



Neutral Citation No. [2022] EWHC 1780 (SCCO)

Case No: T20207152

SCCO Reference: SC-2022-CRI-000012

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 5 July 2022

Before:

COSTS JUDGE LEONARD

REGINA

v

ZARIF

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

Appellant: MR. ABBAS LAKHA, Q.C. (Counsel)

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

COSTS JUDGE LEONARD

1. This appeal turns on a claim for special preparation under paragraph 17(1)(a) of Schedule 1 of the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 28 February 2020, so paragraph 17 (which has undergone several changes since 2015) was in effect as at that date:

“17.— Fees for special preparation

(1) This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under [Part 2](#) or [Part 3](#)

—
(a) it has been necessary for an advocate to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue; or

(b) the number of pages of prosecution evidence, as defined and determined in accordance with paragraph 1(2) to (5), exceeds—

(i) in cases falling within bands 6.1 to 6.5 (dishonesty offences, including proceeds of crime and money laundering), 30,000;

(ii) in cases falling within bands 9.1 to 9.7 (drugs offences), 15,000;
or

(iii) in all other cases, 10,000,

and the appropriate officer considers it reasonable to make a payment in excess of the graduated fee payable under this Schedule.

(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the graduated fee payable under [Part 2](#) or [Part 3](#).

(3) The amount of the special preparation fee must be calculated—

(a) where sub-paragraph (1)(a) applies, from the number of hours preparation in excess of the amount the appropriate officer considers reasonable for cases of the same type;

(b) where sub-paragraph (1)(b) applies, from the number of hours which the appropriate officer considers reasonable to read the excess pages...”

The Background

2. I am grateful to the Appellant for the following summary of events.
3. The Appellant represented Tahir Zarif (“the Defendant”) in the Crown Court at Birmingham. The Defendant was alleged to be the ringleader of a gang who planned and carried out the robbery of a wholesale cash and carry wholesale business in Digbeth, Birmingham.

4. The gang travelled from Derby to carry out reconnaissance and recruited a former employee as an inside man. They armed themselves with at least one live firearm and cable ties to use as restraints. During the course of the robbery the manager of the business, Mr Akhtar Javeed, attempted to resist. The Crown's case was that Mr Javeed was shot dead by the Defendant. The gang then fled, having gained nothing from the attempted robbery.
5. After the shooting the Defendant fled the country to Pakistan, with which the UK has no extradition treaty. The other members of the gang were arrested, tried and convicted, but the Defendant remained abroad in hiding until he was detained under an international warrant. He was kept in custody and extradited after prolonged legal wrangling in a very rare instance of a successful UK-Pakistan extradition.
6. Whilst in prison in Pakistan and subsequently in the UK in HMP Belmarsh, the Defendant became mentally ill. When younger he had been sectioned under the Mental Health Act, and during this period of incarceration his paranoid schizophrenia and delusions returned.
7. It was not possible to take instructions from the Defendant and at the start of his trial, on 5 October 2020, HHJ Melbourne Inman QC, the Recorder of Birmingham, ruled that he was unfit to plead.
8. HHJ Melbourne Inman QC directed that a finding of fact hearing take place. He discharged legal aid, the criminal proceedings having been concluded, and directed that the Defendant should be represented by QC and junior, with the costs to be assessed and paid from central funds. It is however common ground between the Appellant and the LAA, following *Lord Chancellor v Ross & others* [2021] EWHC 2961 (QB), that payment is due to the Appellant under the 2013 Regulations.
9. The Crown's case changed fundamentally following disclosure, shortly before the fact-finding hearing began, that the Crown had secured the cooperation of a man named Mistry, one of the co-accused who had previously been convicted. Over a period of weeks the Crown had interviewed Mistry, debriefed him and entered into an agreement with him pursuant to the provisions of the Serious Organised Crime and Police Act 2005.
10. Normally the Crown would not seek to rely upon the evidence of a co-accused, especially one who had been tried and convicted, his evidence having been disbelieved by a jury. The Crown had made a tactical decision to approach Mistry and to assess his potential as a witness, deciding to rely upon him to fill in gaps in the prosecution case.
11. The process of recruiting a criminal as a witness and entering into 2005 Act agreement with him is, says the Appellant, strictly regulated. An initial approach was made to Mistry and then over a period of days and weeks "scoping" interviews were conducted exploring his potential use to the Crown. Following this a 'cleansing' process was carried out. This required full acceptance by him of all his conduct, criminal or otherwise, that might be considered capable of having an impact on his credibility. The scoping and cleansing interviews were video recorded and records

were kept of all communications, paper, oral and email between the officers conducting the process and Mistry and his legal team.

