



Neutral Citation No. [2022] EWHC 3113 (SCCO)

Case No: T20227149

SCCO Reference: SC-2022-CRI-000095

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 29 November 2022

Before:

COSTS JUDGE ROWLEY

R

v

MILLS

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

Appellant: Thomas McKail (Counsel)

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Thomas McKail of counsel against the decision of the determining officer not to make two graduated fee payments under the Advocates Graduated Fee Scheme as set out in the Criminal Legal Aid (Remuneration) Regulations 2013.
2. Counsel was instructed on behalf of Mark Mills in accordance with a representation order dated 14 March 2022. According to that order, Mills had been charged with aggravated burglary and possessing a knife blade or sharp pointed article in a public place.
3. On 7 April 2022 the prosecution uploaded to the Digital Case System (“DCS”) an indictment (“B1”) containing three counts. The first concerned the aggravated burglary contrary to section 10 of the Theft Act 1968 and which described the offence as follows:

“MARK MILLS on the 13th day of March 2022 having entered a building, namely Selfridges Store, Manchester as a trespasser, attempted to steal therein and at the time of committing the said burglary had with him a weapon of offence, namely an axe.”

4. Counts two and three concerned having an article with a blade or point contrary to section 139 of the Criminal Justice Act 1988 and concerned Mills, without good reason or lawful authority, having with him an axe in Exchange Square, Manchester and a kitchen knife in Mirabel St, Manchester, both on 13 March 2022.
5. Prior to the PTPH, the defence made written representations to the prosecution that the aggravated burglary count appeared to be without substance. At the PTPH, the Crown uploaded a second indictment (“B2”) which, in addition to the three counts in the first indictment, contained a fourth count of burglary contrary to section 9 of the Theft Act 1968 in the following terms:

“MARK MILLS on the 13th day of March 2022 having entered a building, namely Selfridges store, Exchange Square, Manchester as a trespasser, attempted to steal therein.”

6. Once the second indictment had been preferred, the defendant pleaded guilty to counts two, three and four but not guilty to the first count. The trial judge, HHJ Patrick Field KC made a note in the DCS at 10.59 on the day of the PTPH as follows:

“Indictment amended to add count 4.

Indictment at B1 stayed.

Pleas: 1. NG; 2. G; 3. G; 4. G.

Pleas acceptable. NEO on count 1 – NG verdict

PSR had been ordered by magistrates, but none has been prepared.

Adj until 10.5.22 for sentence (not reserved)”

7. Based upon the outcome of the proceedings, counsel claimed for a guilty plea in respect of the B2 indictment and that fee has been paid. Counsel has also claimed for a fee based upon the B1 indictment, but the determining officer has refused that claim.
8. According to Schedule 1 at Paragraph 1(1), the definition of a case under the 2013 Regulations for the purposes of calculating an advocate's graduated fee, is that an assisted person faces "one or more counts of a single indictment...". A graduated fee is payable for each such case. Therefore if, for example, an indictment is severed then there are two indictments and two fees are payable
9. In such circumstances, some action is required at the end of proceedings in respect of each indictment. If there has not been a trial in respect of an indictment, then it needs to have been quashed or stayed. Traditionally, that was a relatively infrequent occurrence but where it occurred, it would appear that fees were paid by the Legal Aid Agency since few, if any, appeals reached the Senior Courts Costs Office. When indictments were produced on paper, it would be a straightforward matter to determine whether an indictment had simply been amended on the same piece of paper, or a separate indictment had been created and thereby set out on a different document.
10. However, criminal proceedings have entered the digital age in the last decade and arguably unforeseen consequences have arisen. One such consequence is that the varying, to use a neutral term, of the case against a defendant has led to numerous indictments existing on the DCS at the end of proceedings. In some instances, orders have been made to stay all versions other than the one which has ultimately been pursued by the prosecution. Where this has occurred, claims have sometimes been made for a graduated fee in respect of those stayed or quashed indictments.
11. The determining officer has regularly refused to pay what appears to be a second fee for the same case and this has led to appeals being made to the SCCO. The initial result of such appeals was success for the appellants (see e.g. R v Ayomanor (SC-2020-CRI-000146)) but that was short lived and more recently decisions of Costs Judges Leonard, Whalan and myself have taken the view that the recent practice involving the DCS is really one of amendment of a single indictment in most cases.
12. Counsel in this case has looked at and sought to distinguish this case from those decisions. In essence, he says in his grounds of appeal that the changes in the second indictment were not merely cosmetic or reflective of housekeeping but comprise substantive changes to the criminality alleged against the defendant.
13. Counsel asked for this appeal to be decided without a hearing and so I set out the submissions from his grounds of appeal as follows:
 - i) If the first indictment had remained, or had not been added to, the case would have proceeded to trial with the aggravated burglary offence being denied (or potentially argued to dismiss).
 - ii) The defence did not offer a plea prior to any of the indictments being preferred but simply made representations about the existing indictment prior to the PTPH.

- iii) The change to the original indictment was an addition of a wholly separate count. It was not administrative nor tidying up in any way.
 - iv) There was no application to add a count or amend the original indictment but solely to prefer and proceed with the B2 indictment.
 - v) This order was confirmed on the sidebar of the DCS by the judge this which changed the indictment and case dynamics significantly.
 - vi) The facts of R v Gary Moore ([2022] EWHC 1659 (SCCO)) involved minor amendments with limited impact on the Defendant and the case before him. It was not at all similar to this case which had “whole scale” impact. The count that was added was not the same, unlike in Moore.
14. Having considered counsel’s arguments, it does not seem to me that any of them take this case outside the scope of others recently decided, such as Moore, where the nature of the second version of the indictment is really no more than an amendment of the original.
15. I have set out the particulars of the burglary offences. Other than the immaterial alteration of the description of the address of the burglary, the only difference between count 1 of the original indictment and count 4 of the second indictment is the removal of the aggravation i.e. the carrying of an axe. It was presumably a lack of any evidence of the axe being carried in the Selfridges store which led to the representations to the prosecution before the PTPH. The offence which Mills faced was thereby downgraded and he pleaded guilty on the first occasion.
16. This turn of events seems to me to be an entirely commonplace one where the prosecution reconsiders the evidence that it has and decides to vary the seriousness of the offence with which the defendant is faced. In appeals concerning whether a trial has started, it is often the case that negotiations between the prosecution and defence result in lesser offences being put forward and to which the defendant then pleads guilty. It seems to me to be stretching the definition of two cases beyond breaking point for the amended version of the indictment to justify a further fee because of a second case being brought against the defendant. I simply do not see how this can be described, for example, as changing the case dynamics significantly. Nor is it relevant, in my view that if the prosecution had continued to pursue the aggravated burglary count, that offence would have been defended vigorously.
17. In my judgment this is a case which has clearly only ever been about one indictment and the variation of it to include a lesser count has been achieved in the modern fashion of providing a further electronic document. In the past, the further count would have been added to the original document. Consequently, I consider the determining officer was correct to conclude that only one fee was payable to counsel and accordingly this appeal fails.