



Neutral Citation No. [2022] EWHC 2232 (SCCO)

Case No: T20207802 / T20217328

SCCO References: SC-2022-CRI-000043  
SC-2022-CRI-000046

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

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

Date: 19 August 2022

**Before:**

**COSTS JUDGE ROWLEY**

**REGINA**

**v**

**SHABIR & KHAN**

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

Appellants: Harris Solicitors & Eldwick Law

The appeals have been dismissed for the reasons set out below.

**COSTS JUDGE ROWLEY**

### **Costs Judge Rowley:**

1. This decision concerns appeals by Harris Solicitors and Eldwick Law against the decisions of determining officers not to pay cracked trial fees under the Litigators Graduated Fee Scheme in respect of indictments which were quashed by the trial judge.
2. The solicitors were instructed on behalf of Kamran Shabir and Jhazeb Khan, respectively. They were charged with various violent offences along with co-defendants and their trial took place in August 2021. At the beginning of the trial some of the co-defendants, including Khan, pleaded guilty to one of the offences and no evidence was offered against Shabir. The determining officers took the view that the trial had not started and so paid cracked trial fees by way of graduated fees. The solicitors appealed those decisions and I took the view that the trial had begun in a meaningful sense and trial fees were payable.
3. By the time the trial had concluded, the indictment was in its fourth iteration (described as “B4”). After the trial judge had sentenced the various defendants who had pleaded guilty, the Crown prosecutor said to the judge

“Could we quash all the indictments other than B4 please?”

The judge responded:

“And verdicts of not guilty in respect of the other counts all to lie on the file.”

4. Based upon this interaction, the solicitors have claimed a cracked trial fee in respect of some of those quashed indictments labelled B1 to B3. They do so on the basis that their respective clients pleaded not guilty to the counts in the relevant indictment and the prosecution has subsequently not proceeded with it. As such, the definition of a cracked trial fee in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013 has been satisfied.
5. The determining officer in the case of Shabir rejected the claim on the basis that it was out of time. As such the determining officer did not deal with the merits of the claim itself. However, the determining officer in the case of Khan did reject the claim on the basis of its merits rather than any delay. The determining officer took the view the indictment had been amended rather than that there had been two separate indictments justifying two separate fees.
6. Prior to the digital age, it was clear which indictment a defendant faced since it was produced on paper. If it was replaced by another indictment then some action, such as quashing or staying the first indictment had to be taken and this would lead to a fee being payable in respect of that first indictment such as occurred in the case of R v Sharif (168/13). A further fee would be payable in respect of the second indictment when the case concluded. If the paper indictment was simply amended, then the typed or manuscript amendment would be clearly seen on the indictment.
7. The preferment of the indictment is now usually carried out by the uploading of it onto the Digital Case System. Where the prosecution reviews the counts on the indictment and wishes to change them, then a new document may be uploaded rather than any

amendment being made to the original document even where what would traditionally have been described as an amendment, rather than a new indictment, was required.

8. From the appeals now regularly being received by costs judges, it would appear that this change in practice has resulted in there being numerous iterations of indictments existing on the DCS and which need to be dealt with at the end of the trial. As a result, numerous claims have been brought for more than one fee which was a comparative rarity prior to the use of the DCS.
9. The Court of Appeal has also found itself considering the effect of this change in practice in the case of R v Jessemey [2021] EWCA Crim 175. Martin McCarthy of counsel, who appeared on behalf of the solicitors in these appeals, submitted that the Court of Appeal's approach in Jessemey lent weight to the solicitors' argument.
10. Mr McCarthy's argument was that the 2013 Regulations define a case as involving one or more counts on a single indictment. If there is more than one indictment, then there is more than one case (ignoring the question of joinder) and a fee for each case can be claimed. The preferment of a new indictment on the DCS, in accordance with Criminal Procedure Rule 10 and applying the reasoning in Jessemey, supported the existence of a new indictment and consequently a requirement, at some stage before the case ended, to dispose of earlier, extant indictments.
11. The case of Jessemey contained a number of procedural woes which the Court of Appeal needed to tackle in order to decide the appeal. Jessemey was originally sent a postal requisition containing a single charge of an offence contrary to s15A of the Sexual Offences Act 2003 ("the s15A offence"). When he arrived at the Oxford magistrates court, Jessemey found that the prosecution had decided to prefer a second charge under s8 of the same Act ("the s8 offence"). Both charges concerned either way offences. Jessemey gave no indication of plea regarding the s15A offence but indicated a plea of guilty to the s8 offence.
12. The magistrates committed Jessemey to the Crown Court for sentence but failed to do so in a way which allowed the Crown Court judge to impose a sentence which was any greater than the magistrates could have imposed.
13. Two indictments were uploaded to the DCS. The first indictment was uploaded to the indictment section of the DCS. It contained a single count relating to the s15A offence. The second indictment was uploaded to the applications section of the DCS. It contained two counts. The first count concerned the s15A offence and the second count concerned the s8 offence where Jessemey had been committed for sentence. It is said in the Court of Appeal's judgment that there was some concern that the documentation received from the magistrates court was ambiguous about the manner in which the charge relating to the s8 offence had been sent to the Crown Court.
14. CPR 10 confirms that an indictment is preferred once it is uploaded onto the DCS. The Court of Appeal refined this by indicating that the indictment had to be uploaded to the indictment section rather than any other section of the DCS since otherwise it would be "a recipe for chaos." The Court of Appeal also confirmed that if two indictments were uploaded to the indictment section, both will have been preferred. The prosecution would then be required to elect the indictment in respect of which they intended to proceed.

