



Neutral Citation No. [2024] EWHC 1320 (SCCO)

Case No: T20220250

SCCO Reference: SC-2024-CRI-000025

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 3 June 2024

Before:

COSTS JUDGE ROWLEY

R

v

ADENIJI

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

Appellant: Faradays Solicitors

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Faradays solicitors against the decision of the determining officer to calculate the litigator's graduated fee on the basis of there being a cracked trial rather than a Newton hearing. In accordance with the Criminal Legal Aid (Remuneration) Regulations 2013, a case which involved a Newton hearing would be treated for remuneration purposes as being a trial rather than a cracked trial.
2. The solicitors were instructed on behalf of Michael Adeniji in respect of a three count indictment relating to the supply of Class A and B drugs. The defendant originally pleaded not guilty to all counts on the indictment but, on the day of the trial, the defendant changed his plea to guilty on the class B count. He also submitted a basis of plea and the prosecution indicated they would not proceed with the counts regarding the Class A drugs in light of that plea. The case was adjourned for consideration of the basis of plea and sentencing.
3. The defendant was represented by Graham Arnold of counsel and he also appeared on behalf of the solicitors on this appeal. At paragraphs 4 and 5 of his skeleton submissions, Mr Arnold described the position of the Crown and the defendant in respect of the basis of plea as follows:

“That basis of plea advanced the case that the defendant was supplying cannabis mostly within his own social circle. This was not accepted by the prosecution. The prosecution maintained that the defendant should be sentenced as a commercial dealer of cannabis. The resolution of this issue was likely to resolve whether the defendant was to be sentenced to immediate custody or to a suspended sentence.

In the prosecution sentencing note...it was asserted that messages on a relevant handset...were ‘indicative of a level of supply higher than that likely for supply to a small circle of friends as suggested in the basis of plea.’ That was the factual dispute the judge had to resolve.”

4. Following the hearing on 3 January 2023 the judge, recorder Campbell KC, recorded the following note in the Digital Case System:

“LISTED FOR SENTENCE/NEWTON

...

Following argument determined issue as to basis of plea.

Sentence:...”

5. The nub of the appellant's case is that the hearing was listed as a Newton hearing, the judge was required to determine factual issues and, having done so, recorded it as being a Newton hearing in the DCS. As such, the single issue on the appeal, to quote Mr Arnold's skeleton, should be answered by stating that a Newton hearing did occur and it was not merely a cracked trial with a sentencing hearing.

6. Mr Orde, who appeared on behalf of the Legal Aid Agency at the hearing of this appeal, relied upon a transcript of the hearing before the judge. In particular, he relied upon a passage where Mr Arnold had confirmed that the defendant did not wish to give evidence in respect of the basis of plea, but wished Mr Arnold to make submissions on his behalf.
7. The judge clarified that there was no dispute that the messages on the phone were ones which the defendant had either made or received. Having received confirmation of that, the judge then said that there was “therefore no dispute on the underlying material.” There was, however, a dispute as to “what conclusions can be drawn from that underlying material, and whether that puts this offending into the significant or a lesser role categories.”
8. This description was agreed by the advocates and the judge went on to say:

“And in those circumstances, it doesn’t seem to me that it’s necessary to have a Newton hearing, and that the hearing can proceed with you both making submissions as to where on the basis of those facts the offending lies for the purpose of categorisation, and for me to...come to a view in relation to that.”
9. Given that the judge did not seem to think that a Newton hearing was being held, Mr Orde submitted that the determining officer’s categorisation of this case as being a cracked trial with a subsequent sentencing hearing was correct. The subsequent annotation in the DCS did not change that conclusion.
10. In the case of R v Hoda (215 of 15) I described the nature and purpose of a Newton hearing as follows:

“11. In the case of R v Newton, the Court described three kinds of hearing which could constitute a trial of the facts:

 - a. The disputed facts could be put before the jury for their decision
 - b. The judge could hear the evidence and then come to a conclusion
 - c. The judge could hear no live evidence but instead listen to submissions from counsel and then come to a conclusion

12. The purpose of a Newton hearing is to establish the facts so that the correct sentence can be imposed. From this can be gleaned the proposition that only cases where a material difference in the sentence will depend on the Judge’s findings will justify a Newton hearing. Consequently, it is unusual for the parties to be content to address the judge on the written evidence as the third option above sets out. But it is just as much a Newton hearing as one where live evidence is called.”