12. Having indicated an intention to call him as a witness, the Crown provided transcripts of Mistry's evidence from his trial but did not provide the rest of the trial transcripts until during the fact-finding proceedings.
13. The result, according to the Appellant, was that the case involved an enormous amount of preparation and work (fact-finding work in particular) throughout the period of the hearing, which ran between 5 October and 13 November 2020, far beyond what had been undertaken to ready the case for the criminal trial.
14. It was necessary for the Defence to undertake a complete reassessment of the case. The issues (as best as could be ascertained without instructions, given the Defendant's mental state) had, for the purposes of his proposed trial, revolved around whether the Defendant had been involved in the crime at all; whether he was one of the men present at the time of the shooting of Mr Javeed; and if so, whether he was the gunman. The Crown had been relying upon the interpretation of CCTV evidence, telephone evidence and height comparison analysis in support of the case against him.
15. The evidence that was given at the original trial of the Defendant's co-conspirators was not admissible against the Defendant, who was not a party to those proceedings and had not had the opportunity to test or challenge what was said by any of the witnesses, including his co-accused. All prosecution witnesses who might give any pertinent evidence were required to attend to give their evidence again, subjecting themselves to cross-examination.
16. Given that Mistry had completely denied involvement and minimised his connection to the other conspirators, hitherto his evidence had been of relevance only in putting the case into context. Now, in a fresh account, he accepted being a member of the gang. He gave detailed and complex descriptions of his involvement and the involvement of others. He accepted being one of the two masked and armed men who entered the cash and carry and identified the Defendant as the other, and as the person who had shot Mr Javeed. As a result everything that Mistry had said previously had to be considered afresh once full disclosure had taken place.
17. The Crown's schedules of unused material had to be completely reconsidered by the Defence in the light of the new evidence, together with the original evidence in from this and the previous trial to identify the extent to which what was now being said was consistent with what had previously been said. Of particular import was comparing the material that was available to Mistry whilst he was serving his prison sentence. His sworn evidence had previously been disbelieved by the jury that convicted him. If it could be established that his new 'open and honest' account was really what he thought that the Crown wanted to hear, rather than a completely honest account, then that would go a long way to undermining him as a witness.
18. The court heard legal argument about the admissibility of Mistry's evidence. Once that had been determined, there was then the question of whether the proceedings could continue or whether they should be adjourned to give the Defence a proper

amount of time to ready themselves to address the new material that was still being provided.

19. This volume of new work would normally necessitate adjourning the case to allow sufficient time for the Defence to prepare to meet this new material. However, in the middle of the pandemic, had the case adjourned it would have meant a delay of a year or more. It was not a matter of pushing back the trial by a few weeks. In the meantime, had the Defendant regained his health there would have been powerful arguments for his release as the Crown could not have been said to have acted with due expedition in putting this part of the Prosecution case together. A huge amount of money and resources had been put in place to enable the case to proceed, including arrangements to fly witnesses to the UK from New Zealand and the USA.
20. HHJ Melbourne Inman QC was in consequence most reluctant to lose the allocated Court slot. He ordered that the case should go ahead but on the understanding that the Defence would be allowed what time was needed during the course of the trial to prepare to meet the challenges of the new material as it was provided by the Crown. This involved the Appellant and his junior working together not just throughout the court day, but every evening and weekend to deal with the evolving evidence and disclosure.
21. As the case proceeded there were difficulties with the jury, requiring individuals to be discharged. The Crown provided new material in a ‘drip feed’ manner depending upon when they received it; when they had had the chance to consider it for service or disclosure; and pursuant to disclosure requests and orders made by the Court. This included the entirety of the scoping and cleansing interview process with Mistry. The statements that had been served were themselves derived from lengthy video recordings with him, all of which had to be watched in full to assess what he said and how he said it. Subsequently transcripts were provided for use in Court with the jury. These had to be compared with the recordings for accuracy (there were discrepancies) and context: particular words and phrases, when written down, might not represent the nuances of what was actually said.
22. All of the unused material that related to Mistry had to be reviewed again and cross-referenced with his new account (not his “sanitised” statements, but the raw material upon which they were based) to see if it supported or undermined his evidence. The telephone material had to be examined again as Mistry gave a series of explanations about the use to which telephones had been put, and by whom.
23. He gave, for example, completely new evidence (in his statement but then in oral evidence as the case progressed) about travel overseas within the period of the conspiracy. It had previously been apparent that there had been some sort of foreign travel by three of the conspirators (Mistry, Van Alten and the Defendant) but not what that travel entailed. Mistry was now saying that it concerned the purchase of drugs and weapons.
24. Prior to his involvement as a witness Mistry had given evidence during his trial with the other conspirators. Now transcripts of evidence from the first trial had to be reviewed in their entirety: not just his account, but also what other witnesses and co-

defendants had said about him. These were not provided until the fact-finding hearing was under way.

