



SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000122

Dated: 24 August 2020

ON APPEAL FROM REDETERMINATION

REGINA v ADIL KHAN

PRESTON CROWN COURT

APPEAL PURSUANT TO REGULATION 29 OF THE CRIMINAL LEGAL AID
(REMUNERATION) REGULATIONS 2013

CASE NO: T20197337

LEGAL AID AGENCY CASE

DATE OF REASONS: APRIL 2020

DATE OF NOTICE OF APPEAL: 15 MAY 2019

APPLICANT: DRUMMOND SOLICITORS LIMITED	SOLICITORS	
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The appeal has been dismissed for the reasons set out below.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013 under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2 to the 2013 Regulations. The Representation Order was made on 11 July 2019 and the 2013 Regulations apply as in effect on that date.
2. The graduated fee due to the Appellant is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"), subject to an overall "cap" of 10,000 pages. The issue on this appeal is the appropriate PPE count.
3. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, (2)-(5), which explain how, for payment purposes, the number of pages of PPE is to be calculated:

"(2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).

(3) The number of pages of Crown evidence includes all—

- (a) witness statements;
- (b) documentary and pictorial exhibits;
- (c) records of interviews with the assisted person; and
- (d) records of interviews with other defendants,

which form part of the committal or served Crown documents or which are included in any notice of additional evidence.

(4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.

(5) A documentary or pictorial exhibit which—

- (a) has been served by the Crown in electronic form; and
- (b) has never existed in paper form,

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

Background

4. The Appellant represented Adil Khan ("the Defendant") in the Crown Court at Preston. On 8 August 2019 the Defendant along with two others, Fidel Hughes and Gary Whicker, entered not guilty pleas to a six-count indictment. Counts 4, 5 and 6 alleged a conspiracy between the three defendants to supply diamorphine, cocaine and crack between 1 January 2017 and 12 April 2018. The Defendant was also charged with possessing, on 11 April 2018, money obtained through criminal conduct.
5. The three defendants had been in a car that was chased at high speed by the police. The Defendant was found to have a mobile phone and £291 on his person and bags of cocaine concealed in his mouth. His defence was that he had been purchasing drugs from his co-defendants in the car. When they were spotted by the police, his co-defendants drove off with him in the car and then forced him to take custody of the drugs, the money and the mobile phone.
6. When the three defendants were arrested, five phones were seized from them. Whicker was found to have the key to an address at 77 Monk Street. The police searched that address and recovered additional mobile telephones. They also found drug packaging bearing Hughes and Whicker's fingerprints, and a set of scales. The Crown's case was that this address was used for packaging drugs for sale.
7. Ultimately, the Crown relied upon three download reports. Data from the telephones was used to attribute each of the mobile phones to one of the defendants. Hughes' phone had a "tick list" of debtors and location data linking him to the Monk street address. Communications (messaging and call) data was relied upon to establish the conspiracy and in the case of the Defendant's phone, to identify him as a "spotter" who would warn drug dealers and users of police activity. DC John Dodrill had reviewed the material on the phones and give live evidence at trial about the interpretation of the data recovered from the defendants' mobile phones. PC Williamson produced attribution charts in relation to them.
8. On the 29 January 2020 a pre-trial review was listed before HHJ Medland Q.C. who ordered that the Crown serve the telephone reports. Each defendant challenged the attribution of the phones and could not agree or challenge the conclusions made by the prosecution witnesses concerning attribution and because the messaging contact relied upon by Dodrill was in an isolated format and not in context with other communications. The trial commenced on 4 February 2020 and the Defendant was convicted on 7 February.
9. The Appellant submitted a claim based upon a PPE count of 10,000. The Determining Officer reviewed the download reports and allowed 3,554 pages. This comprised 56 statements, 71 exhibits and 17 streamlined forensic reports (without cover sheets) and 3,410 pages served on disc, comprising all call logs, chats, contacts and messaging data. She refused to include data which she

found to duplicate in Excel format the information already included in PDF format.

10. The Appellant argued that all of the served electronic data was relevant and should be included in the PPE count as the Appellant had a professional obligation to consider it and that material in Excel did not duplicate the PDF format. Relying upon the judgment of Master Rowley in *R v Mooney* (SCCO 99/18, 29 May 2019) and of Master Nagalingam in *R v King* (SCCO 170/19, 15 November 2019) the Appellant also argued where a report included some relevant data, all of the material in that report should be included.

Submissions

11. On the hearing of this appeal Mr Jonathan Turner, counsel for the Appellant, argued that the paper PPE count should be 199, to include cover pages; that it was inappropriate to allow only parts of PDF telephone download reports; and that even if it was appropriate, the Determining Officer's assessment was arbitrary and unreasonable.
12. With regard to the paper PPE count, Mr Turner relied upon the Judgment of Master Whalan in *R v Ridwan* (SCCO 118/19, 26 September 2019, where he said at paragraph 16:

"I see no grounds for discounting pages such as "cover sheets" so the Appellant's calculation of an additional 37 pages should be preferred to the Respondent's concession of 16 pages."

