



Neutral Citation No. [2023] EWHC 3131 (SCCO)

Case No: 22DA1187522

SCCO Reference: SC-2023-CRI-000075

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 7 December 2023

Before:

COSTS JUDGE ROWLEY

R
v
AVERY

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

Appellant: William Dudley (Counsel)

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by William Dudley of counsel against the determining officer's decision to calculate counsel's fee by reference to band 3.4 of the Banding of Offences in the Advocates Graduated Fee Scheme (AGFS) ("the banding document").
2. Counsel was instructed on behalf of Bradley Avery in respect of a four count indictment heard in the Crown Court at Worcester. The counts arose out of the defendant's relationship with his partner during a period between January 2020 and July 2022 during which time he was also his partner's carer. It was alleged that he assaulted her on numerous occasions and prevented her from leaving her address and attending appointments to stop people from seeing her injuries, as well as other matters said to demonstrate controlling or coercive behaviour contrary to section 76 of the Serious Crime Act 2015. Those events also led to a count of assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861 and common assault contrary to section 39 of the Criminal Justice Act 1988.
3. In relation to those three counts, the offences can be found in the banding document which altered the Advocates Graduated Fee Scheme in 2018. The document replaced the table in the Criminal Legal Aid (Remuneration) Regulations 2013 which had previously classified offences for the purposes of both the advocates and litigators' schemes. Revisions were made to the banding document shortly after it came into being and so version 1.2 has been in force since the beginning of 2019 in relation to advocates' graduated fees. Where the offence on which the fee is to be calculated can be found in Table B of the document, the corresponding band in Table A can be used to calculate the appropriate fee.
4. Offences which have only recently appeared on the statute book inevitably could not have formed part of the banding document. The fourth count with which the defendant was faced, namely intentional strangulation contrary to section 75A of the Serious Crime Act 2015, is one such recent offence. It was added to the 2015 Act by the Domestic Abuse Act 2021 and so was not classified, unlike the other offence contrary to the 2015 Act which the defendant faced.
5. Offences which are not expressly banded are deemed to have been allocated to band 17.1 along with "standard cases." If the advocate does not consider that this deemed banding is appropriate, a request for a reclassification can be made as part of the claim for the graduated fee. The determining officer will either accept the band proposed by the advocate, calculate the fee on the basis that the offence remains in band 17.1 or allocate the case to a different band for the purposes of calculating the graduated fee.
6. Where there are multiple counts on an indictment, the advocate is entitled to choose which count is to be used for the purposes of calculating the graduated fee. In this case, counsel has chosen the intentional strangulation count. Consequently, counsel proposed that the fee should be calculated using band 3.3 and the determining officer has used band 3.4. There has been some narrowing of the classification since counsel began at 3.2 and the determining officer started at 3.5. The bands are briefly described as follows in Table A:

“Band 3.1: Attempted murder of a child, two or more persons, police officer, nursing/medical contact or any violent offence committed with a live firearm.

Band 3.2: All other attempted murder.

Band 3.3: s18

Band 3.4: s20 Offences Against the Persons Act cases and other serious violence offences specified in Table B.

Band 3.5: s47 cases (Actual Bodily Harm), Threats to Kill and other serious violence offences specified in Table B.”

7. The serious violence offences specified in Table B include the following:

| Offence | Band |
|---|------------|
| Attempted murder | 3.1 or 3.2 |
| Causing or allowing death of a child or vulnerable person | 3.1 |
| Maliciously administering poison, etc, so as to endanger life or inflict grievous bodily harm | 3.2 or 3.3 |
| Wounding with intent to do grievous bodily harm | 3.3 |
| Racially or Religiously Aggravated wounding or grievous bodily harm | 3.3 |
| Offences relating to female genital mutilation | 3.3 |
| Causing explosions, sending explosive substance or throwing corrosive fluids with intent to do grievous bodily harm | 3.3 |
| Cruelty to and neglect of children | 3.4 |
| Ill treatment or neglect of a person lacking capacity by anyone responsible for that person’s care | 3.4 |
| Attempting to choke etc. in order to commit indictable offence [s21] | 3.4 |
| Inflicting bodily injury, with or without a weapon [s20] | 3.4 |
| Racially aggravated malicious wounding:- wounding or inflicting grievous bodily harm [s20] | 3.4 |
| Controlling or coercive behaviour | 3.4 |
| Threats to kill | 3.5 |
| Assault occasioning actual bodily harm [s47] | 3.5 |

8. The extract from Table B shows that if counsel used the count concerning controlling or coercive behaviour, the fee would be based on band 3.4. Similarly, the count concerning actual bodily harm would use 3.5 and the count concerning common assault would in fact use band 17.1 as it is recorded in the miscellany of standard cases there. In order for counsel to achieve any greater remuneration under the scheme, the appropriate banding of the count concerning intentional strangulation needs to be a band above 3.4.

