Neutral Citation No. [2023] EWHC 2512 (SCCO)

Case No: T20190927

SCCO Reference: SC-2023-CRI-000070

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 9 October 2023

Before:

COSTS JUDGE LEONARD

R
v
ALLI

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

Appellant: **Archer Maher Limited (Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal is governed by the Graduated Fee provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 11 October 2019, and the 2013 Regulations apply as in force at that date.

2. The issue on this appeal is whether the Appellant solicitors, who represented Oluwagbemiga Adesola Alli ("the Defendant") in the Crown Court at Cardiff, should be paid the Graduated Fee appropriate to a trial that has started, or to a cracked trial (as defined below). The Appellant has been paid for a cracked trial, but maintains that a trial fee is payable.

3. Schedule 2 to the 2013 Regulations governs payment to Litigators under the Graduated Fee Scheme. Paragraph 1(1) of Schedule 2 provides definitions that are pertinent for the purposes of this appeal:

> "…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 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 first hearing at which he or she entered a plea; or
>
> (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which he or she entered a plea,
>
> declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea…"

4. "Trial" is not defined in the 2013 regulations, and in many cases (including this one) the question of whether a trial fee or a cracked trial fee is payable will depend on whether a trial had begun in a "meaningful sense", the test identified by Mr Justice Spencer in *Lord Chancellor v. Henery* [2011] EWHC 3246 (QB).

5. Whether that is so will depend upon the facts of the case. At paragraph 96 of his judgment Spencer J set out the principles by reference to which a court can determine the question:

> "(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…
> (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…
> (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 because before the case can be opened the defendant pleads guilty…
> (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…
> (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… in the light of the relevant principles explained in this judgment."

The Background

6. The Defendant faced 11 counts of Fraud, possession of articles for use in fraud and handling stolen goods. The Prosecution case was that he had come into possession of documents containing the personal details of two individuals, and used that information to commit fraud by opening bank accounts and obtaining credit cards in their names.

7. Trial was listed for 12 May 2021. According to an attendance note produced by counsel for the Defendant, Mr Richard Barton, the trial judge, Mr Recorder Powell QC, called counsel into chambers. There followed an unrecorded conversation in which the judge indicated that if the trial was to proceed and go into the following week, he could not conduct it.

8. Mr Barton raised with the judge the fact that the Prosecution had not formally served electronic telephone download evidence upon which the Prosecution case relied, which had been handed over on discs but never formally served. Mr Recorder Powell QC agreed that this had to be done, and indicated that if the Defendant were to plead to something then he would deal with him that day by way of a suspended sentence.

9. Having taken instructions, Mr Barton offered a plea to Counts 5-10, which the Prosecution accepted. In court, the Defendant was rearraigned on counts 5-10, to which he entered guilty pleas. The Prosecution offered no evidence on the other counts, and also confirmed that the CPS would serve an updated Notice of Additional Evidence including the telephone downloads.

10. After mitigation, Mr Recorder Powell QC imposed a sentence of 24 weeks' imprisonment, suspended for 12 months.

11. According to Mr Barton, in the discussion in his Chambers Mr Recorder Powell QC expressed the opinion that 12 May 2021 ought to count as day one of the trial, because there had been so much preparation pre-trial and on the day, in particular on the part of the Appellant. He wanted to do all that he could to ensure that the Appellant received proper recompense, as without their hard work the case could easily have drifted on unnecessarily.

Submissions

12. The Determining Officer has found that trial did not start and that the Appellant should be remunerated for a Cracked Trial. The Appellant relies upon *R v Coles* (SCCO 51/16, 15 March 2017), *R v Sallah* (SCCO 281/18, 18 March 2019) and *R v Cox* [2023] EWHC 270 (SCCO) in arguing that substantial matters of case management were dealt with, specifically the issue of service of the telephone download evidence, ahead of the jury being sworn. This evidence was central to the prosecution's case and the Judge indicated that it should be formally served and not simply handed over.

13. There had been significant delays in the service of that evidence, and service directly correlated with the Defendant entering a basis of plea on the initial day of trial. That service was a significant issue is evident from a skeleton argument filed by Mr Barton the day before trial and the Prosecution's response to it.

Conclusions

14. I have reviewed the skeleton argument filed by Mr Barton for the trial. It argues that the prosecution should be stayed as an abuse of process, primarily on two grounds. The first was a delay in bringing the case to court, which he said had never adequately been explained. The second was that the Prosecution had failed to comply with repeated orders to serve formally the telephone download evidence, including an order made on 24 July 2020 by HHJ Williams to the effect the Prosecution must formally serve such material as it wished to rely upon by 31st July 2020, or would not be permitted to rely upon it without leave of the Court.

15. The Prosecution response was fairly brief, to the effect that the abuse of process application had been left much too late, that there was no basis for concluding that the delay had made a fair trial impossible and that failure formally to serve disclosed evidence does not amount to an abuse of process.

16. I do not doubt Mr Barton's account of his discussions with Mr Recorder Powell QC, but I must respectfully disagree with the proposition that it would be right to conclude that a trial had started because the Appellant had undertaken much work in preparing for it. That is not a criterion for determining whether a trial has started.

17. It has long been established that the 2013 Regulations, like their predecessors, must be applied mechanistically, so that the amount payable does not necessarily reflect the

amount of work done. For authoritative guidance on whether a trial has started, one must look to *Lord Chancellor v. Henery*.

18. It is not clear whether the Appellant has actually seen a copy of *R v Cox*, which the Appellant has described in submissions as unreported and as concerning submissions made out of court, whereas *R v Cox* has been reported and as I read it, turned upon two short hearings in which the judge determined an application to exclude evidence and heard, but did not determine, a bad character application.

19. As Costs Judge Whalan said in *R v Cox*, each case turns upon its own facts. Even given, as he and Costs Judge Rowley concluded in *R v Coles* and *R v Sallah*, that an actual ruling by the court may not be essential to justify the conclusion that the court has been dealing with substantial matters of case management, one could not draw that conclusion on the facts of this case.

20. Mr Barton's abuse application was never heard because the acceptance of the plea offered by the Defendant made that unnecessary. As for service, Mr Barton's note records a short, informal discussion with Mr Recorder Powell QC in chambers. The main point of the discussion seems to me to have been to air the possibility of avoiding further delay through the acceptance of a plea.

21. As regards the telephone download evidence, unsurprisingly, Mr Recorder Powell QC readily agreed with the proposition that the Prosecution should serve evidence which it had already been ordered to serve. When the matter came before the court the Prosecution simply confirmed (again, unsurprisingly) that the evidence would be formally served, in effect after all matters had been resolved. None of that constitutes substantial case management.

22. I can find no connection between the service of the telephone evidence and the Defendant's Guilty plea, which appears rather to have been a response to the judge's informal observations on sentencing. Given the timing, service would seem to have had more to do with establishing the correct PPE count.

23. It is to the credit of the Defendant's representatives that they concluded the case without further delay, but that cannot justify the conclusion that a trial started. Applying, as I must, *Lord Chancellor v. Henery*, the only conclusion that I can come to is that it did not.

24. For those reasons, this appeal must be dismissed.