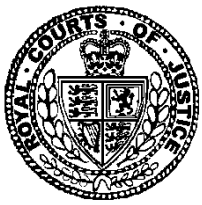

Neutral Citation No. **[2024] EWHC 3453 (SCCO)**

Case No: Common Platform URN 45EL07623

SCCO Reference: SC-2024-CRI-000093

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 4 October 2024

Before:

COSTS JUDGE Brown

IN THE MATTER OF:

R v Wali
Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013/Regulation 10 of the Costs in Criminal Cases (General) Regulations 1986

SVS SOLICITORS

Appellant

-and-

THE LORD CHANCELLOR

Respondent

The appeal has been unsuccessful for the reasons set out below. There shall be no order as to the costs of the appeal.

REASONS FOR DECISION:

1. The issue arising in this appeal is as to whether the fee payable to the Appellant under the Criminal Legal Aid (Remuneration) Regulations 2013 for their representation of the Defendant should be on the basis that the case proceeded to trial or not; if not, it is be regarded as a 'cracked trial' for the purposes of the payment of the fee. Pursuant to Schedule 2 of the 2013 Regulations the fees payable to litigator for cases which proceed to trial are different from those applicable to a 'cracked trial'.

2. The Appellant was asked to deal with this matter on the papers but I decided that I should instead convene a short hearing. At the hearing, which took place by video link on 10 January 2024 the Appellant, appeared by counsel, Mr. Montgomery and Ms. Weisman, an employed lawyer, (having already provided written submissions) appeared on behalf of the Respondent (effectively the LAA); she had

3. I have taken the background of this case from the written submissions of Ms. Weisman which I understand is not to disputed in any substantial or material way.

4. The Defendant faced trial at Guildford Crown Court, charged with two counts of attempted murder, with alternative counts of wounding with intent, and a count of possessingan article with a blade or sharp point. .

5. On 8 February 2024 the parties attended court for a scheduled case management hearing (FCMH). Discussions took place between prosecution and defence as to the prosecution's position should the defendant offer guilty pleas to the two counts of s18 wounding and the single count of possession of a bladed article. The reviewing lawyer in the matter considered those possible pleas and determined that it remained appropriate for the trial on the other counts to go ahead. The Defendant entered not guilty pleas to all matters against him.

Events on 12 February 2024

6. I have the benefit of transcript in respect of the appearance at court on 12 February 2024 when the parties attended court for what had been listed as the start of the trial. It appears Defendant's arrival at court from prison was delayed, but when the case was called on at some point it appears perhaps fairly shortly before lunch, defence counsel informed the Judge that the Defendant had been reflecting on matters and wished to enter guilty pleas to the s18 counts and the bladed article count. He was re-arraigned on those counts and pleaded guilty. Prosecution counsel informed the Judge that the officer in the case would speak to the victims and the prosecution would then decide whether to pursue a trial on the attempted murder counts.

7. Further discussion took place in court for a short period. The Judge was given time to view video footage of the offences, after which she confirmed she would not make any further comment on the matter but would allow time for the prosecution to consider whether they wished to accept the defendant's pleas or proceed to trial, and whether, in the event that the matter did proceed to trial, the prosecution would play the ABE videos of the two victims. The case was adjourned at or about 12.56 pm.

8. The matter was called back into court just after 2pm (the transcript says 14.08) a the prosecution informed the Judge that the pleas were acceptable. The matter was then adjourned for a pre-sentence report to be prepared and the case was listed for sentence to take place on 19 April 2024. In the event, sentencing took place on 26 April 2024 and the defendant was sentenced to 12 years imprisonment.

The test

9. As noted by Spencer J in *Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB)* there is no definition of the word "trial" in the relevant provisions. There is, however, a definition of "cracked trial". The definition is the same in Schedule 1 (for the advocates' graduated fee scheme) and the material part of the definition is as follows:

> *"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 1 and—*

(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence;

....

10. The issue for determination is thus whether the case proceeded to trial. In *Henery* at [96] Spencer J gave the following guidance as to whether or not a trial has begun:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example this (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the opening of the case, and the leading of evidence (R v Dean Smith, R v Bullingham, R v Wembo).

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment."

11. The Appellant contended that substantial matters of case management took place at Court on the hearing date on 12 February 3 2024 and in lead up to this hearing.

12. The fact that a jury had not been empanelled a jury does not prevent this case from being treated as a trial. Read in context it is clear Spencer J had it in mind that even if matters may not proceed to empanelment of a jury for a trial, if legal argument were to take

place in circumstances which would have (or was likely to have) led as a continuous process to the empanelment of a jury and the opening of the case, that may be enough.

13. The Determining Officer held that trial had not commenced in a meaningful sense, and there had been no substantial matters of case management.

14. The Appellant submitted that substantial case management had taken place, over four days, commencing on 8 February, continuing until the conclusion of the hearing of 12 February, and including correspondence and liaison between prosecution and defence between those hearings. They cited liaising with and arranging witnesses as key examples, including discussions with the two victims in the case, and suggested that there was "back and forth throughout the day as part of case management". They argued that there had been the agreement of facts and jury bundle during 12 February and this was substantial case management in readiness for trial. They further asserted that the case was on all fours with the decision of Cost Judge Whalan in *R v Pipe* [2024] EWHC 106 (SCCO).

15. It seems to me that where the defendant changes their plea before the opening of the case there is likely to be some case management involved, but this of itself is not enough to demonstrate that trial has begun in a meaningful sense. The agreement of evidence and jury bundles might often be considered within the remit of pre-trial preparation, and the mere fact that work of this sort was undertaken does not appear to sufficient basis to say that a trial has meaningfully begun. The type of detailed consideration of documents and liaison between the parties which might reach the threshold must be substantial": more ordinary matters of case management which do not satisfy this test.

16. In *Pipe* the trial was listed to commence on 5 November and all matters of case management cited as relevant took place over two days. The transcript of proceedings on 12 February in this case indicates that any discussion in respect of case management after the entry of guilty pleas would, it seems to me, have been relatively slight and not throughout the day. That period was one in which the defence were largely awaiting confirmation as to whether the Prosecution would proceed on the attempted murder charges.

17. There is no evidence of issues being raised which, if not agreed, would require resolution by a Judge, and the absence of any such dispute which might militate against trial having commenced. Whilst the prosecution enquire of the Judge as to whether she wished to comment on certain matters, namely what the video might show in relation to perceived intent, prosecution counsel nonetheless did not make this enquiry in the context of an adversarial dispute,: indeed the Judge herself made it clear she had no comment to offer. I agree with Ms. Weisman that any reference to ABE interviews, rather than triggering substantial matters of case management, appears to have been brief, to the extent that prosecution counsel actually notes that the interviews "say very little".

18. It seems clear to me in any event, applying the provisions set out above and the guidance provided in *Henery* that the Determining Officer was correct. The matter did not proceed to a trial in any meaningful sense. Quite apart from anything else that may be said the contemplation of the parties at the hearing before the lunch adjournment was they where consider whether any trial was going to ahead. It is difficult see that event before lunch occurred weas part of a continuous process leading to the empanelment of a jury. After lunch

it was known that the trial would not proceed. In any event there was not in my view, the substantial case management required for the events to count as a part of a trial.

19. Accordingly, this appeal is dismissed.

Costs Judge Brown

COSTS JUDGE BROWN