



Neutral Citation No. [2024] EWHC 1328 (SCCO)

Case No: T20227049

SCCO Reference: SC-2023-CRI-000113

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 3rd June 2024

Before:

COSTS JUDGE WHALAN

R

v

TYRONE BARTON

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

Appellants: EBR Attridge LLP

The appeal has been unsuccessful, for the reasons set out below.

COSTS JUDGE WHALAN

Introduction

1. EBR Attridge LLP ('the Appellants') appeal the decision of the Determining Officer at the Legal Aid Agency ('the Respondent') in a claim under the Litigator's Graduated Fees Scheme ('LGFS'). The issue for determination is whether the fee allowed for the hearing on 29th June 2023 should be paid as a trial, as claimed or as a 'cracked trial', as allowed.

Background

2. Mr Tyrone Barton ('the Defendant'), was charged at Kingston Crown Court with three co-defendants on an indictment alleging 13 counts that concerned (mainly but not exclusively) with the supply of Class A, B and D drugs. The Defendant was charged on counts 1, 4 and 12, with conspiracy to supply Class A and B drugs.
3. At a pre-trial preparation hearing ('PTPH') on 31st May 2022, the Defendant entered not guilty pleas for the matters against him. The case was listed for trial.
4. There were several further interim hearings and on 7th November 2022 the Defendant changed his pleas to guilty in respect of counts 4 and 12. These pleas were acceptable to the prosecution, who ultimately offered no evidence on count 1. A pre-sentence report was ordered and a further case management hearing set down for the three co-defendants, whose cases were still proceeding towards trial.
5. Pursuant to the Defendant's sentencing, the Appellants produced a 'Basis of Plea', which was uploaded to the digital case system on 19th December 2022.
6. The Defendant returned to court on 29th June 2023. The trial of the co-defendants had begun but before it concluded they were re-arraigned and changed their pleas to guilty in respect of some of the counts faced. Again, these pleas were acceptable to the prosecution, and the hearing on 29th June 2023 was listed for sentencing. Prior to that hearing, the Crown filed a 'Prosecution Sentence Note' (17 pages, 82 paragraphs) dated 3rd April 2023.

7. Evidently there was some variation in the way in which the Defendant's criminality was portrayed by the prosecution and the defence. No evidence was heard, but the parties proffered lengthy submissions, requiring some form of judicial determination. This hearing before HHJ Plaschkes KC and appears to have lasted four days. The Defendant was sentenced to 3 years' imprisonment.

The Regulations

8. The applicable regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations') as amended.
9. Paragraph 1(1)(a) of Schedule 2 to the 2013 Regulations defines 'cracked trial'. Paragraph 2(4) of Schedule 2 states that:

Where following a case on indictment a Newton hearing takes place –

- (a) for the purposes of this Schedule the case will be treated as having gone to trial;*
- (b) the length of the trial will be taken to be the combined length of the main hearing and the Newton hearing.*

Paragraph 1 of Schedule 2 also defines a Newton hearing as:

...a hearing at which evidence is heard for the purposes of determining the sentence of a convicted person in accordance with the principles of R v. Newton 77 Cr. App. R.13 CA.

Case Guidance

10. In R v. Hodo [2015] SCCO Ref: 11/15, it was held that a Newton hearing may be deemed to have taken place even if there is no hearing where live evidence is called on disputed fact, but in circumstances where evidence is read and/or contrasting submissions are made on that evidence. In R v. Morfitt [2016] SCCO Ref: 55/16, it was held, inter alia, that the fact that the case was listed and prepared for as a Newton hearing are relevant considerations, though determinative of the issue.
11. The Appellants cite and rely on the decision of CJ Leonard in R v. Makengele [2019] SC-2019-CRI-000072. In that Makengele the case was set down for sentence and not listed as a Newton hearing. No evidence was called. At the sentence hearing, the prosecution and defence made extensive submissions as to the defendant's role and

the category of his offending. CJ Leonard noted (para. 18-21) that the judge in Makengele had effectively determined two factual issues that were not agreed by the prosecution and the defence, namely the importance of the defendant's role in the drug distribution network and the extent to which he played that role under duress. Determination of those facts was a necessary pre-requisite to sentencing. CJ Leonard concluded that the judge had determined effectively the "trial of an issue" and that accordingly the listing for sentence could properly be described as a Newton hearing.

