



Neutral Citation No. [2023] EWHC 2686 (SCCO)

Case No: T20227010

SCCO Reference: SC-2023-CRI-000012

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 12 October 2023

Before:

COSTS JUDGE LEONARD

R

v

BARNES

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

Appellant: Liam O'Brien (Counsel)

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

The appropriate additional payment, to which should be added the sum of £400 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE LEONARD

1. Mr Liam O'Brien ("the Appellant") represented Dillon Barnes ("the Defendant") in proceedings before the Crown Court at Durham. The defence was funded by Criminal Legal Aid under a Representation Order dated 14 April 2022 and the Appellant is entitled to payment from public funds in accordance with the Advocates' Graduated Fee Scheme at Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013, as in effect on that date.

Rules and Authorities

2. Schedule 1 starts at paragraph 1(1), with this definition:

“In this Schedule—

‘case’ means proceedings in the Crown Court against any one assisted person... on one or more counts of a single indictment...”

3. The particular significance of that definition, for the purposes of this appeal, is that payment may be calculated on the basis that there was more than indictment, and so more than one “case”, against a given defendant. For example, if an indictment against a defendant is severed into two separate indictments, there may be two “cases” under the regulations and payment stands to be calculated accordingly. In contrast, if two separate indictments against a given defendant are joined into one, then there may be only one “case” against that defendant.
4. The appeal turns on whether there was (as the Determining Officer found) only one indictment, or (as the Appellant contends) there were two indictments, and so two “cases”, against the Defendant. It is the Appellant’s position that following severance of an indictment there were two cases, which entitles the Appellant to a single cracked trial fee plus an uplift under paragraph 27 of Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013.

The Procedural History of This Case

5. I am obliged to the Appellant for the following summary of the facts.
6. At approximately 5.50 a.m. on 11 April 2022 the Defendant committed an offence of robbery and an offence of making off without payment at a service station in Seaham (“the service station offences”).
7. At approximately 7.10 a.m. on the same day the Defendant and an individual who was alleged, but not proven, to be William Bogie committed an offence of robbery against delivery driver working in the City of Durham (“the Durham City offence”).
8. The Defendant and Mr Bogie were sent to the Crown Court separately, and initially appeared before the Crown Court on separate indictments. The indictment faced by the Defendant was a three-count indictment alleging the service station offences as Counts 1 and 2 and the Durham City offence as Count 3. The indictment faced by Mr Bogie was a single count indictment alleging only the Durham City offence.

9. At a joint Plea and Trial Preparation Hearing (PTPH) on 24 of May 2022 the Crown's application to join the two indictments was granted. The Defendant was arraigned and entered a plea of "not guilty, but guilty to theft" in respect of Count 1 (the service station robbery allegation), a guilty plea in respect of Count 2 (the making off without payment offence) and a guilty plea in respect of Count 3 (the Durham City robbery allegation).
10. The Defendant's plea on Count 1 was not accepted. Mr Bogie was not arraigned, as an application to dismiss was to be advanced on his behalf.
11. The case was next before the Court on 8 July 2022 for a Case Management Hearing and for the hearing of Mr Bogie's application to dismiss, which was dismissed. The position then was that there must be a trial in respect of Count 1, to determine whether the Defendant was guilty of the service station robbery, and a trial in respect of Count 3 to determine whether Mr Bogie was guilty of the Durham City robbery, to which he pleaded not guilty.
12. The issue in respect of the Defendant on Count 1 was whether the offence was merely a theft which did not involve the use or threat of violence (the Defendant's position) or a robbery involving a threat of violence (the Crown's position).
13. The issue in respect of Count 3 was identification. Mr Bogie denied being the second male involved in the Durham City robbery which the Defendant had admitted committing.
14. The Appellant raised the issue of whether it would be fair or appropriate for the Defendant to be tried on Count 1 alongside Mr Bogie on Count 3. He argued that this would cause unnecessary prejudice for both defendants. In the case of the Defendant, the Appellant submitted that a jury deciding whether he had made a threat of violence could be prejudiced not only by knowing that later the same day he went on to commit a very serious offence of robbery involving the use of a weapon, but also seeing footage of the offence (as they would need to do in respect of Mr Bogie).
15. Both the Trial Judge and the Crown accepted those submissions and agreed that the three-count joint indictment should be severed into an indictment dealing with the service station offences (which only involved The Defendant) and the Durham City offence (which involved both defendants).
16. At a subsequent hearing on 26 July 2022 the indictments were severed. The DCS record for the Defendant's case reads "All previous indictments stayed by HHJ Singh... Counts Severed... Rearraigned on 26.2.22". After the indictments were severed, the Defendant entered a guilty plea to the offence of robbery following an indication from the Judge (presumably HHJ Singh) that the offence would be viewed as a theft with a threat, which would make little if any difference to sentence. Mr Bogie pleaded not guilty. His case went to trial and he was ultimately acquitted.

