



Neutral Citation No. [2023] EWHC 3126 (SCCO)

Case No: T20217316

SCCO Reference: SC-2023-CRI-000033

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 4 December 2023

Before:

COSTS JUDGE LEONARD

R

v

HUSSAIN

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

Appellant: **Shafi Solicitors**

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

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors under the Litigators' Graduated Fee Scheme set out at Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013. A short extension of time is needed for the appeal, which is granted.

2. The graduated fee due to the Appellant is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence (“PPE”). PPE, broadly speaking, describes the evidence upon which the Prosecution relies.
3. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, (1)-(5) to the 2013 Regulations. Those paragraphs explain how, for payment purposes, the number of pages of PPE is to be calculated:

“(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).

(3) The number of pages of Crown evidence includes all—

- (a) witness statements;
- (b) documentary and pictorial exhibits;
- (c) records of interviews with the assisted person; and (d) records of interviews with other defendants,

which form part of the served prosecution documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.

(5) A documentary or pictorial exhibit which—

- (a) has been served by the Crown in electronic form; and
- (b) has never existed in paper form,

is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances.”

4. The PPE page count is subject to a cap, but for present purposes is 10,000 pages.

The History

5. The Appellant represented Asad Hussain (“the Defendant”) in the Crown Court at Liverpool.
6. The case against the Defendant turned on the events of 23 December 2020, when the police were called to the conservatory of an address in Preston. Sarmad Al-Saidi was found with multiple stab injuries to his chest and legs. Mr Al-Saidi was transferred to hospital, where he died several days later.
7. A murder inquiry revealed Mr Al-Saidi’s attackers to be Jamie Dixon and Lemar Forbes. They had been assisted by the Defendant, who was with Mr Al-Saidi at the time of the attack and took a telephone call from Forbes minutes before the attack. The case against him was that he had helped to organise the attack at the Preston address, and to ensure that Mr Al-Saidi was unarmed when it took place.
8. The Defendant was indicted on two counts of conspiracy to commit Grievous Bodily Harm and of Murder. Trial commenced on 12th July 2021 and concluded on 27 July 2021. The Defendant was found not guilty of murder, but convicted on the conspiracy charge and sentenced to 5 years’ imprisonment. Dixon and Forbes both were sentenced to life imprisonment for murder.
9. The Crown, as part of the investigation, seized a number of mobile telephones. Those were analysed and the data retrieved, along with data from the mobile phone providers. Extracts from this electronic phone material formed a key part of the Crown’s case against all three Defendants.
10. Among those extracts were records of Snapchat communications, shortly after the murder, between the Defendant and Forbes; a “bitmoji” (a customised, computer-generated personal image that a Snapchat user can create and designate as their account image) which appeared on the Defendant’s mobile phone and that of Forbes, helping to establish that the Defendant was a party to the Snapchat communications; evidence of the deletion of substantial amounts of data from the Defendant’s mobile phone on the date of, and shortly after the date of, the offence; and the installation of four Virtual Private Networks (“VPNs”) on the Defendant’s mobile phone, with usage peaking on 24 December 2020.
11. Post-trial, the Appellant submitted a claim for payment based upon a PPE count of 10,000 pages. The Determining Officer allowed 6835 pages, of which 4,709 pages comprised electronic evidence within the following categories;

Call Log, Cell Towers, Chats & Contacts 84 pages

Email 24 pages

Instant Messages 13 pages

Locations 1501 pages

Passwords, Searched Items & social media 5 pages
Web history 279 pages
Installed applications 67 pages
Applications Usage 836 pages
Timeline 1600 pages
Images 300 pages (at 5% of 6,000 pages).