15. When Jessemey came before the Crown Court, the prosecution counsel informed the court that the confusion regarding the alleged ambiguity in respect of the s8 offence had been resolved. No attempt was made to move the two count indictment to the indictment section and so there was only one indictment which had been preferred (the single count indictment).
16. One of the many procedural woes identified by the Court of Appeal was that the prosecution only decided at this point that the s8 offence, to which Jessemey had pleaded guilty, fully reflected his criminality. If the same view had been taken before the magistrates court, then none of the subsequent difficulties would have arisen.
17. The prosecution counsel then sought to discontinue the single count indictment so that the sentencing of Jessemey could occur. As the Court of Appeal found, that approach was not only flawed procedurally but also meant that there was no conviction against Jessemey which would have enabled the Crown Court to have sentenced him over and above the limits of the magistrates court's jurisdiction. That particular procedural problem has no relevance to this case. I have set out the rather tortuous history of the Jessemey case in order to make sense of the final paragraph which follows from the conclusion that the single count indictment could not be discontinued as proposed by the prosecution counsel:

“As we have observed the single count indictment remains extant. It is necessary to take some step to dispose of the indictment. We consider that the appropriate course is to order the indictment to lie on the file on the usual terms. One of us will sit as a judge of the Crown Court in order to achieve that end. We should say that we find it difficult to conceive of any circumstances in which any court would give leave for the prosecution to proceed with that indictment.”

18. The need to deal formally with the extant indictment is the crux of Mr McCarthy's submission. As he put it in his written submissions, the result of preferring the final indictment (B4) was that there were various live indictments in the indictment section of the DCS which contained “distinct criminality.” The court was therefore required to stay the earlier indictments and as such fees are payable for each of the cases represented by those indictments. Mr Rimer, who appeared on behalf of the Legal Aid Agency, queried why two or even three fees were not claimed on this basis? The answer appears to be that in order to be able to claim a fee, the defendant had to have been in a position to plead not guilty before the indictment was stayed in order to satisfy the definition of a cracked trial. Only one earlier indictment in respect of each of the defendants satisfied that condition.

#### The indictments

19. The first indictment (B1) was preferred on 17 January 2021. It contained the following counts:
  - i) kidnapping
  - ii) attempting to cause grievous bodily harm with intent

- iii) possessing an imitation firearm, with intent to cause fear of violence
  - iv) blackmail
  - v) blackmail
  - vi) intimidation
20. The first five offences were all said to have taken place on 27 December 2020. They were said to be committed by five defendants, one of whom was Jhazeb Khan. The sixth offence took place the day after and involved one of the co-defendants.
21. The second indictment (B2) was preferred on 8 June 2021. The same six offences were set out as counts on this indictment. Kamran Shabir was added as a co-defendant to the first five offences.
22. The third indictment (B3) was preferred on 17 August 2021. This was the first day of trial. The offences remained the same as in the first and second indictments. The defendants to the various offences were the same as in the second indictment (i.e. including Kamran Shabir) save for count three where the number of defendants had been reduced to two of the co-defendants.
23. The final indictment (B4) was preferred on 19 August 2021. A seventh count was added to the indictment regarding the assisting of an offender. It concerned one of the co-defendants allegedly lying in order to impede the apprehension of one of the other co-defendants.
24. Four of the co-defendants, including Jhazeb Khan, pleaded guilty on a written basis of plea to the first count of kidnapping at the trial. The judge sentenced these defendants before being asked to quash the earlier indictments and to leave the other counts to lie on the court file.
25. Mr McCarthy submitted that there were a number of important changes as the various indictments were uploaded to the DCS. He referred to the addition of the extra defendant (i.e. Shabir), and the subsequent reduction of defendants in respect of count three. He did not rely upon the additional count which did not relate to either of these defendants.
26. I have to say that I do not accept Mr McCarthy's submission that important changes were made. The addition of one defendant where there are already five co-defendants does not seem to me to be one which would obviously make a significant difference to the conduct of the defence of one of the existing defendants. Moreover, in respect of Kamran Shabir, there is no such change because he only became involved when the second indictment was preferred. As far as his defence was concerned, the only change between the original indictment for him (B2) and the final indictment was the removal of him from count three along with some of the other co-defendants.
27. It is entirely plain from reading the case of Jessemey and indeed the case of R v J [2018] EWCA Crim 2485 (referred to as MJ in Jessemey) that amendments to the original indictment would be expected to encompass changes of the sort which occurred here. In R v J, the form of indictment used at the trial differed from the indictment on which

the applicant had been arraigned so that there were more counts on the indictment for which the defendant had been convicted (but had not entered a plea). The appeal of J was conjoined with another appeal which involved the same issue. As the Court of Appeal described it:

“In each case, the prosecution’s intention had been to apply to amend the original indictment under s.5 of the Indictments Act 1915 (“the 1915 Act”) (and, if necessary, seek to have certain new counts sent to the Crown Court for trial), but by oversight no such application was made and therefore the applicant was not re-arraigned.”