9. Table A summarises the serious violence offences banded at 3.3 in Table B with the laconic “s18”. Table B describes other offences which do not appear to need to show intent in the manner of s18 but that intent is probably to be read into the religious element, to use the word religious rather loosely. The aggravated offences are triable either way but the others, including the poisoning and explosive offences, are triable by indictment only.
10. Strangulation was, prior to the enactment of s75A, generally an aggravating factor to a charge of assault occasioning actual bodily harm or common assault. Mr Binks, who appeared on behalf of counsel at the appeal hearing, helpfully referred me to the Court of Appeal’s recent decision in R v Cook [2023] EWCA Crim 452 in which this new offence was considered on an appeal against sentence. The strangulation had in fact occurred on the day before s75A came into effect and so Cook was charged with common assault. Having pleaded guilty to the charge, he was sentenced to 15 months’ imprisonment and the sentencing judge took some notice, at the request of the advocates apparently, of the sentencing guidelines for assault occasioning actual bodily harm in the absence of any Sentencing Council guidelines for the new offence.
11. The Court of Appeal considered that the judge was right to have no more than “some” regard for those guidelines since it is not necessary for there to be any element of physical or psychological harm to prove the offence of intentional strangulation.
12. Mr Binks relied on paragraph 4 of the Court of Appeal’s judgment in terms of the severity of intentional strangulation as a crime as follows:

“The absence of any reference to injury or harm was deliberate. The act of strangulation inevitably creates a real and justified fear of death. The victim will be terrified and often will be unconscious within a relatively few seconds if pressure is maintained. There is real harm inherent in the act of strangulation.”
13. In Mr Binks’ submission, this offence should be looked at as being more serious than an assault contrary to either s20 or s47 and it should be equated more properly with s18. He mentioned that a s18 wounding might only need to break the skin to create the necessary wound. The marks left by a strangulation would be at least as severe in any event.
14. Mr Binks also told me that this offence is often left to lie on the file when other offences such as s18 or s20 have been dealt with substantively. Indeed, the indicting of defendants under this new provision was patchy in his chambers’ experience. This comparative rarity did not help when claiming a graduated fee subsequently and it was his experience that re-bandings to 3.3, 3.4 and 3.5 were all recorded outcomes.
15. Ms Weisman, who appeared for the Legal Aid Agency on the appeal, did not seek to minimise the seriousness of the offence with which Avery had been charged, but nevertheless, she submitted that it was not close to being equivalent to s18. It was her submission that, for the purposes of classification, the “average” (my terminology) offence needed to be taken into account not ones at one end of the scale or the other. Therefore, the minimal wounding example given by Mr Binks was not a typical s18 offence.

