



Neutral Citation No. [2024] EWHC 1318 (SCCO)

Case No: T2021317

SCCO Reference: SC-2023-CRI-000123

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 28 May 2024

Before:

COSTS JUDGE LEONARD

R

v

O'Sullivan

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

Appellant: **Matthew Buckland (Counsel)**

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

COSTS JUDGE LEONARD

1. The Appellant represented Aaron O'Sullivan ("the Defendant") in criminal proceedings before the Crown Court at Manchester. The defence was funded by Criminal Legal Aid under a Representation Order dated 7 June 2022 and the Appellant is entitled to payment from public funds in accordance with the Criminal Legal Aid (Remuneration) Regulations 2013.
2. The Appellant argues that under the 2013 Regulations, two case fees are payable. The Legal Aid Agency ("LAA")'s Determining Officer has concluded that only one case fee is payable.

Rules and Authorities

3. The appeal turns on whether, for the purposes of the 2013 Regulations, there was (as the Determining Officer found) only one indictment, or (as the Appellant contends) there were two indictments, against the Defendant. The relevant provisions are to be found in the Advocates' Graduated Fee Scheme at Schedule 1, as in effect at the date of the Representation Order. Schedule 1 incorporates the "graduated fee" scheme for advocates like the Appellant, who represent legally aided defendants.
4. 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-
(a) on one or more counts of a single indictment..."
5. The particular significance of that definition, for the purposes of this appeal, is that a graduated fee is payable for each "case". For that reason, for example, if an indictment against a defendant is severed into two separate indictments, the litigator or advocate representing that defendant may in consequence receive two graduated fees. (the position where two separate indictments against a given defendant are joined into one, is considered below).
6. This is true not only of the 2013 Regulations, but of identical graduated fee provisions in the Criminal Defence Service (Funding) Order 2007, which preceded them.

7. Schedule 1 also incorporates this definition:

““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...”

The Procedural History of This Case

- 8. On 17 June 2021 an indictment was uploaded to the Crown Court’s Digital Case Management (“DCS”) system. It incorporated one count of money laundering against the Defendant, running to millions of pounds over a sustained period. There were four co-defendants.
- 9. On 8 July 2021 a Plea and Trial Preparation Hearing (“PTPH”) took place. A 5 week trial was fixed for 17th January 2022. On 7 January 2021 the Court confirmed the trial and the time estimate.
- 10. On 18 January 2021, at a “mention”, the court re-fixed the trial date as the court had no Judge to try the case. The trial was relisted for July 2022. In May 2022 the defence applied to break the fixture and the court refused the application.
- 11. On 10 June 2022 the parties attended court for a PTPH in relation to an indictment of conspiracy to supply class A drugs. The two indictments the Defendant faced (the subject of two separate representation orders) were joined and all previous indictments stayed.

12. The case against the Defendant proceeded on the single, consolidated indictment. The court re-fixed the trial for 17 April 2023. It was subsequently rescheduled again, to March 2024. I understand that a substantial body of additional evidence has been served in relation to the drug charge.

The Appellant's Submissions

13. The Appellant has made a claim for the indictment which incorporated only the money laundering charge. The claim is for a cracked trial fee. The Determining Officer has rejected that, saying that as the two indictments have been joined, there is only one case and only one case fee can be payable.
14. The Appellant says that the money laundering case had been prepared fully for trial. Certificates of trial readiness had been served by all parties and opening notes, jury bundles and defence statements had all been served and agreed. As is normal practice the agreed facts were in an iterative process of refinement, but substantial work preparing the case for a five week trial had been undertaken in January 2022.
15. Even though joinder took place, the one stayed indictment in respect of which a claim has been made (and there were other stayed indictments, representing only updates to the original, for which no claim has been made) was a very substantial case that would have been heard in a very substantial trial had the Court not vacated the date. Where the first indictment has been stayed after the date that it was allocated for trial, and when all the trial preparation work had been done, it is proper, says the Appellant, to acknowledge that two distinct cases have been prepared for trial and that two fees should ultimately be paid.