The Principles

12. The parties have made reference to a number of judicial authorities and non-binding Costs Judge decisions. I will focus upon those I believe to be most relevant for the purposes of this appeal.
13. By virtue of paragraph 1(5) of Schedule 2 to the 2013 Regulations, served electronic evidence which has never existed in paper form may still be excluded from the PPE count if the Determining Officer considers that to be appropriate. At paragraph 50(ix) of his judgment judgment of in *Lord Chancellor v SVS Solicitors [2017] EWHC 1045 (QB)* Holroyde J (as he then was) described this as an important and valuable control mechanism which ensures that public funds are not expended inappropriately.
14. Holroyde J's guidance helps determine how the Determining Officer's discretion should be exercised. At paragraph 50(viii) of his judgment he identified the key criterion: whether the evidence was of central importance to the trial (and not merely helpful or even important to the defence).
15. At paragraph 50(vii) Holroyde J explained that where the prosecution seeks to rely on only part of the electronic data recovered from a particular source, issues may arise as to whether all of the data should be included in the PPE count. The resolution of such issues will depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data.
16. Holroyde J also mentioned the observations of Costs Judge Gordon-Saker in *R v Jalibaghodehzi [2014] 4 Costs L 781*, in which (referring to similar provisions in the Criminal Defence Service (Funding) Order 2007) the Costs Judge said, at paragraph 11:

“The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically “taking into account the nature of the document and any other relevant circumstances”. Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper. So in a case where, for example, thousands of pages of raw telephone data have been served and

the task of the defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count.”

17. In practice, parts of the served electronic evidence are routinely excluded from the PPE count. Telephone download reports are commonly served in both spreadsheet and PDF format. The PDF format mimics presentation on paper, lends itself readily to a page count and is usually conveniently and clearly divided into sections containing different categories of data, many of which are self-evidently irrelevant and can properly be excluded.
18. In *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB) Mrs Justice Nicola Davies DBE (as she then was) concluded that, given the importance to the prosecution in that particular case of text messages, it was incumbent upon the defence team to look at all the underlying data from which the prosecution had extracted samples upon which it relied. The defence needed to test the veracity of text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown, and to check the accuracy of the data finally relied on by the Crown. The underlying data should accordingly be included within the PPE count.
19. *Hayes* in my view indicates that where key prosecution evidence is extracted from a particular category of electronic data, the starting point is that all of the electronic evidence in that particular category (in *Hayes*, messaging data) would be included within the PPE count.
20. The appropriate exercise of discretion is, however, always case specific. So, where mobile phone downloads contain large numbers of images, only a small proportion of which are relevant, Cost Judges have, in decisions such as *R v Sereika* (SCCO 168/13, 12 December 2018), allowed an appropriate percentage of the full body of image data, most of which requires little or no consideration.
21. That approach was approved by Cotter J in *The Lord Chancellor v Lam & Meerbux Solicitors* [2023] EWHC 1186 (KB). At paragraph 62 of his judgment, he said:

“In my judgment... when conducting any assessment of electronic material there is nothing wrong, if it necessary and appropriate, with a rough and ready analysis; a “sensible approximation”. It is an entirely proper approach to consider the content of a documentary or pictorial exhibit and conclude that only a proportion of the pages should count as PPE...”

Submissions

22. The Appellant argues that this case is to be distinguished from *R v Sereika*, because most of the images in that case were relevant, requiring only a glance, if that. In this case, the defence team was required to look at, and did look at, each and every one of the images, emojis, and pre-installed icons in detail. They were obliged to do so to ensure that they

properly discharged their professional duties where there client, at the age of 17 years old, faced a Murder charge. The issues in the case which justified looking at all the images were so central and important that not to do so would have been a dereliction of duty.

