



Neutral Citation No. [2022] EWHC 2425 (SCCO)

Case No: T20180095  
SCCO Ref: SC-2021-CRI-000137

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

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

Date: 26/09/2022

**Before :**

**COSTS JUDGE NAGALINGAM**

**Between:**

**R**

**-v-**

**Ngie Law**

**and**

**IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION**

**Thomas Schofield**

**Appellant**

**- and -**

**The Lord Chancellor**

**Respondent**

Hearing date: 12/05/2022

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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**COSTS JUDGE NAGALINGAM**

### **Costs Judge Nagalingam:**

1. The appeal has been dismissed for the reasons set out below. There shall be no order as to the costs of the appeal.
2. Whilst the appeal was originally brought on two bases, namely classification of offence and trial type, the Appellant has since confirmed that only the trial type remains in dispute for remuneration purposes.
3. The Appellant advocate represented the Defendant in proceedings before the Derby Crown Court, and subsequently claimed a trial fee, based on the contention that a Newton hearing took place, whereas the Determining Officer assessed that the correct payment was for a cracked trial.
4. This is an appeal against the decision to pay a cracked trial fee as opposed to a trial fee.

### **Background**

5. The Defendant was charged on an 18-count indictment, broadly split between charges of fraudulent evasion contrary to section 170(2) of the Customs and Excise Management Act 1979 (counts 1-5) and carrying a maximum penalty of 7 years, and charges of purchasing/keeping restricted specimens, namely ivory, contrary to regulation 8(1) of the Control of Trade in Endangered Species (Enforcement) Regulations 1997 (counts 6-18) and carrying a maximum penalty of 2 years.
6. A plea and trial preparation hearing proceeded on 19 April 2018 and a trial was fixed for 25 February 2019. However, due to reasons of availability, the trial date was adjourned to 17 August 2020, then 5 July 2021, and finally 16 August 2021 (in the floating list).
7. In fact the case was not called on 16 August 2021 and instead placed in the floating list for 17 August 2021.
8. Prior to the commencement of the trial, the defence requested an adjournment, following which, matters as to sentencing were discussed with the trial judge, who indicated what sentencing criteria he would apply if an acceptable basis of plea was to be put before him.
9. The Defendant subsequently pleaded guilty to all 18 counts upon which he was indicted, and the matter was listed for sentence on 18 August 2021.
10. The Appellant has submitted a claim for a two day trial, and appeals the decision of the Respondent to allow remuneration on the basis of a cracked trial only.

### **Regulations**

11. This claim is governed in general by the Criminal Legal Aid (Remuneration) Regulations 2013 (as amended) (“the Remuneration Regulations”).
12. The Remuneration Regulations, at Schedule 1, paragraph 1(1)(a) set out that:-  
“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;

13. A Newton hearing is defined at paragraph 1(1) of Schedule 2 of Remuneration Regulations as “...a hearing at which evidence is heard for the purposes of determining the sentence of a convicted person in accordance with the principles of *R v Newton* (1982) 77 Cr. App. R. 13 CA.”

14. Schedule 2, Part 1, Paragraph 2(4) of the Remuneration Regulations sets out that:-

Where following a case on indictment a Newton hearing takes place –

(a) For the purposes of this Schedule the case will be treated as having gone to trial;

(b) the length of the trial will be taken to be the combined length of the main hearing and the Newton hearing.

### **Decision**

15. It is uncontroversial that unless it can be evidenced that factual issues were resolved at the sentencing hearing, then the criteria for a Newton hearing has not been fulfilled and remuneration on the basis of a cracked trial is appropriate.

16. It is also uncontroversial that if a Newton hearing did take place then the Appellant should be remunerated on the basis of a trial.

17. In arriving at this decision I have taken into account that the nature of the counts upon which the Defendant was indicted do not seek to directly link the Defendant with the harming of animals. The case concerned evading the illegal exportation, and purchase of, restricted items. Namely those made from ivory.

18. The case log on 17 August 2021 records that 2 minutes after the case was called on, “**Judge Addressed Advocate..** This couldn’t be heard this week”.

19. Thereafter, the log records a 15 minute discussion between the advocates and the trial judge during which time the defence advocate is recorded as having said “There is a

way that we could resolve this case ... could we have a bit of a steer?”, and “I suggest that a simple way to break the deadlock is to reserve the case if this was to resolve ... I would ask that the case is put back 30 minutes to see if we can resolve”.