Submissions

17. The Determining Officer, on the initial determination, noted that the court log for 26 July 2022 read: “10:02am Prosecution addresses Judge will proceed on Count 1 Robbery against Barnes no objection to severance” and took the view that this was not a case of “an indictment split into counts to be tried differently...When Mr Bogie was severed off the indictment a new one was created/preferred, but no actual change was made to the case and counts that deft Barnes was charged with.”
18. In his written reasons the Determining Officer reiterated his view that whilst the trial was affected by the severance of the defendants, that did not alter the number of indictments against the Defendant, who was moved to a separate indictment for him alone rather than for him and a co-accused.

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19. The Appellant argues that this analysis does not stand up to scrutiny. Counts 1 and 2 (the service station offences) were severed from Count 3 (the Durham City offence). This, as a matter of objective fact, resulted he says in two indictments. One (Document 3 in section B of the Crown Court’s Digital case management system (“DCS”) involved the Defendant alone. It contained only the service station offences. The other (Document 4 in section B of the DCS) involved both Mr Barnes and Mr Bogie and contained the Durham City Offence.
20. The Appellant points out that if, as the Determining Officer concluded, the act of severance “did not alter the number of indictments” then it is difficult to see how, as the Determining Officer accepted, the Defendant was “moved to a separate indictment for him alone”. He could only have been “moved” from the joint indictment which also contained the Durham City offence on which he appeared jointly with Mr Bogie.
21. Mr Orde for the Lord Chancellor refers to *R v Ghafoor* (SC-2021-CRI-000132, 4 February 2022), *R v Ayomanor* (SC-2020-CRI-000146, 12 January 2021), *R v Wharton* (SC-2020-CRI-000195, 1 February 2021), *R v Moore* [2022] EWHC 1659 (SCCO), *R v. Shabir & Khan* [2022] EWHC 2232 (SCCO), *R v. Thomas* [2022] EWHC 2842 (SCCO).
22. Mr Orde submits that severance does not necessarily mean there were two cases against the Defendant. Prior to severance the Defendant had pleaded guilty to counts 2 and 3. Before severance occurred, the Defendant indicated he would plead guilty to count 1. Following severance, guilty pleas were almost immediately entered for all three offences. This was not a case where the charges against the Defendant changed following severance, and there was no prospect of the Defendant facing separate trials following the guilty pleas.

Decisions

23. In *R v. Thomas* I summarised most of the Costs Judge decisions referred to above, pointing out that all of them were, necessarily, fact specific. I will not restate that analysis in full, but I will attempt for present purposes to trace the way in which the issue of multiple indictments has developed over recent years, in particular to emphasise that the mere existence, from time to time, of more than one indictment against a given defendant does not necessarily justify the conclusion that there was more than one “case” against that defendant.
24. The judgment of Master Gordon-Saker, now the Senior Costs Judge, in *R v Hussain and Others* [2011] 4 Costs L.R. 689, remains a key decision on the subject of whether, as a result of multiple indictments, there has been one or more “case”. It offers a useful starting point from which to address the issue.
25. In *R v Hussain and Others* it appeared that there had been four indictments against the same defendant. Indictments 1 and 2 (“the second indictment”) had been joined, but not proceeded with. Indictment 4 amounted only to an amendment of indictment 3 (“the third indictment”), which went to trial and resulted in a conviction.
26. The Senior Costs Judge found that, by reference to the 2007 Order, there had been two cases, for which two graduated fees were payable. A trial fee was payable (and had been paid) for the third indictment. On the facts of that particular case, a cracked trial fee was also payable for the second indictment.
27. At paragraphs 15 and 18 of his judgment, he expressed his conclusions in this way:

“Had the second and third indictments been joined, then there would only be one case. However there is nothing to suggest that happened. There is nothing which prevents two indictments being in existence at the same time for the same offence against the same person on the same facts. The court will not however permit both to proceed and will require the Crown to elect which will proceed to trial...

