9. It is clear however from the terms of Regulation 1(5) and the guidance set out above that it is not of itself enough for the material to count as PPE that it be 'served' (as it was in this case). When dealing with the issue as to whether served material should count as PPE, Holroyde J, said this:

> *"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 that public funds are not expended inappropriately.*
>
> *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".*

10. It is also clear that downloaded material need not be regarded as one integral whole, as a witness statement would be, and that when exercising discretion under paragraph 1(5) a qualitative assessment of the material is required, having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance (updated in March 2017) and I have considered them in this context.

11. The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, provides as follows:

> *"In relation to documentary or pictorial exhibits served in electronic form (i.e., those which may be the subject of the Determining Officer's discretion under paragraph 1(5) of the Schedule 2) the table indicates –*
>
> "*The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account 'any other relevant circumstances' <u>such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the Defendant</u>*." [my underlining]

12. At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

> "*Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the Defendant's case*.
>
> *Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the Defendant's case, e.g., it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the Defendant's involvement*.
>
> *Raw phone data where the case is a conspiracy, and the electronic evidence relates to the Defendant and co-conspirators with whom the Defendant had direct contact*.

13. In his decision Holroyde J also cited, with apparent approval, part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi [2014]* 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are at paragraph 11:

> *"The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically 'taking into account the nature of the document and any other relevant circumstances'. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. <u>It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper.</u> So, in a case where, for example, thousands of pages of raw telephone data have been served and the task of the Defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count*." [my underlining]

14. In *R v Sereika (2018) SCCO Ref 168/1* which, as here, concerned the allowances to be made for images on telephone downloads, Senior Costs Judge Gordon- Saker said as follows:

> *"In this particular case, the exercise of that discretion is not easy. On the one hand the prosecution chose to serve this evidence as an exhibit. The solicitors were under a professional obligation to consider it. Given the nature of the defence, that the phone was used by others, it is not difficult to conclude that the solicitors will have wished to look for photographs indicating that use. On the other hand, it is unlikely that the vast majority of those photographs will have been relevant to that task. It would seem unlikely that the solicitors will have looked in detail at each of the 20,608 images served on disc. Most will have required a glance or less.*
>
> *In short, it is clear that the evidence on the phone was central to the case against Sereika and his assertion that others had used the phone was central to his defence. The solicitors were required to consider the phone evidence carefully. However, much of the evidence on the phone would not require consideration.*
>
> *It seems to me that in these circumstances there is no reason why a Determining Officer (or costs judge on appeal) should not take a broad approach and conclude that as only a proportion of the images may be of real relevance to the case, only that proportion should be included in the page count. Inevitably that will be nothing more than "rough justice, in the sense of being compounded of much sensible approximation": per Russell LJ in In re Eastwood [1974] 3 WLR 454 at 458. But that is the nature of the assessment of costs".*

15. Turning back to this case, it is clear that the Determining Officer directed herself in accordance with the decision in *Sereika*. Mr. Mackrell did not in the event take issue with that approach. It seems to me in any event that that approach is clearly correct on a proper interpretation of the regulations. The alternative is that a very large amount of time would be spent by those concerned with the administration of this scheme going through material such as this in great detail with the potential for detailed argument about possible relevance. It means however, inevitably- as the Senior Costs Judge pointed out, that there is the potential for some rough justice.

16. It is clear that the police relied heavily on the content of the downloads from the telephones to show that the Appellant's client was drug dealing. A significant amount of material taken from the telephone was exhibited to witness statements. To show that the phones were used by the Defendant, the Prosecution relied on an image of him asleep, which image is found in one of the exhibited photographs. It appears that the telephones were used to market the drugs by taking photographs of them and showing them to clients. The drugs were sent by post and photographs were taken of the bags and address labels, as appears from the exhibits.

17. The Appellant asserts in the grounds of appeal that the material was (at least on one telephone) "littered" with images exhibited and referred to by the Crown including images of drugs, envelopes, address labels, receipts for delivery, weapons such a Taser, cash, a picture of the Defendant himself (which was relevant to an issue of attribution) all being relevant to the case against the Defendant. However, the Appellant has already been compensated for the material insofar as at least some of it had been extracted and exhibited to statements which had already been allowed in the 'paper' PPE.

18. In any event, Mr. Mackrell took me to certain pages of the relevant sections which he identified as material. This included images of what appeared to be images of drugs (including cannabis and packets of diazepam), envelopes and labelling suggesting the posting of such drugs as well as quite a number of images of the Defendant (as I was told). I have no difficulty accepting that many, if not all, of these images were of relevance and that evidence of the type identified was on the phones and was central to the case. The difficulty was that the pages on which this material appeared, amounted to only about 1-2% of the material in these sections at most: on the LAA's calculation less than 1%, I think.

19. The Determining Officer held that the majority of the material appear to consist of pre-installed images, thumbnails, personal photos, and screenshots. She said that it was not clear how these would be considered relevant to the case, and they appear to have little or no evidential value. She considered that 5% of the total images from each of the phone downloads gave what she said was a fair reflection of the relevant material in the two Sections.

20. Mr. Mackrell asserted that the pages he took me to (which were from the whole of the sections of both reports, not just a selected part) were only a sample. I raised with him my concern that the LAA did not dispute that there was some relevant material; it was the extent of the material that was in dispute and my difficulty was in seeing how I could determine this issue on the basis of mere assertion in circumstances where it was open to him to demonstrate how much of the material required consideration (without necessarily taking me through to each page of it).

21. In my view Mr. Orde is right to say that there is a burden on the Appellant when seeking to assert that a higher assessment should be made, to establish that the material was relevant and needed to be considered closely. The Appellant was instructed in the criminal proceedings and will know what issues arose. The Appellant will know what evidence was relied upon by the prosecution and what evidence amongst the material served was relevant. The difficulty with assessing the pages of electronic material is that it tends to include a large amount of irrelevant material. That was the case here. The premise of the claim to include the material as PPE is that it is material that required some consideration as opposed to being material that only required a glance. In the absence of Mr. Mackrell taking me to any further relevant material I think I am entitled to assume that if there was a substantial amount of any further material which was relevant and had not been included in the allowance for 'paper' PPE then he would have been able to identify it (not least because one might assume that it was material specifically flagged up and noted as relevant when the solicitors considered it following service).

22. In any event having looked at the material and indeed sampled sections of it, I am not satisfied that I should increase the allowance made in respect of this material provided to me. The Determining Officer's allowance appears to come within the bounds of a reasonable and sensible approximation even accepting that that there are probably some other images which are or may be relevant and were not caught by those which Mr. Mackrell specifically took me to.

23. Even accepting that the bulk of the material was irrelevant I quite accept that the material needed to be considered and checked generally but I think a special preparation fee would be appropriate for this work and I will leave it to the parties to agree a timetable for an application for such a fee, along with the option of submitting a claim for special preparation for the remaining material served electronically.

COSTS JUDGE BROWN