11. It seems clear that the need to determine factual issues that are material to the level of sentence to be imposed has traditionally required the giving of live evidence. For example, in Archbold Criminal Pleading and Practice, the three possibilities for resolving a dispute (see paragraph 10 above) are set out and then the comment is made (at 5A-339) that “*the second method is known as a Newton hearing.*”
12. The possibility of simply making submissions – which I took directly from R v Newton(1983) 77 Cr.App R. 13 itself – has the ability to muddy the waters because those submissions can look very much like the sort of submissions which would be made in mitigation in any event. They would, as the judge put it here, be relevant to the categorisation of the offending and so where it fits on the scale of sentencing (very often set out in sentencing guidelines.)
13. Indeed, in the case of Newton itself, the Court of Appeal, when describing the submission only option, said that where there is a “substantial conflict” between the two sides, the judge must come down on the side of the defendant. “In other words where there is a substantial conflict, the version of the defendant must so far as possible be accepted.”
14. The sentencing of the defendant in this case is included within the transcript with which I have been provided. The judge concluded that the defendant “had an operation in his own right” for the selling of drugs, both in respect of Class A and Class B drugs. That operation had reduced in size by the time of the selling of cannabis and the judge expressly stated that he was sentencing the defendant on the basis of his plea i.e. that the extent of the dealing was essentially to his social circle. In respect of both classes of drug, the defendant was placed in the significant role category, albeit at the bottom end.
15. Mr Orde also placed reliance on the case of R v Shehu ([2023] EWHC (SCCO)) where Costs Judge Leonard concluded that the relevant hearing did not amount to a Newton hearing. He said that, in circumstances where the facts were not disputed, the submissions by the parties as to how significant the defendant’s involvement was, could only properly be described as mitigation in relation to the position within the sentencing guidelines that were appropriate.
16. The LAA’s reliance on Shehu, wherever the facts appear to be essentially agreed, seems to me to be rather overdone. Costs Judge Leonard refers to the defendant’s role as involving “taking charge of the property at which cannabis plants were being grown and looking after the plants.” Apparently he did so in return for being allowed to live there rent free. The only question the sentencing judge had to decide was how significant a role the defendant had in the operation as a result of that arrangement.
17. There have been a number of appeals regarding hearings said to be Newton hearings rather than sentencing hearings recently. In my view, Shehu is an outlier, factually, in there being no dispute about the facts whatsoever. The majority of cases are in line with this one, where the extent of the involvement requires an interpretation of the evidence – often messages sent between parties – in order to draw the necessary inferences. In some cases, the judge’s comments when passing sentence could equally be described as being the result of the advocates making mitigation submissions.

18. As with much of the Graduated Fee Scheme, the onus is on the litigator (or advocate) to persuade the determining officer that a particular threshold has been established. In this particular situation, the similarity with pleas in mitigation at sentencing hearings requires, in my view, some compelling evidence of either all parties, including the judge, treating the hearing as a Newton hearing or some clear factual issue which the judge has to determine in order to move on to giving sentencing remarks.
19. This is perhaps a higher bar than the Court of Appeal described originally in Newton but that appeal was dealing with how the judge was to pass sentence when facts were in dispute. Here, the question is whether a particular hearing has involved facts being in dispute at all, and, if so, whether they were material to the judge's sentencing. These two situations are not the same.
20. In this case, the judge's comments at the hearing are illuminating in my view. He clearly did not consider that submissions on the undisputed telephone messages required any form of Newton Hearing but merely him "coming to a view" about the extent and seriousness of the drug dealing for the purposes of passing sentence. Whilst this required more consideration than the Shehu scenario, it does not, in my judgment, reach the threshold for establishing that a Newton hearing took place.
21. For these reasons, this appeal is dismissed.