Neutral Citation No. [2024] EWHC 1323 (SCCO)

Case No: 43SS0356323

SCCO Reference: SC-2024-CRI-000042

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
KOLA

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

Appellant: GSG Law Ltd (Solicitors)

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is the appeal of GSG Law Ltd against the allowance made by the determining officer of 3,141 pages of prosecution evidence ("PPE") when calculating the litigators' graduated fee under the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The solicitors were instructed on behalf of Lorenc Kola who, together with five others, faced a count of conspiring to supply a Class A controlled drug namely cocaine. At the time of his arrest Kola was found in possession of a pink iPhone which was described by the prosecution as being the controlling phone. In the summary police report, the phone (exhibit MCL/04) is described in the following terms:

> "The crux of MCL/04, is the operational control it holds over the drug line it has few contacts saved on the device and almost all sent messages of MK-based postcodes – this is what police infer is the recipient being directed to their next deal. It has clearly been used in order to put a barrier between numbers advertised to the general public, and that controlling those working for the group."

3. In his note for taxation, the defendant's counsel, Will Paynter, described how the full phone download was served as used evidence and it ran to 5,116 pages. His note then says:

> "This evidence needed to be considered carefully given his alleged possession of it and in consideration of when he was in active use of it and what his role was."

4. According to counsel's note, the total of 5,591 pages was served evidence in this case, whether paper or electronic in nature. Although the solicitors' calculation of the number of pages differed, they accept counsel's calculation. As can be seen from the first paragraph of this decision, the determining officer, however, concluded that the appropriate PPE should be 3,141 pages and the difference between these two figures is at the heart of this appeal.

5. There is no dispute that the evidence was served by the prosecution. Consequently, all of the paper evidence, save for the odd cover sheet, counts towards the PPE total. The same is not true, however, of the electronic evidence. That has been the position ever since the 2013 Regulations came into force and it is a little dispiriting to note that challenges to determining officers' decisions are still being made in the face of the express wording of the Regulations and innumerable Costs Judge decisions.

6. There is a two stage test for electronic evidence to be counted as PPE. The first stage is for the evidence to be served and that hurdle has clearly been met. The second hurdle however is that, unlike paper evidence, electronic evidence will only be counted as PPE if it is sufficiently important to the case. The second hurdle was described by Holroyde J (as he was then) in the leading case of Lord Chancellor v SVS Solicitors at paragraph 50 as follows:

> "If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately."

7. Paragraph 1(5) referred to by Holroyde J explicitly says that a documentary or pictorial exhibit which has been served by the prosecution electronically and has never existed in paper form:

> "…is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking into account the nature of the document and any other relevant circumstances." (Emphasis added)

8. Looking at the online assessment of this case, it is clear that the solicitors have not understood the point that the LAA tried to make regarding the need to demonstrate the importance of the document so that the determining officer could take it into account in the manner required by the regulations.

9. The note from counsel simply says that the evidence needed to be considered carefully given the defendant's alleged possession of it. That provides no detail as to why all of the contents of the telephone download needed to be considered with the same sort of scrutiny as would any paper evidence that had been served by the prosecution.

10. When a request for an explanation of why all of the download needed to be considered as PPE, the solicitors have simply failed to deal with that request. It is abundantly clear from cases such as SVS that the extraction report can be subdivided into parts which appear to be sufficiently important from those where it seems unlikely that that would be the case. Commonly, the determining officer will allow communications such as messages and chats and telephone calls but not allow technical data or timeline entries. If the solicitors wish to seek to claim all of the telephone download as PPE, then the onus is upon the solicitors to set out why all of the documentation is sufficiently important.

11. This is an appeal from the determining officer's written reasons. Within those reasons, the determining officer has set out which elements of the telephone download have been allowed as part of the overall calculation of the PPE. There is then an explanation of the two-stage hurdle which the litigator needs to overcome in order for electronic evidence to be counted as PPE. Regrettably, the notice of appeal makes no effort to respond to the issues raised by the determining officer regarding the importance of all of the download.

12. Instead, the solicitors suggest that the determining officer has said that the solicitors should simply not look at all of the download in a manner which would undoubtedly

risk being negligent. But there is nothing in the written reasons to indicate that that is the determining officer's suggestion. Indeed the complete opposite is the case. The solicitors do need to look at all of the served evidence but in terms of remuneration, there is more than one option available to recompense for that review of all of the evidence.

13. It is only where the electronic evidence is sufficiently important to be counted as if it were paper evidence that it will be remunerated as PPE. For the remainder of the electronic evidence, a claim for time spent by way of special preparation can be made. This is less remunerative but that is intended to reflect a review of the less important material.

14. In this case, the determining officer has allowed the communications aspects of the telephone download in an entirely unremarkable fashion based on his understanding of the case. There is no indication provided by the solicitors as to why any of the other elements of the download should be treated as PPE and I can see no justification for criticising the determining officer's allowance in this case.

15. The solicitors have asked for this appeal to be dealt with on paper rather than following a hearing. Whilst that approach has prevented the solicitors from providing any further information regarding the importance of the electronic evidence, the arguments put forward to the determining officer and raised so far on this appeal fill me with little confidence that any further information would have been likely at a hearing in any event.

16. Accordingly, this appeal is dismissed.