Neutral Citation No. [2023] EWHC 2195 (SCCO)

Case No: T20217283

SCCO Reference: SC-2023-CRI-000039

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 10/ 8/23

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Davies
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

RILEY HAYES SOLICITORS
Appellants

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been unsuccessful. There shall be no order as to the costs of the appeal.

REASONS FOR DECISION

1. The issue arising in this appeal is whether the Determining Officer was correct to assess the fee payable to the Appellants on the basis that a Newton Hearing had not taken place so that the fee payable to the Appellants under Paragraph 20 of Schedule 2 of the Criminal Legal Aid (Remuneration) Regulations 2013 was on the basis of a 'cracked trial' rather than a 'trial fee'.

2. At the hearing on 10 August 2023 Mr. Cox, solicitor, appeared on behalf of the Appellants. The Legal Aid Agency ('LAA') were represented by Ms. Weisman (employed solicitor). I also had the benefit of written submissions.

3. No issue was raised about the date when the appeal was lodged, the appellants having asked, as I understand it, for additional time whilst they obtained a transcript relevant to the appeal.

4. The Appellants represented the Defendant, Mitchell Davies. The Defendant was charged on an indictment along with three other defendants – Logan Head, Patrick Purcell and Callum Cooper. All four defendants faced charges of (1) conspiracy to steal motor vehicles and (2) conspiracy to steal items from within motor vehicles. The case involved a large number of thefts and attempted thefts of cars and vans, and of items from within them. Mr. Head additionally faced a charge of dangerous driving.

5. I take the essential narrative as to what happened in the proceedings from the written submissions from Ms. Weisman. It is not necessary for me to rehearse it all; the precise chronology of the pleas does not matter for current purposes. It is not disputed by Mr. Cox.

6. Following a number of earlier pre-trial hearings at which no pleas were taken the parties came before the court on 4 May 2022. On that date, the t the Defendant entered not guilty pleas to both counts faced. It is understood that Mr Head also pleaded not guilty, but later changed his pleas, and the other two defendants entered guilty pleas. Two further pre-trial reviews took place in December 2022, and at the second of these, on 8 December 2022, the Defendant changed his pleas to guilty in respect of both counts. At that hearing, the court gave an indication that it was unsatisfactory for there to be no basis of plea from the Defendant and listed the matter for sentence on 9 January 2023, with a direction that the Defendnat serve a basis of plea by 15 December 2022. The trial date was vacated.

7. On 9 January 2023 the matter came before the court for sentencing as scheduled. The prosecution said that a Newton hearing was needed for Mr. Head. The court fixed that Newton hearing to take place on 6 February 2023, with sentencing for the other three defendants, including the Defendant, to take place on the same day. The defence team for the Defendant had not served their basis of plea as directed, so the Judge directed that it should be uploaded by 4pm that same day, i.e. 9 January.

8. On 6 February 2023 the parties came before the court for sentence as scheduled. The defence team for the Defendant had not uploaded their basis of plea on 9 January as directed, but did so on the morning of the 6 February hearing. It indicated that the Defendant accepted a number of the thefts and attempted thefts of and from motor vehicles with which he was charged, and in initial discussions between the parties the prosecution accepted this

basis. However, in further discussions later in court it emerged that while the number of offences was accepted, the valuations attached to them were not.

9. There was an exchange between the Judge and counsel for both prosecution and defence as to why this issue had been raised at such a late stage; why it was not referenced specifically in the basis of plea; and what steps might be needed to resolve the issue. It was canvassed that it may be necessary for each victim to give evidence, and the Judge noted that this might take 3 or 4 days of court time, and that it could affect any credit awarded to the defendant for his guilty pleas.

10. Defence counsel indicated that the matter could likely be resolved by confirmation from the officer in the case that sufficient checks had been carried out pursuant to the victims giving their statements so as to demonstrate the reliability of the valuations within the statements. The Judge indicated that on that basis it would be sufficient for defence counsel simply to speak to the officer in the case, and the case was put over so that this conversation could take place outside court in the presence of prosecution counsel. When the matter came back into court, defence counsel indicated that there was no issue with the information provided by the officer in the case and the case proceeded to sentence. Sentencing took place the following day and the Judge sentenced Davies to 40 months imprisonment.

11. This claim is governed in general by the 2013 Criminal Legal Aid (Remuneration) Regulations. The Remuneration Regulations, at Schedule 2, paragraph 1 (1) (a) set out the following definitions:

"cracked trial" means a case on indictment in which—

(a) a plea and case management hearing takes place 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; and*
> *(ii) either—*
> *(aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the plea and case management hearing; or*
> *(bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them; or*
> *(b) the case is listed for trial without a plea and case management hearing taking place;*

12. Schedule 2, Part1, Paragraph 2 (4) of the Remuneration Regulations sets out that:-

Where following a case on indictment a Newton hearing takes place –

a) *For the purposes of this Schedule the case will be treated as having gone to trial;*

b) *the length of the trial will be taken to be the combined length of the main hearing and the Newton hearing.*

13. The definition of "Newton hearing" is given as a hearing at which evidence is heard for the purposes of determining the sentence of a convicted person in accordance with the principles of *R v Newton* 77 Cr. App. R. 13 CA. As is well known a Newton hearing involves the sentencing court making findings, usually following the giving of evidence, in order to determine the correct level of sentence; the purpose of the hearing is to "enable the sentencing judge to determine such facts as are necessary in order to sentence the defendant".