16. Ms Weisman referred both orally and in writing to s21 Offences against the Person Act 1861. That offence concerns attempts “to choke, suffocate, or strangle any other person insensible or unconscious, or incapable of resistance...” to enable the perpetrator to commit an offence. That offence is triable only by indictment and the potential sentence is one of life imprisonment.
17. This offence is set out in Table B and has been banded at 3.4 (see above). Mr Binks accepted that he had to deal with what he described as a cogent argument. He categorised it as an obscure / arcane offence which was lingering on the statute book. Ms Weisman accepted that it was an old offence but thought that it might still be the best comparator.
18. She also emphasised the point that there was no intention to kill demonstrated by this case. If there had been any such evidence, the prosecution would have had various other charging options e.g. attempted murder.
19. Ms Weisman also submitted that the sentencing tariffs of other offences were relevant to considering the correct band. The possibility of life imprisonment for s18 was well beyond the potential maximum of 5 years imposed by s75A. The Court of Appeal in Cook said that the offence needed to be treated seriously but there were different magnitudes of this.
20. Mr Binks concluded by returning to Cook as being a good example of the seriousness of s75A. There had been a minimal act of strangulation but it had resulted in an immediate custodial sentence of 15 months which the Court of Appeal considered to be, if anything, lenient. Mr Binks remained of the view that the facts of the individual case need to be considered when contemplating a re-banding.
21. In my judgment, the determining officer’s conclusion of re-banding this case in band 3.4 was correct, notwithstanding Mr Binks’ well-argued submissions.
22. If a count concerns an offence which is expressly set out in the banding document, then there can be no argument that the case has been correctly banded. The severity of the crime alleged to have been committed in an individual case plays no part in which band is to be applied in these circumstances. The prosecution will have considered the extent of the crimes with which the defendant could be charged and are under a duty to prosecute the most serious crimes that the evidence will support. When it comes to the graduated fee the advocate can choose the most serious crime according to the banding document on which to claim the graduated fee. This system, therefore, takes no account of the individual case circumstances and takes a mechanistic approach to the calculation of the fee.
23. As a general principle, therefore, it seems to me that Ms Weisman is right that the typical offence for a particular crime should be used when considering potential comparators in the banding document. On this basis, it also seems to me that Ms Weisman is right to regard the sentencing tariffs and mode of trial as useful indicators when making comparisons.
24. These indicators suggest that there is much more similarity in the severity of the crime of intentional strangulation with common assault or ABH than there is with s18. A maximum sentence of 5 years’ imprisonment is a serious crime but it is of a different

order to life imprisonment. If the defendant is tried in the magistrates' court, the maximum sentence is 12 months.

25. Mr Binks sought to establish the life threatening nature of strangulation by reference to the quotation from Cook, but I do not think that it assists for two separate reasons. The first is highlighted by the facts in Cook itself. As the Court of Appeal records at paragraph 5 of the judgment, the offence occurred on “the day before the commencement of section 75A of the 2015 Act, so Cook was charged with common assault”. This phraseology to me suggests the Court of Appeal equated the charges as being similar so that the new offence would be charged where previously common assault would have been the outcome. The facts in Cook are not that dissimilar from the present case in terms of the strangulation occurring in the victim's own home and there being a history of violence. In this case, the prosecution charged Avery with common assault and assault occasioning actual bodily harm. Therefore, whilst the Court of Appeal made the comment in Cook about the serious nature of strangulation, it did not prevent it from considering the appeal against sentence and, amongst other things, the reference to the Sentencing Guidelines regarding assault occasioning actual bodily harm (and no more) as being of some relevance.
26. Secondly, the quotation from paragraph 4 of Cook is a broad description of strangulation as a whole. A broad description of assault would similarly include the victim being terrified etc. Yet, when the factual circumstances are considered, there are a range of offences which may be appropriate. Not every assault is going to lead to a near death experience any more than every strangulation. It may be that s21 OPA 1861 is not used very much – as the advocates seemed to conclude – but it is plainly aimed at more serious offences where the victim has been rendered unconscious (or similar). The wording of s75A is, it seems to me, aimed at a less serious crime. Rather than rendering the victim unconscious or insensible, all that is required is to affect the victim's ability to breathe. It is a defence to the offence if the victim consented to this act, unless they suffered serious harm and the perpetrator intended this to occur (or was reckless as to the possibility). Whilst there are gradations of seriousness covered by this wording, it is, in my view, clearly aimed at less serious crimes than would be covered by s21.
27. For these reasons I consider that the determining officer was correct in determining this claim by using band 3.4. I do not, however, accept the statement at the end of the written reasons that band 3.5 would have been appropriate if the coercing and controlling behaviour count had not been available to allow a determination using band 3.4.
28. The decision of the Court of Appeal in Cook only came out just before the written reasons were produced and there is no reference in those reasons to Cook. I take the view therefore that they were written without the benefit of the Court of Appeal's guidance. That guidance does not translate directly into the banding document but in my view, it suggests that the correct band would be 3.4. As I have described above, there are gradations of severity within the wording of s75A which make the offence broad enough potentially to straddle more than one band. The offence is sufficiently new for it to be difficult to establish what a “typical” s75A case contains. But, I think it is plain from the Court of Appeal's commentary, that it considered the offence to be more serious than assault occasioning actual bodily harm and was of a different nature

from assault offences in any event. The nearest comparator, it seems to me, is s21 Offences against the Persons Act 1861, which is banded at 3.4.