



Neutral Citation No. [2024] EWHC 1753 (SCCO)

Case No: T20220239

SCCO Reference: SC-2024-CRI-000027

**IN THE HIGH COURT OF JUSTICE**  
**SENIOR COURTS COSTS OFFICE**

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

Date: 8 July 2024

**Before:**

**COSTS JUDGE LEONARD**

**R**

**v**

**JAMES**

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

**Appellant: Vienna Kang Advocates (Solicitors)**

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

**COSTS JUDGE LEONARD**

1. This appeal concerns whether, under the Graduated Fee provisions of Schedule 2 to The Criminal Legal Aid (Remuneration) Regulations 2013, the Appellant is due a cracked trial fee or a trial fee. The issue turns upon whether, for the purposes of the 2013 Regulations, a “Newton Hearing” (a fact-finding hearing for sentencing purposes, which is treated as a trial under the Regulations) took place.
2. The relevant Representation Order was made on 20 February 2023. The 2013 Regulations apply as in force at that date. Schedule 2 at paragraph 1 provides the following definitions:

“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 the assisted person 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...

... “Newton Hearing” means a hearing at which evidence is heard for the purpose of determining the sentence of a convicted person in accordance with the principles of *R v Newton* (1982) 77 Cr App R 13...’

## **Background**

3. The Appellant represented Daniel James (“the Defendant”), who faced trial on indictment in the Crown Court at Warwick on one count of conspiracy to supply cocaine, a controlled class A drug. His two alleged co-conspirators were, respectively, at large and already sentenced, so the Defendant faced trial alone.
4. The early history of the case has no bearing on this appeal. After a number of hearings on 1 March 2023 the Defendant appeared at court and pleaded not guilty to the conspiracy charge. The case was listed for a further hearing on 12 April 2023, to set a trial date. On 12 April, the Defendant changed his plea to guilty. He subsequently submitted a written basis of plea dated 7 June 2023 in which, I understand, he raised a large number of factual assertions purportedly limiting his role in the conspiracy.
5. The Crown responded, disputing the basis of plea, on 17 June 2023. I understand that the Crown submitted at the time that because of the significant factual disputes between the parties, a one-day Newton hearing would be required.

6. The Defendant however informed the court on 20 July 2023 that he no longer intended to rely on the basis of plea. On 21 July the parties attended court for a mention hearing at which the Judge ordered pre-sentence reports and directed the parties to provide sentencing notes in advance of the Defendant being sentenced.
7. In its sentencing note the Crown contended that the Defendant had played at least a significant role, with features of a leading role in the conspiracy, whereas the Defence contended that the Defendant fell squarely into the significant category (the distinction between a significant and a leading role being important for sentencing purposes).
8. On 6 September 2023 the parties attended court for the hearing, at which Mr Recorder Steel KC found that the Defendant had played a significant, rather than a leading role, and sentenced him to 7 years and 6 months' imprisonment.
9. The Appellant contends that the hearing of 6 September was a Newton hearing, entitling the Appellant to a trial fee. The Determining Officer concluded that it was a sentencing hearing, so that the appropriate fee was for a cracked trial.

### **Submissions**

10. Mr McCarthy for the Appellant submits that that by the time of sentence, there were factual issues in dispute that concerned the role of the Defendant. The Court heard competing, evidence-based submissions from both counsel. Defence counsel, in particular, took Mr Recorder Steel KC to the features of the evidence that mitigated against a leading role and were more appropriate hallmarks of a significant role. The Judge acceded to those submissions and found in favour of the defence.
11. Mr McCarthy refers to a number of Costs Judges' decisions, including *R v Hoda* (SCCO 11/15, 13 May 2015); *R v Morfitt* (SCCO 55/16, 29 July 2016); and *R v Makengele* (SCCO SC-2019-CRI-000072, 6 January 2019). He argues that *R v Makengele*, a decision of mine in which I concluded that there had been a Newton hearing, is almost on all fours with this case.
12. Ms Weisman for the Lord Chancellor reminds me of another of my own decisions. In *R v Shehu* [2023] EWHC 3483 (SCCO), finding against the appellant, I distinguished between cases where the court, for the purposes of determining an appropriate sentence, heard competing submissions on disputed facts, and those where the submissions from the prosecution and defence were based on facts which were of themselves not in dispute. The former category of case might justify the conclusion that there had been a Newton hearing. The latter could not.
13. Ms Weisman also mentions *R v Davies* [2023] EWHC 2195 (SCCO), in which Costs Judge Brown found that to demonstrate that a Newton hearing had taken place, the Appellant must demonstrate that two alternative factual accounts were before the court, and that there had been a "substantial conflict" between the two accounts.

## The Transcript of 6 September 2023

14. I have been supplied with a transcript of the proceedings on 6 September 2023. It is not necessary to address its content in any detail. A review of the transcript demonstrates that there was no material factual dispute about the role that the Defendant had played in the conspiracy. The question to be determined by the Judge was whether that role could properly be characterised as a leading role, rather than a significant role.

## Conclusions

15. I am unable to agree that this case is on all fours with *R v Makengele*. In that case the importance of the Defendant's role in the drug distribution network (as did the extent to which he played that role under duress) turned on disputed facts, in relation to which the Trial Judge, HHJ Saggerson KC, had to make findings before sentencing. Here, there was no need for any factual finding. This case has more in common with *R v Shehu* than with *R v Makengele*.
16. It also has much in common with *R v O'Hare and Harding* [2024] 1317 (SCCO), in which I also concluded that where before sentencing the court had not been called upon to make a finding of fact, there had been no Newton hearing. I will repeat here the brief summary of the principles that I offered in that case.
17. In *R v Robert John Newton* (1983) 77 Cr. App. R. 13, the Court of Appeal identified the three forms of what is now known as a "Newton Hearing". The disputed facts may be put before the jury for a decision; the judge may hear evidence and then come to a conclusion; or the judge may hear no live evidence but instead listen to submissions from counsel and then come to a conclusion.
18. For the purposes of this appeal it was (as in *R v O'Hare and Harding*) common ground that, despite the wording of the 2013 Regulations to which I have referred, live evidence need not be heard for a hearing to qualify as a Newton hearing. I agree, given the principles of *R v Newton*, to which the 2013 Regulations expressly refer.
19. The essential point however is that there must be a fact-finding exercise for the judge to conduct. Here, there was none. The hearing of 6 September 2023 was intended to be, and was, a sentencing hearing. It was not a Newton hearing.
20. For those reasons this appeal fails, and must be dismissed.