Case Law

16. One of the most frequently quoted Costs Judge decisions on the subject of whether, as a result of multiple indictments, there has been one or more “case”, is that of Master Gordon-Saker, now the Senior Costs Judge, in *R v Hussain and Others* [2011] 4 Costs L.R. 689.
17. In *R v Hussain* 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.
18. 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.
19. 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.”
20. Recent decisions on multiple indictments have focused upon the modern practice, because of the way in which the DCS works, of staying an existing indictment and preferring a new version, rather than amending the original, so that the apparent stay of one indictment and its replacement by another is really no more than an amendment to the original indictment and the case against the relevant defendant has not changed in any substantial way. It follows that the fact that an original indictment was stayed or quashed is not, of itself, determinative of whether there were two cases.
21. A point common to all such decisions is, however, that if two or more indictments are joined, then there is only one case. As Costs Judge Whalan put it in *R v Ayomanor* (SC-2020-CRI-000146, 12 January 2021):

“An indictment can be formally amended (once or on more than one occasion), either by the addition of a party, a count or both, and there is still only one indictment. Two or more indictments can be joined and the effect of this joinder is the same as amendment, namely that there is still only one indictment...”

22. *R v Horsfall* [2023] EWHC 3128 (SCCO) is a case specifically relied upon by the Appellant. In *R v Horsfall* Costs Judge Rowley addressed an appeal by solicitors concerning an indictment incorporating counts of possession of a weapon and ammunition which had been superseded by an indictment incorporating counts of conspiracy to possess and supply for sale weapons and ammunition (the possession indictment ultimately being stayed).
23. Costs Judge Rowley accepted that this was a different case from those in which the apparent stay of an indictment and its replacement with another, represented no more than an amendment to the original. He noted that the intention had been to join the two indictments, and observed (at paragraph 15 of his judgment):
24. “If the joinder had occurred, then the solicitors would have to have accepted a single fee in accordance with the regulations. But this is not what actually happened and it is difficult to see that there are anything other than two freestanding indictments in this case. Indeed, the possession indictment was the only indictment for the first few months and so any work done during that period would have been solely for that case. This is very different from the administrative amendments made to an indictment in some of the other cases...”
25. He made these further observations (at paragraph 17):

“The “swings and roundabouts” nature of the graduated schemes is referred to in numerous costs judges’ decisions. Joinder of the two indictments (and therefore fees) in this case would have been a swing which the solicitors would have to bear. Absent that joinder, it seems to me that the solicitors are entitled to enjoy the roundabout of two fees for the two indictments, notwithstanding the fortuitous manner in which they came about.”
26. I also refer below to some pertinent extracts from the decision of Costs Judge Brown in *R v Arbas Khan* (SCCO 219/18, 5 April 2019).

Conclusions

27. One can appreciate the force of what the Appellant is saying, and his reasons for saying it. In the remarkable circumstances of this case, there is much to support the proposition that it would be only fair to allow the Appellant to claim a cracked trial fee for the money laundering case. That is not, however, the way in which the 2013 Regulations work. The Appellants in *R v Hussain* and *R v Horsfall* enjoyed the benefit of the “swings and roundabouts” effect of the 2013 Regulations. Here, the same principles apply, but to the Appellant’s disadvantage.

28. It seems to me that Ms Weisman (who appeared on the appeal for the Lord Chancellor) is right in saying that a stay of the money laundering indictment is not really consistent with its joinder with the drugs indictment. Joinder of necessity means that the money laundering indictment continues as part of the joint indictment. What appears to have been a “catch all” order staying all previous indictments cannot change that.

29. Costs Judge Brown considered a similar situation in *R v Arbas Khan* (SCCO 219/18, 5 April 2019), in which he undertook a careful analysis of the applicable law before coming to the conclusion that where indictments have been joined, there is only one indictment for the purposes of the 2013 Regulations. At paragraphs 23 and 24 of his judgment he said:

“In this case joinder was what the Prosecution were seeking and no-one was objecting. The Judge acceded to the Prosecution’s request. His intention was, objectively ascertained, to join the indictments. The effect of the joinder, to my mind, is that the counts in the previous form of the indictments could not be proceeded with separately; there was no need to prefer a new indictment. Indeed having acceded to the application no new indictment came into existence and there was no need for any stay of any previous indictment; indeed there was no other indictment that could be stayed. Joinder was, objectively speaking, all that was required and in my judgement that necessitated only an amendment to the existing indictments.

I daresay that it may have made no practical difference to the parties whether a joinder took place or stay with preference of new indictments. In any event it appears that the Judge was not addressed about the potential difference between the two courses of action for the purposes of payment. The effect of the joinder was that the previous allegations against the different defendants were joined into one indictment. His reference to staying the indictments seems to me to be ‘belt and braces’ in the circumstances.”

30. I agree with Judge Brown’s analysis, as quoted above and throughout *R v Arbas Khan*.

31. As Ms Weisman also points out, a cracked trial fee cannot be payable for a money laundering charge that is, at least for the present, continuing to trial.

32. The unavoidable conclusion is that this, in common with all other cases of joinder of two or more indictments, is one case, for which one case fee is payable. The appeal must be dismissed.