23. The prosecution case relied on an analysis of images and emojis, comparing them to images on Lemar's phone, not only to prove the handset belonged to the Defendant but that the defendant had a conversation with Lemar after the attack. The bit emoji was a customised image, not pre-installed, and there was no way of identifying it in isolation from that other emojis and icons in the images section, unlike *Sereika* whereby only a proportion of the images were of real relevance and needed to be considered.
24. The Defendant maintained (having deleted some of the content of this phone around the time of the attack) that the contact between him and his co-defendants on the day of the attack and in the following days was not extraordinary and that that he had had the usual level of contact in respect of calls and text messages and through social media platforms.
25. He maintained that an examination of his phone would reveal that he had nothing to do with previous incidents of bad blood and violence between his co-defendants and Mr Al-Saidi, as alleged and relied upon by the Crown. He had remained friendly with Mr Al-Saidi and his group of friends up the time of the attack. He was not, he said, involved in the use of knives or machetes; in making threats of violence against Mr Al-Saidi; in violence generally; or in the supply of drugs, a "turf war" over drug distribution being offered by the Crown as a motive for the murder. Nor did he have any close or criminal association with Dixon. Whilst he used a VPN service, this was a long-standing arrangement which had nothing to do with the attack on Mr Al-Saidi.
26. An examination of Images on the Defendant's phone was necessary to see if he was depicted in possession of knives or machetes or in the company of others, including his co-defendants, when they had possession of knives. This was of importance because there was evidence from Asad Hussain's phone of him carrying out web searches where to buy knives and there were images on the phones of Forbes, who had pleaded guilty to Murder, glorifying the possession of a machete both before and after the murder of Mr Al-Saidi. The Defendant's denial that he was present at previous incidents of violence, involving knives, between his co-defendants and the deceased necessitated an examination of locations, Cell Site Data, and images.
27. If those assertions could be proved true, that could defeat the case against the Defendant, so it was necessary to consider the data in detail in order to prepare for cross-examination of the witness who had exhibited the extracts from the electronic data relied upon by the Crown.
28. At the appeal hearing, the other categories of data claimed by the Appellant as PPE having been allowed, the focus was on images, the Appellant arguing that of the 6,000 pages of images included in the relevant download report, 3,000 should be allowed, so as to bring the total PPE figure close to the 10,000 originally claimed.
29. Mr Mahmoud, for the Appellant, offered me a number of examples, within the body of image data, of bitmojis that would have been created by the Defendant either for as an entertainment or for use, most probably as Snapchat profile images; of pictures of persons connected to the case; and, in one instance, of a person in black clothing and wearing a

balaclava, similar to the clothing worn by Dixon and Forbes at the time of the attack.

Conclusions

30. The importance of the deletion of data, of the timing of deletions and of, for example, the installation and use of VPN facilities was recognised by the Determining Officer in the categories of data included within the PPE count.
31. The matter remaining in issue is the appropriate page count for the body of image data. In this respect, the approach taken by the Determining Officer was, in principle, right and consistent with the authorities to which I have referred. By the time of the appeal hearing I do not believe that that principle was in issue, the Appellant arguing rather for a substantially higher page count.
32. As I have observed, the Defendant distinguishes *R v Sereika* from this case. I am unable to accept the distinction, because it seems to me that this case and *R v Sereika* are very similar.
33. Although only a small part of the photographic evidence in *R v Sereika* was relevant, it was of key relevance in that it offered direct evidence of the involvement of the defendant in the cultivation of cannabis, the offence with which he was charged. The Senior Costs Judge, who heard *R v Sereika*, accepted that the appellant's solicitors had a duty to and would have gone through all of the images, seeking out those that mattered.
34. The task of distinguishing between relevant and non-relevant images in a telephone download report (which are not, in my experience, ever arranged in any particular order) would have been no more or less difficult in *R v Sereika* than in this case. The point, as I have mentioned, is that the great mass of image data, being self-evidently irrelevant, required little or no consideration.
35. This case seems to me to be no different. As ever, those images that could be said to be relevant are interspersed with a mass of other unimportant, standard, largely pre-installed images and innocuous pictures, which can be gone through quite quickly.
36. Mr Orde for the Lord Chancellor conceded that various images to which Mr Mahmoud referred me at the appeal hearing, which would have required closer examination and consideration, justified inclusion within the PPE count. His point, supported by a schedule of examples culled by the Legal Aid Agency from every 250th page of the documents section of the telephone download report, was that only a small percentage of the images could be said to be relevant, so that the 300 pages allowed by the Determining Officer could be seen to be fair.
37. I tend to agree. In fact, I have my doubts about the importance of any bitmoji in the PPE, other than the single example associated with the Defendant's Snapchat account. The others seem to me to be no more significant than a pre-installed emoji.
38. As for the body of images generally, one must not make the mistake of correlating a defence solicitor's duty to go through a body of evidence with the inclusion of such evidence in the PPE. For example the necessary consideration of data to verify the Defendant's claim that there was on his mobile phone no evidence linking the Defendant

to previous examples of violence or ill will between Mr Al-Saidi and his murderers does not support the inclusion of that data within the PPE. If anything, the absence of anything incriminating within the data would point to the opposite conclusion. This is, I believe, an example of the distinction drawn by Holroyde J between evidence which is central to the case and evidence (or, in this example, the lack of it) which is useful to the defence.

39. In short, I have found nothing to support the proposition that the Determining Officer's allowance of 5% of the image data in this particular case fell short of a reasonable allowance. The Determining Officer appears to me to have been right in the decision she made, and the appeal must be dismissed.