25. This was not the only new material that had to be analysed and assessed. The Crown indicated for the first time that they wanted to rely upon material gleaned from electronic SD cards that they said belonged to the Defendant. This was material that showed him firing guns. The Crown now desperately wanted to have it put before the jury to bolster the assertion that the Defendant had a real gun when the murder took place.
26. The Crown had changed their junior barrister very shortly before the trial. The initial person instructed was a CPS in-house advocate. He had been tasked with reviewing disclosure. He was replaced by a Miss Brennan shortly before the trial started. She completely overhauled the disclosure that had taken place and over the course of the case disclosed enormous volumes of material, ranging from witness statements to police 'action' lists; from details of seized property to downloads of multiple telephones and electronic devices.
27. The Defence instructed Mr Clues, a forensic analyst, who had considered the evidence that it was believed would be relied upon at trial but who now had completely to re-evaluate his conclusions in the light of this new evidence and to see whether what was now being said was consistent with the telephone downloads, billing and cell site evidence produced by the Crown. There was an ongoing dialogue between him and Defence counsel to ensure that the content of Mistry's evidence was checked and re-checked for consistency and accuracy. The work he did involved cell site analysis, methodology checks and the rendering of large amounts of raw data into a form that could be examined and searched by counsel to assist in preparing cross-examination.
28. The total of served material amounted to 14,977 pages, over half of which was served during the course of the trial. Additionally the disclosure schedules alone ran to 8 lever-arch files, not counting the material that had actually been disclosed.
29. The Appellant made a claim for 176 hours' special preparation, supported by a detailed work log and based upon the proposition that all of the work undertaken by the Appellant outside court was both necessary and incurred as a result of the very unusual facts of the case.
30. The Determining Officer calculated that the work log totalled 174 hours. She accepted that a special preparation payment was due but paid 120 hours. Her view was that although the Crown's recruitment of Mr Mistry and the Defendant's inability to give instructions led to the Appellant having to undertake more work than would normally be undertaken in such a case, the work undertaken in preparation for trial would still have been relevant and of value, it has been not uncommon for a defence team to have make adjustments to a defendant's case before presenting it to the court.
31. Bearing in mind that the graduated fee was calculated on the basis of a 24-day hearing, payment would, in her view, already have been made for preparation and attendance. The Appellant's instructing solicitors were paid on the basis of a PPE count of 9963 pages, so the consideration of the evidence would have been covered by the graduated fee, whenever it was served. The 120 hours allowed represented

about 3 working weeks, or an additional 5 hours' work for each day of a 24-day hearing. Whilst it was difficult to establish which proportion of the total work undertaken by the Appellant was represented by the claim for special preparation, this seemed to the Determining Officer to represent reasonable remuneration for additional work undertaken due to the very unusual factual issues of the case.

Conclusions

32. I do not find the Determining Officer's reference to the PPE count to be particularly helpful. This is a claim under paragraph 17(1)(a) of Schedule 1, so the task in hand is to identify the amount of work undertaken by the Appellant, as a result of the very unusual facts of this case, in excess of the amount considered reasonable for cases of the same type. It is not to identify work in excess of that thought to be covered by the basic graduated fee.
33. The Appellant's schedule of work in support of the claim (which, at least as presented to me, does add up to 176 hours) starts on the first day of the hearing, so it is a matter of identifying the amount of work undertaken by the Appellant from that date in excess of the amount considered reasonable for cases of the same type.
34. Accepting (as I do) that the schedule as presented is accurate, it evidently incorporates a very substantial body of work reasonably undertaken outside court hours in order for the Appellant and his junior to meet a new case in the course of a hearing that would, in other circumstances, have been adjourned to give them time to do so.
35. The difficulty lies in identifying the extent to which that work exceeds the amount that would be considered reasonable for cases of the same type. The Appellant's case is that all of the work undertaken by him before and after each day at court, at weekends etc. between trial opening and sentencing must qualify as special preparation. I do not think that that can be right. I have never known a major trial in which it has not been necessary for counsel to undertake work outside court hours. The Appellant's submissions do not address that.
36. An obvious example from the Appellant's log would be work recorded between the jury's verdict on 13 November 2020 and the sentencing hearing on 14 May 2021. I have no reason to suppose that this work exceeds that which would have been undertaken regardless of the very unusual circumstances of the case. Similarly, the Appellant offers me no basis for concluding that the time spent preparing a closing speech exceeds that which would have had to be spent in any event.
37. Doing the best I could on the information available to me, I have carried out a broad calculation of the work that I could identify as in excess of that which would have been undertaken by the Appellant regardless of the unusual facts of this case. I found myself coming to no more than the Determining Officer's 120 hours.
38. For those reasons, this appeal must be dismissed.