It may be thought that the solicitors have obtained something of a windfall for, in layman’s terms, this was really only one case. However the regulations have to be applied mechanistically and if, as here, there were two indictments which were not joined, then there must be two cases and two fees.”
28. In *R v Wharton* (SC-2020-CRI-000195, 1 February 2021), Costs Judge Rowley found that it would be wrong to conclude that there were two “cases” where, due to the way in which the DCS operates, what was in reality nothing more than an amendment to an existing indictment was necessarily managed by the stay of one indictment and its replacement with another. That is because it is not possible (or at least practicable) to add manuscript or typed amendments to an indictment uploaded to the DCS in electronic form, as would have been the case when indictments were prepared on paper.

29. Costs Judge Rowley adopted the same approach in *R v. Shabir & Khan*, drawing a contrast with pre-digital cases such as *R v Sharif* (168/13), in which the quashing of one indictment and the preferment of another normally meant (because a mere amendment would be dealt with by a manuscript or typed amendment) that the prosecution “had to start again”.
30. Other Costs Judges, in the light of the issues identified by Costs Judge Rowley, have since adopted the same approach. In *R v Moore* Costs Judge Whalan did so, revising the view he had taken in *R v Ayomanor*. In *R v Thomas* I did the same.
31. In *R v Wharton* Costs Judge Rowley referred to the judgment of Costs Judge Brown in *R v Abbas Khan* (SCCO 219/18, 5 April 2019) in which Judge Brown drew upon published guidance and case law to demonstrate (consistently with conclusions of the Senior Costs Judge in *R v Hussain and Others*) that the joinder of indictments did not, as a matter of law, in itself mean that there had been more than one indictment. That was the case even though the previous separate indictments had, of necessity, been stayed.
32. In *R v Ghafoor* Costs Judge Brown addressed the question of severance. In that case, the defendant was one of 25 defendants charged on a 14-count indictment concerning a money laundering operation on a large scale. For administrative reasons, the defendants were split into groups and the indictment was severed for that purpose.
33. Costs Judge Brown took the view that the severance of the indictment did not create two “cases” against the defendant Ghafoor. The counts against him did not change. (Nor, it would appear, were they ever split between different indictments). The severance simply split the indictment between groups of defendants in order to facilitate separate trials.

Conclusions

34. Section 2, Paragraph 2 of the Legal Aid Agency’s Crown Court Fee Guidance, as last updated in October 2022, reads (my emphasis):

“A ‘case’ is defined as proceedings against a single person on a single indictment regardless of the number of counts. **If counts have been severed so that two or more counts are to be dealt with separately**, or two defendants are to be dealt with separately, or if two indictments were committed together but dealt with separately, **then there are two cases, and the representative may claim two fees.**”
35. I am not bound by that guidance, but it seems to me to be right. At paragraph 22 of his judgment in *R v Ghafoor*, referring to an earlier but identical version of that guidance, Costs Judge Brown observed:

“Where one count is severed from a single indictment against one defendant, so that there are then two separate indictments, it follows also that there are two cases (see for example, *R v McCarthy* 36/17)
...”

36. That is what happened in this case. Following severance there were two indictments against the Defendant. One covered the service station offences and contained two counts against the Defendant only. The other covered the Durham City offence and contained one joint count against the Defendant and Mr Bogie.
37. At the time of severance the Defendant had pleaded guilty to the Durham City offence and to one of the service station offences, but he had not yet been sentenced for any of them and might, for example, have applied for permission to change his plea.
38. It is not quite clear to me why Mr Orde says that the Defendant, at the point that the indictments were severed, had already indicated that he would plead guilty to the service station robbery. From counsel's narrative it would appear that it was not until after the indictment was severed that the judge gave an indication of likely sentence and the Defendant responded with a guilty plea. It seems to me that that is more likely. If it had been understood that the Defendant was going to plead guilty to the service station robbery, then there would have been no further need for severance.
39. In principle, however, it seems to me that this makes no difference. At the time the indictment was severed, the Defendant had not pleaded guilty to the service station robbery and still faced trial. Even if he had pleaded guilty, he had not been sentenced.
40. It seems to me that, consistently with the Crown Court Fee Guidance, the observations of Costs Judge Brown in *R v Ghafoor* and the conclusions of the Senior Costs Judge in *R v Hussain and Others*, the correct conclusion in this case must be that there were, both in fact and in law, two indictments against the Defendant and therefore two "cases".
41. For those reasons, this appeal succeeds.