As is also clear from the decision in *R v Newton*, such a hearing can take three forms. The first is where disputed facts may be put before the jury for a decision; that is obviously not relevant here as a jury was never empanelled. The second and third methods described by the Court in *R v Newton* are as follows:

> *"The second method which could be adopted by the judge in these circumstances is himself to hear the evidence on one side and another, and come to his own conclusion, acting so to speak as his own jury on the issue it which is the root of the problem.*
>
> *The third possibility in these circumstances is for him to hear no evidence but to listen to the submissions of counsel and then come to a conclusion. But if he does that, then…where there is a substantial conflict between the two sides, he must come down on the side of the defendant."*

14. It is clear that it is not sufficient for current purposes simply to show that a Newton hearing was listed, *R v Stafi* Ref 448/18. Such a hearing must 'take place'. It is thus not sufficient that work was done in preparation for such a hearing. Whilst this rule might on occasions be said to operate harshly on legal representatives, it seems to me that there is a clear underlying rationale for such a rule.

15. A Newton hearing can take place even though no live evidence is heard, *R v Hoda* (SCCO Ref 11/15). I have previously accepted that a Newton hearing can take place even though the judge is ultimately not required to rule on disputed facts (*R v Asseum* SCCO Ref 194/18) albeit, it is relevant to note that, in that case, the listed Newton hearing on the disputed issue had been opened and there had been submissions on the dipute, albeit that there were discussions leading to compromise in the course of a hearing.

16. A Newton hearing may place even though the relevant hearing has not been listed as a Newton hearing, *R v Makengele* (SCCO Ref: SC-2019-CRI-0000072_.

17. In *R v Huang* Ref: SC-2019-CRI-000057) I held that the Determining Officer had a right to consider whether or not any Newton hearing had taken place in any meaningful sense. As Master Rowley had noted, in *R v Elymilahi* 70/15 and 134/ 15, on occasions there

> *"was a fine line to be drawn between a Newton hearing and a standard sentencing hearing but that it could not be said that a Newton hearing had taken place where "the Judge has simply sentenced [the defendant] on the basis of his own plea, having satisfied himself about the inconsistencies which initially troubled him".*

18. In any event the the third limb of *R v Newton* requires a "substantial conflict between the two sides".

19. None of these matters I have set out above about the approach to be taken application of the relevant provisions, are, as I understand it, in dispute.

20. I accept, as Mr Cox argued, that in the course of the relevant hearing an issue was raised regarding the value of the vehicles and property stolen in the offences in which Mr Davies had admitted being involved and that this matter was relevant to the sentencing and was capable of being an issue which required determination at Newton hearing. I note too an

email was sent prior to the hearing on 13 January in wcih the Defendants' solicitors said that there would be submissions made in respect of level of harm, level of culpability and quantum. Any issue as to quantum was not however flagged up, as I understand in the basis of plea.

21. The hearing was not listed as a Newton hearing. This is not determinative but I think Ms. Weisman was right to point that there was no clear alternative version of the facts in respect of the relevant property; the Defendant was questioning the value of the property but this was resolved by discussion with the officer in the case, and that was not before a judge in the course of the hearing itself.

22. Mr. Cox relied on the fact was that a request had been made for the officer to attend the hearing. I am not sure that it was unusual in a case such as this for an officer to attend as sentencing hearing. I would accept that the request might also indicated that the officer might be asked questions about relevant matters whilst the parties attended the hearing. But I would have some doubt whether such a process of dealing with queries or providing clarification is unusual at a sentencing hearing.

23. A concern about the value of the vehicles and property stolen could have been addressed prior to the hearing; and I do not think the fact that the Defendant's case on this point having been raised rather later than might have been expected, as the judge's comments suggest, could convert what started as a sentencing hearing into a Newton hearing. Indeed had there been substantial issues as to value, as the judge's remarks indicate, a further hearing may have been required and the discount for a guilty plea may have been lost or reduced.

24. In the circumstances, like the Determining Officer, I am unable to conclude that the hearing hwas a Newton Hearing in a meaningful sense. The issue raised was, to my mind, in the nature of a query but in any event the hearing itself was some way short of a hearing to resolve *"substantial conflict between the two sides"* It seems to me that if it were the case that, if in a sentencing hearing the raising of an issue in the circumstances that occurred here would amount to a Newton hearing for the purposes of the rule, it might substantially distort the operation of the scheme. In any event, to my mind, the Determining Officer was correct to determine that the events that took place on this hearing did not render it a Newton Hearing.

20. This appeal is, accordingly, dismissed.

COSTS JUDGE BROWN