20. In response the log records “**Judge Addresses Advocate..** Discussions with Counsel as to the maximum sentence”, albeit contingent on an acceptable basis of plea being put forward.
21. Following an adjournment, the case log records that 9 minutes after resumption “Defendant re-arraigned and pleaded Guilty to all 18 counts”. By this stage it was 4.11pm and the trial judge stated “I can not sentence today ... I will list tomorrow”.
22. At 4.12pm the case log records “**Defendant NGIE CHUNG LAW; Case to be listed on 18-Aug-2021; Reserved to HIS HONOUR JUDGE S SMITH Q.C.** For Sentence – t/e 1 hour”. Guilty pleas to all 18 counts are then formally recorded prior to the close of court business on 17 August 2021. The basis of plea is not recorded.
23. On 18 August 2021, after the case was called on the court log records that at 3.06pm “**Defence Addressed Judge for NGIE CHUNG LAW ... Mitigation**” and that 9 minutes later sentences were handed down in relation to all 18 counts.
24. Following the Defendant’s change of plea, the Appellant submits that in order to determine the Defendant’s sentence the court heard evidence pertaining to whether the Defendant’s sales and purchases of ivory were commercial or non-commercial in nature, and whether or not the Defendant had close or remote links to hunters.
25. Little to no reliance is placed on the court log by the Appellant. Instead, reliance is placed in an unnamed and undated “local newspaper report”, a copy of which I have not seen save for the paragraphs which have been reproduced in the Appellant’s Notice, to demonstrate that factual findings were made by the trial judge.
26. In addition, I have had regard to the Appellant’s “EXPLANATORY NOTE TO FEE CLAIM” dated 19 August 2021 in which at paragraph 27 it states “A trial fee is payable because the learned judge made extensive factual findings on 18<sup>th</sup> August 2021, relevant to sentence”.
27. As to the notion that “extensive” factual findings were made, it seems to me that in reality the Appellant’s case is little more than that the trial judge found the total value of sold ivory to be £65,000, and that the Defendant’s course of conduct was not commercial, but rather ‘a hobby that turned into a crime’.
28. I also find that there is no evidence that HHJ Smith QC had “become very well acquainted” with the case, nor that he had reserved the case to himself “throughout”. Indeed, the Appellant’s own “EXPLANATORY NOTE TO FEE CLAIM” dated 19 August 2021, at paragraphs 8 to 17, makes no reference to HHJ Smith QC, from the Early Administration hearing of 19 March 2018 until 17 July 2020, when a trial was listed before HHJ Smith QC. In the intervening period, the trial had been fixed and then re-listed on several occasions, with the only trial judge named being HHJ Shant QC.
29. Further, there was no formal listing of a Newton hearing. The fact that a Newton hearing was never formally listed is not fatal to this appeal. However, the absence of that

formality means, as observed in *R v Makengele* [2019] SCCO Ref SC-2019-CRI-000072, “one must have regard to what actually happened”.

30. I do not consider *R v Makengele* to be analogous with the index matter. Firstly, there is no evidence that HHJ Smith QC heard extensive submissions. Indeed, at best the log records a maximum of 9 minutes of mitigation pleas. Further, HHJ Smith QC at no time refers to the 18 August 2021 hearing being a trial of any issue/s.
31. The Appellant’s grounds seek to characterise the passage, “the Defendant had a long-standing interest in the sale of ivory, but it could be characterised as ‘a hobby that turned into a crime’” as a factual finding.
32. Given the counts upon which the Defendant had been indicted, and having subsequently pleaded guilty, I consider this less a factual finding and more a statement of the obvious given the circumstances as they presented themselves on the day of sentencing.
33. As to the passage “the Defendant was not associated with those who killed elephants (largely based on the carbon dating evidence that showed that the ivory he sold was not new, but principally from animals killed between 1970 and 1990)”, I also do not consider this to be factual finding made by the court. Again it is nothing more than an observation. This is clear given the content of paragraph 22 of the Prosecution’s opening note, which states:

“Of course, Mr Law in Derby, the Defendant, has not been shooting elephants. That is not what we say. And in fairness to him it is right to tell you now that he is someone of previous good character, with no previous convictions or cautions recorded against his name. However, what the Crown say is that he has been purchasing and selling items made from ivory.”
34. The Appellant is therefore left relying on a reproduced extract from an unnamed newspaper, as to what was said in the 9 minutes (maximum) of mitigation pleas before sentences were handed down.
35. Whilst I am not minded to treat the reproduced extract of what happened at the hearing as evidence, I do not consider the content of the same assists the Appellant in any event. That is because firstly, it was never the prosecution’s case that the Defendant had been concerned in the practice of poaching or had links to current poaching practices. Secondly, and in consistency with the 9 minutes reflected by the court record for pleas in mitigation, the reproduced extract reflects that the Appellant did not rely on findings of fact in the manner pleaded in this appeal but rather relied on the stringent bail conditions the Defendant had been living under, that he had effectively been on a five year suspended sentence order, that he had been prevented from visiting his place of birth (i.e. Malaysia), that he is ethnically Chinese which meant he was culturally used to the purchase and sale of ivory, and that there was no suggestion (because the prosecution made that clear) that the Defendant was linked to the killing of elephants.
36. For all these reasons I am unable to conclude that a Newton hearing took place when having regard to what I can reliably conclude actually happened.
37. The appeal is accordingly dismissed.

COSTS JUDGE NAGALINGAM