12. The Respondents adduce and rely on another judgment of CJ Leonard in R v. Shehu [2023] SC-2022-CRI-000147. The Shehu the court distinguished between cases where the court had determined competed submissions on disputed facts, which could be classified as a Newton hearing/trial, and those hearings where the prosecution and defence invited the court to resolve disputed inferences, but based on facts which of themselves were not in dispute, which would not be classified as a Newton hearing/trial.

The submissions

13. No request was made for an oral hearing; I am required to determine this appeal on the papers. I gave the parties until 1st March 2024 to file, if so advised, any additional written submissions or documents.
14. The Respondent's case is set out in Written Reasons dated 14th November 2023 and in Written Submissions drafted by Ms Francesca Weisman, a Senior Legal Adviser at the LAA, dated 21st February 2024. The Appellants' case is set out in typed Grounds of Appeal filed on 28th November 2023. An additional document – a 'Court Attendance Note' for 29th June 2023 – was filed on 1st March 2024.

My analysis and conclusions

15. The Appellants, in summary, submit that the hearing on 29th June 2023 was a Newton hearing, meaning that it would be paid as a trial under the LGFS. They point out that a case can be properly classified as a Newton hearing, even if it was listed for sentence and no evidence was called. They aver that the hearing on 29th June was "on all fours" with the judgment in R v. Makengele (ibid), in that the court heard and

effectively determined extensive submissions by the prosecution and the defence as to the role of the Defendant and the category of his offending. These findings were, submit the Appellants, were a necessary pre-requisite to sentencing and, indeed, the findings of HHJ Plaschkes KC determined the Defendant's sentence of 3 years.

16. I note that in about September 2023 the Appellants contacted HHJ Plaschkes KC in the hope that he would "express a view as to the correct trial type and/or whether the case was analogous to R v. Makengele". The learned judge replied on 1st November 2023: "I have carefully checked my note of sentence in the case filed. I am unable to assist with EBR Attridges' request". This response, in my view, neither helps nor prejudices the Appellants' position. The judge was simply confirming that, on the basis of his own notes, he was unable to express a view.
17. The Respondent, in summary, acknowledges that a Newton hearing need not be listed as such. Further, referring to the reported cases, there is no requirement for evidence to be heard at a Newton hearing. The Respondent's case turns effectively on the distinction drawn by CJ Leonard in R v. Shehu (ibid), namely between cases that a court effectively determine disputed facts, from those where competing inferences or conclusions were drawn on facts which were ultimately not in dispute. This case, submits the Respondent, reflected the latter and not the former. Ms Weisman, referring to para. 60-62 of the Prosecution Sentence Note, which contradict the assertion that the court had to determine detailed submissions on matters of disputed fact. Specifically, from para. 22 of her Written Submissions:

The Note refers to the description of Barton's role as "broadly agreed", and adds that, whilst there may be a difference in perspective as to whether there was any "commercial" scale activity, what is disputed is the "characterisation" of that role as opposed to the underlying facts. Most crucially, perhaps, the prosecution sets out in terms that "this is nevertheless a matter of submission rather than an issue of fact requiring litigation".

18. I find, on the facts of this case, that the hearing on 29th June 2023 should be classified and paid as a cracked trial, as the Respondent asserts, and not a Newton hearing/trial, as the Appellants claim. Clearly, there were, in respect of the Defendant, several questions of disputed emphasises concerning his role as 'an occasional runner' for the relevant drugs conspiracy. I accept that HHJ Plaschkes KC effectively resolved these competing submissions as a prerequisite to passing sentence on the Defendant.

Nonetheless, it seems to me that the Respondent is correct in pointing out that the core, underlying facts were effectively agreed by the parties, and that any conflicting emphasis representing, in the words of the prosecution, “a matter of submission rather than [an] issue of fact requiring litigation”. Although it evidently took some time to hear and determine these questions, I am not satisfied that the process in this case should be properly classified as a Newton hearing and, in turn, a trial. This appeal is dismissed.

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