



Neutral Citation No.[2022] EWHC 1537 (SCCO)

Case No: T20200560

SCCO Reference: SC-2021-CRI-000153

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30 May 2022

Before:

COSTS JUDGE LEONARD

REGINA

v

KOROMA

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

Appellant: (Carson Kaye, 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 21 October 2020, and the 2013 Regulations apply as in force at that date.
2. The issue on this appeal, as with the Appellant solicitors' appeal in *R v Williamson* (the two appeals having been heard together) is whether the Appellant solicitors, who represented Simeon Koroma ("the Defendant") in the Crown Court at Nottingham, should be paid the Graduated Fee appropriate to a trial that has started, or to a cracked trial. The Appellant has been paid for a cracked trial, but maintains that a trial fee is payable.
3. The matters in issue on this appeal are similar to those in *R v Williamson*, and a number of my conclusions are common to both cases. For ease of reference, I have where appropriate repeated my observations and conclusions in each case to avoid the necessity of reading both judgments together.
4. 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...”

5. “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).

6. 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

7. By 13 September 2021, when his trial (having been delayed from 8 March 2021 by the pandemic) was due to start, the Defendant was charged with two counts of possession with intent to supply class A drugs and two counts of possession with intent to supply class B drugs, having pleaded guilty to possession at a Plea and Case Management Hearing either on 19 December 2020 or 19 January 2021. All parties attended Nottingham Crown Court for trial and the case was listed as a “fixed floater” on 14 September 2021.
8. On 14 September 2021, work was undertaken to get the case ready. This included interview edits, amending admissions and the Prosecution’s opening note, and uploading them to the Crown Court Digital Case System. Discussions were held between the Prosecution and Defence regarding the basis of plea and an indication of the length of sentence was sought from and given by the trial Judge, Miss Recorder

Levett. The indictment was then put to the Defendant, and guilty pleas entered. The agreed basis of plea was that the Defendant was an addict paying off part of a debt by following instructions to take the drugs from one address to another, not selling Class A drugs himself. The Defendant, in consequence, did not have to face the severe consequences of a conviction for supplying Class A drugs.

9. The Court log records this exchange between the Defendant's counsel and the Trial Judge:

“Mr Whitehall... can this be declared as first day of trial even though trial did not start... **Judge Addresses Advocate**... I'm not sure I can as the Jury were not empanelled... I can indicate it is due to the work of counsel that there was no need for a trial or for a Jury to be empanelled...”

10. It is useful to compare this sequence of events with the summary of events given by Spencer J at paragraphs 10-13 of his judgment in *Lord Chancellor v Henery*:

On the day of trial a grade C fee-earner from the solicitors, a paralegal, attended court to instruct counsel... at 3.05pm the case was called on. The judge confirmed that it was an effective trial. The judge was informed that a prosecution witness (a police officer) was not available, but defence counsel confirmed that he was not required. There was some discussion between counsel and the judge about the lack of defence statements for the other two defendants, and the judge enquired if and when bad character applications were to be made...

At 3.17pm a jury was empanelled and the jurors were sworn. The court log records that the jury was sent home to return at 12 noon the following day, “they are NOT put in charge today, to be put in charge tomorrow”. The case was adjourned until 11am the following day...

Next day... the case was called on at 11am and counsel requested more time, which the judge allowed. At 12.40 pm the prosecution applied to add a second count to the indictment, against each defendant, alleging affray. The application was granted. At 12.51 pm the judge informed counsel that he would discharge the jury, the court log again recording that the jury had not been “put in charge.” No doubt the judge was concerned that the jury had already been waiting for nearly an hour. Once the jury had been discharged, all three defendants pleaded guilty. Their cases were adjourned for sentence...”

11. On those facts, Spencer J found that there had been no trial in any meaningful sense. The question is whether, applying the principles he set out, a different conclusion would be reached in this case.
12. Against any such conclusion is that the Defendant pleaded guilty before the case could be opened. The Trial Judge, in accordance with the recommendations of Spencer J, was asked to indicate whether in her view the trial had started and was clearly of the view that it had not. Even counsel's request for an indication, at least according to the court log, incorporated an admission that it had not.

13. The Appellant argues that the court log will not represent a complete record of the proceedings, in particular Defence input, and that the discussions between Prosecution and Defence, as in *R v Coles* (SCCO 51/16) were of significant, evidential import, resulting in a very significant change to the Prosecution case and the Defendant's position. The Appellant, similarly, relies upon *R v Keville* (SCCO 232/19) and *R v Atlass-Gomez* (SCCO 198/19).

14. Before I explain my conclusions, I should mention one argument raised by Mr Rimer for the Lord Chancellor. It is an argument that I previously addressed and rejected, at paragraph 24 of my judgment in *R v S Mohammed* (SCCO SC-2021-CRI-000090) in these terms:

“... I do need to address Mr Rimer's argument to the effect that paragraph 96(6) of *Lord Chancellor v Henery* can apply only to long trials. That is to take Spencer J's reference to the context in which substantial case management commonly takes place before the jury is sworn (a long trial) and turns it into a prerequisite for deciding whether, as a matter of fact, the court has dealt with substantial matters of case management. To my mind that cannot be right. Logic dictates that whether a trial has started will turn upon what has happened at the point when it is said to have started, not by its subsequent length.”

15. Perhaps Mr Rimer overlooked the fact that I had already considered that argument and found it to have no merit. On this occasion, he argued that at paragraph 96(6) of his judgment Spencer J was offering a wider guidance which would be of value in relation to the length of trials, rather than on the question of whether there had been a trial or it had cracked. Again, I do not believe that that can be right. Spencer J's guidance was offered specifically with the view to resolving that question.

16. Nonetheless, on the available evidence, I do not believe that the facts of this case justify the conclusion that the criteria set out at paragraph 96(6) of *Lord Chancellor v Henery* have been met.

17. Mr Rimer argued that the “substantial case management” criterion will only be met if the court itself engages in substantial matters of case management. It seems to me that that must be what Spencer J had in mind. Even so, I do not rule out the proposition that “substantial case management” can be undertaken through discussions between Prosecution and Defence and not necessarily through active intervention by the trial Judge. Proper regard must however be had to the nature of the discussions.

18. “Substantial case management” (*R v Wood* (SCCO 178/15)) will involve significant issues concerning the conduct of the trial which, if not agreed, would fall to be determined by a ruling from the trial judge. Such issues appear to have been negotiated and agreed in *R v Coles*. The Appellant's case is, in effect, that because the Prosecution was persuaded to accept a basis of plea through which the Defendant faced a much less severe penalty than he would have done on the case against him as represented by the Prosecution's opening note, substantial case management discussions must have taken place. To my mind that simply does not follow. At the very least I would need to know the nature of the discussions. I do not, and Mr Kaye,

who represented the Appellant at the hearing of this appeal, was not at the Defendant's trial and was not in a position to say exactly what was discussed.

19. On the evidence, Prosecution and Defence counsel were able to negotiate a basis of plea, and so avoid a trial, against a background of normal case preparation. The trial Judge recognised their achievement in her observations but stopped short of concluding that the very fact that a trial had been avoided justified any finding on her part to the effect that it had nonetheless started. I would have to agree.
20. For those reasons, this appeal fails.