



Neutral Citation No. [2024] EWHC 1969 (SCCO)

Case No: T20200208

SCCO Reference: SC-2024-CRI-000005

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 29 July 2024

Before:

COSTS JUDGE LEONARD

R
v
MUSE

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

Appellant: Wells Burcombe LLP (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. 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 Awaleh Muse (“the Defendant”), who faced trial on indictment in the Crown Court at Reading on two counts of being concerned in the supply of class A drugs (cocaine and heroin). There were three other co-defendants on the same indictment.
4. The Defendant entered not guilty pleas on 23 March 2020, and served a defence case statement denying all knowledge of the drugs on 29 May 2020. He subsequently entered guilty pleas on 8 February 2021. There were also other offences to be dealt with for sentence, under separate case numbers, mostly drug related.
5. Following the entry of his guilty pleas, the Defendant provided a basis of plea on 17 August 2021, which the prosecution did not accept. The matter was, following the trials of co-defendants, listed for a Newton hearing on 21 July 2023. Due to lack of court time, the Newton hearing did not proceed, and it was re-listed on 1 September 2023 before Mr Recorder Bate-Williams. The Defendant however withdrew his basis of plea at the start of the hearing.

The Transcripts of 1 September 2023

6. I have been supplied with two transcripts of the proceedings on 1 September 2023. The first Crown's opening and submissions in mitigation: the second, Mr Recorder Bate-Williams' sentencing remarks.
7. Counsel for the Defendant was Mr Kazantis. The Crown was represented by Ms Staples. I have taken note of the following extracts from the transcripts:

MISS STAPLES: Turning, then, please to the defendants who do fall to be sentenced today. Your Honour will recall that there was potentially a trial of issue to be held in relation to Mr Muse. I'll of course allow my learned friend to address the Court, but I am told that that is no longer pursued.

MR KAZANTZIS: Your Honour, that is correct. We no longer proceed on that basis. The basis of plea that – any point that is in issue is withdrawn.

RECORDER BATE-WILLIAMS: Right-ho. If I could say that in my preparation for this case, I looked very carefully at the statements from Mr Muse's mother and from his sister and I was prepared to accept that, as is often the case in drugs – drug dealing cases, Mr Muse may have been on the wrong end of some degree of threats and violence, as indicated by his mother and sister, but I didn't, pending any further representations which were going to be made – I didn't form the view that the – the extent of the violence and the threats affected his culpability.

MR KAZANTZIS: No, and for that reason, we've taken the view that we won't proceed any further.

RECORDER BATE-WILLIAMS: Well, that's a sensible – good.

MR KAZANTZIS: And I'm grateful for those indications...

MR KAZANTZIS... Your Honour's read the statements from his mother and his sister, and indeed when one looks at the summary for the November case he set out, this is on page F4, there's a summary of his interview, and again he sets out the threats that were made and the reasons he was proceeding to act as he did.

And what we say on his behalf, your Honour, is that when it comes to the case, we - I don't argue because we're no longer proceeding with the basis of plea in terms of whether he had a leading role or not, I won't argue against that. But when one looks at mitigation within the sentencing guidelines, they do say that when there is involvement due to pressure, intimidation or coercion falling short of duress it is something that can be taken into account except where it's already been taken into account at step 1. So if we're not taking it into account at step 1, and I ask your Honour to take it into account when considering mitigation overall he was in control of Line, as set out by the Crown in the facts of the case as opened, but he was not the man in charge at the top. There are always people above, as we know, in cases like this and he was working under direction of those, but he accepts that in terms of how the Courts assess cases his role is a leading one for the purposes of sentencing, albeit still working under the direction of others above and under the threats of violence that he received.

So on balance I ask your Honour to give as much credit as your Honour can for those mitigating circumstances...

RECORDER BATE-WILLIAMS... The basis of plea initially advanced on behalf of the defendant, but not pursued today, conceded that this defendant could not rely on a defence of duress, but put forward the threats and beatings claimed by this defendant as mitigation. This defendant, Mr Muse, accepts that he did not take an opportunity to render the threats ineffective, presumably by reporting them to the police or moving away from the area.

I've read the statement from Mahamari Muse referring to her impression that her brother was stressed, under pressure, and had sustained injuries from time to time, and described an occasion when the family had to leave their home for some hours at her brother's insistence. And she also described an occasion when three masked men came to their home and went to her brother's room. I've also read the statement from Fatima Omar, the defendant's brother, describing obvious injuries and requests for money, and the visit from three masked men.

As I indicated earlier, I'm prepared to accept that the defendant may have been put under some degree of pressure and physical assault from time to time, as is almost... inevitable if one gets involved in the drugs trade, but, as he accepts, that pressure did not amount to duress, and it would obviously have been very much more persuasive if he'd given his later account to police officers in interview, when he was specifically asked by PC Izlania if anyone had forced him or put pressure on him to hold or sell the drugs. It would also have been more persuasive if he hadn't put forward what I can only describe as a cock and bull story in the defence statement six months before his basis of plea was compiled. I will take that pressure and assault claimed by the - this defendant, I'll take that into account in the sentencing as a mitigating factor, as the defendant proposed in his basis of plea, but, as I said earlier in an exchange with Mr Kozentis, I don't find that this significantly affects this defendant's culpability.

Submissions

8. Mr Burcombe for the Claimant submits that counsel for the Defendant received a trial fee for this case, and that so should the Appellant. He relies upon *R v Hoda* (SCCO 11/15, 13 May 2015) and *R v Makengele* (SC-2019-CRI-000072, 6 January 2019) in arguing that it was not necessary for evidence to be heard for the hearing on 1 September 2023 to qualify as a Newton hearing. The evidence of the Defendant's mother and sister had been uploaded in preparation for the hearing, but ultimately the Crown did not take issue with that evidence. As a result, the Defendant's mother and sister did attend the hearing, but were not called. Mr Recorder Bate-Williams, nonetheless, made findings on their evidence which had a bearing upon sentence.
9. When I asked Mr Burcombe to identify the disputed facts which Mr Recorder Bate-Williams determined, I understood his response to be that the fact that the Crown did

not challenge the evidence offered by the Defendant and his family in relation to the pressure upon him, which had previously been disputed, constituted a finding.

Conclusions

10. I am unable to accept that submission. A concession by the Crown does not constitute a finding by the court: it makes such a finding unnecessary.
11. 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”. 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.
12. For the purposes of this appeal it is accepted, despite the wording of the 2013 Regulations to which I have referred, that live evidence need not be heard for a hearing to qualify as a Newton hearing. That must be correct, given the principles of *R v Newton*, to which the 2013 Regulations expressly refer.
13. The essential point however is that there must be a factual dispute for the judge to resolve. Here, there was none. To the extent that Mr Recorder Bate-Williams referred, in his sentencing remarks, to factual matters, he referred to undisputed factual matters.
14. Mr Burcombe submits that had the Defendant’s mother and sister been called upon to give evidence, there would be no question that the hearing of 1 September 2023 was a Newton hearing, but they would only have been called to give evidence if some aspect of their evidence had been in dispute. The hearing of 1 September 2023 may have been listed as a Newton hearing, but it proceeded as a sentencing hearing.
15. It may be that counsel for the Defendant received a fee appropriate to a Newton hearing, but that is not determinative of this appeal. I have to make my own finding on the facts as presented to me, and on the facts of this case my conclusion is that no Newton hearing took place.
16. For those reasons this appeal must be dismissed.