28. Having indicated that the proper course of action should have been followed, the Court of Appeal concluded that the convictions could be upheld in any event. As part of its conclusion the Court said at paragraph 54:

“Indeed, as this case demonstrates, the modern practice of uploading draft indictments onto the DCS, intended to be convenient for all parties and to improve efficiency, is capable of leading to confusion and serious error if care is not taken to ensure that appropriate steps are taken to apply for orders to amend existing indictments and/or to ensure re-arraignment. The risk of multiple versions and uncertainty as to which is the “true bill” is obvious.”

29. The reference to various versions potentially being considered to be the “true bill” must, in my view, refer to ones which have been uploaded to the indictments section of the DCS so that they have been preferred rather than remaining as drafts, given the clear guidance in Jessemey.
30. That potential for confusion is clear in this case from the court log where the record of amendments being made appears to refer to the wrong indictment being the one before the court at the time. Nevertheless, the log does demonstrate that the court was attempting to follow the Court of Appeal’s comments in R v J in taking care to amend existing indictments and / or ensure re-arraignment.
31. Mr McCarthy contrasted the Court of Appeal’s guidance in Jessemey with comments made by a Trial Judge who had been contacted by me in another case on this issue (R v Wharton). Mr McCarthy’s argument was that in the light of Jessemey, the need for formality in dealing with extant indictments at the end of the case superseded the earlier comments of the Trial Judge who had taken a pragmatic view about whether a stay or amendment was ordered.
32. I have concluded that Jessemey does not assist the appellants’ argument. In Jessemey, both sides thought that the single offence indictment containing the s15A offence had been discontinued. The sentencing took place on the s8 offence without any conviction and that caused the problem of the limited sentence being imposed. Since the single offence indictment had neither been discontinued nor heard, something had to be done at the end of the case. By contrast, in this case, the counts being faced by the defendants were all before the court on the B4 indictment. The earlier versions contained no separate counts.

33. But even if there remained “distinct criminality” as Mr McCarthy described it, which had not been dealt with, that does not prevent the determining officer – as the Court of Appeal did in R v J – categorising the indictments as an iterative process of amendment rather than there being two “cases” facing the defendant which justified two fees.
34. This it seems to me is the crux of the issue. Unless there has been a severing of the indictment so that the defendant has to face two separate trials, or there is something equally distinct about the indictments being faced by a defendant (as in Jessemey), then the process of amendment of the indictment up to and including the trial is only one case which the defendant is facing and entitles the defendant’s legal representative to one graduated fee.
35. The court is regularly faced with appeals where the advocate or litigator is seeking two trial fees where the first trial has proved ineffective for some reason. The regulations clearly do not provide for this and a reduced fee is payable for one of the trials. This is so, notwithstanding comments made by the first trial judge that the second hearing is a new trial etc. The only way two fees can be sought under the 2013 Regulations is if the two trials involved different offences brought by different indictments.
36. In a similar way, in this situation, the trial judge may quash earlier iterations of the indictment as a matter of housekeeping as clearly occurred in this case. But that does not necessarily mean that there have been two (or more) cases for the purposes of claims for graduated fees. Where an indictment is quashed in circumstances such as in R v Sharif so that the prosecution has essentially to start again, then two fees may clearly be claimed. But that is, I suspect likely to be a relatively rare event, and is not to be equated with a proliferation of indictments which has grown out of an iterative attempt to be efficient in the use of modern technology. That is the situation here and does not provide the solicitors with the opportunity for claiming more than one fee.
37. As I have referred to above, the claim in Shabir was rejected by the determining officer on the basis that the claim was made out of time. I do not need to deal with this point having decided that the appeal is unsuccessful on the merits. Nevertheless, in case an appeal takes place, I will deal briefly with the point.
38. The three month period allowed for by the regulations had been exceeded by several months. No request for an extension of time within the three months had been made and so the solicitors would need to show “exceptional circumstances” under the 2013 Regulations to be able to bring their claim. A letter was provided by Harris Solicitors regarding this point on the appeal and Mr McCarthy referred to other situations where courts have taken into account the general difficulties caused by the pandemic.
39. The solicitors have, in my view, caused themselves an insurmountable hurdle by also appealing the determining officer’s written reasons regarding when the trial started. There is no explanation given as to why one appeal could be filed with the court in time but the other could not when the time limits for both were running at more or less the same time. I do not need to go into detail, but exceptional circumstances (rather than good reason which is the test for an “in-time” application) is always going to be a high bar and the solicitors did not come anywhere near it on this occasion.
40. For these reasons, these appeals fail.