13. Mr Turner submitted that the cover sheets are akin to chapter headings in a book which bear page numbers. They are indicative of what comes next in the prosecution case by displaying the contents or index to the evidence along with providing details as to the date the statement or exhibit was created.
14. With regard to the electronic evidence, Mr Turner argued that the correct count (subject to the 10,000 page limit) would be 11,420 pages in PDF format only, excluding for example "raw data" or data duplicated in Excel format. He submitted that two of the three PDF telephone download reports relied upon by the Crown in this case were, like those considered by Master Nagalingam in *R v King*, single PDF documents. In the absence of any formal schedules, index of contents, or any signposting from the prosecution, the defence had to review all of the material that had been served to attempt to identify the relevant parts.
15. As for the actual assessment of the content, the Determining Officer did not include images, which were substantial in number, notwithstanding the fact that the attribution report in respect of co-defendant Hughes relied upon for photographs of him taken from his mobile phone. Further, image data on the phones did not include photographs of the Defendant with his co-defendants. All of it had to be viewed in order to obtain an admission from the Crown to that effect.

16. Similarly, no social media files (other than communications) was included, notwithstanding that the absence, in the social media files in its handset, of any evidence of association between the Defendants was an important part of the defence, and that the attribution reports for the Defendant used information from his contacts list, this Sim ICCID number, email and social media accounts without specifying the page of the relevant report on which the attribution evidence was to be found.
17. Each of the defendants was running a cut throat defence. Therefore anything on each of their phones could be used by their Counsel not only to show they were not dealing drugs, but rather that their co-defendants were. As such it was necessary for each legal team to be aware of not just their own client's digital footprint but also that of their co-defendants.
18. Mr Rimer for the Lord Chancellor has filed a set of submissions appending a number of schedules. They include an analysis of the content of the telephone download reports, as supplied to him in accordance with the court's directions for the purposes of determining this appeal. Although the telephone download report from the Defendant's mobile phone, as supplied to Mr Rimer, appears to be incomplete and there appeared to be other discrepancies between what was seen by Mr Rimer and what had been seen by Determining Officer, this is the best available evidence of what the Determining Officer saw.
19. Mr Rimer's schedules include screenshots from each report which demonstrate that each of them is in the fairly standard "Celebrite" format which includes a contents bar, appearing on the left side of the screen when the report is viewed, and which allows fast navigation to each section of each report.
20. The Crown, says Mr Rimer, extracted and exhibited small amounts of message data from each handset and the Determining Officer has included within the PPE count all of the surrounding message data as well as the call log, chats, contacts, MMS and SMS messages downloaded from each of the three mobile phones.
21. As for the paper PPE count, Mr Rimer's primary point (not, I understand, put to Master Whalan when he decided *R v Ridwan*) is simple. Cover sheets do not fall within the definition of PPE in Schedule 2, paragraph 1. In consequence they cannot form part of the PPE count, and it is normal practice for Determining Officers to refuse them. One might as well, he says, include a Notice of Additional Evidence within the PPE count.

Authorities

22. Authoritative guidance on assessing the PPE count is offered by two decisions of High Court Judges, both on appeal from Costs Judges.
23. The first is the judgment of Mrs Justice Nicola Davies DBE (as she then was) in *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB). Davies J concluded that, given the importance to the prosecution in that particular case of text messages, it was incumbent upon the defence team to look at all the

underlying data from which the prosecution had extracted the evidence upon which it relied. The defence needed to test the veracity of text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown, and to check the accuracy of the data finally relied on by the Crown. She found that that underlying data should, accordingly, be included with the PPE count.

24. *Hayes* is often quoted, wrongly in my view, as authority for the proposition that if the prosecution relies upon a report extracted from any part of the served electronic evidence, all of it must all be included within the PPE count. It does mean however that where key prosecution evidence is extracted from underlying data, one would normally expect the relevant parts of that underlying data to be included.
25. Further, detailed guidance was offered by Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB). The focus of that judgment was on service, but in confirming that formal service was not a requirement Holroyde J, emphasising that decisions must be case-specific, identified, at paragraph 50(viii) of his judgement, a key criterion for the inclusion of electronic evidence within the PPE count. That was whether it was of central importance to the trial and not merely helpful or even important to the defence.
26. At paragraph 50(vii) (again focusing on service, but in doing so clarifying the correct approach to inclusion in the PPE count) Holroyde J explained that where the prosecution seeks to rely on only part of the data recovered from a particular source, issues may arise as to whether all of the data should be included in the PPE count.. The resolution of such issues will depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data.
27. He also explained, at paragraph 50(ix):

“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... This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately.”
28. Holroyde J’s guidance reflects the fact that the starting point under paragraph 1(5) of Schedule 2 is that served electronic evidence which has never existed in paper form is not included within the PPE count unless the Determining Officer, exercising his or her discretion, finds it appropriate to do so.

Conclusions

29. I have to agree with Mr Rimer about the paper PPE count. One cannot include cover sheets because they do not fall within the statutory definition of PPE.

30. As for the electronic evidence, it seems reasonably clear that it is possible immediately to identify the sections of each of the three PDF reports and to distinguish between relevant and irrelevant sections.
31. *R v Mooney*, Like *Lord Chancellor v Edward Hayes LLP*, tends to be cited to support of the proposition that if part of a document served in electronic format should be included within the PPE count, all of it should be included. That is not how Mr Turner presented the case, but it has been referred to by the Appellant and I should address it.
32. Master Rowley's point was that where a particular body of evidence sufficiently closely associated to be identified as a "document" qualifies as PPE (in that case, a body of photographic evidence evidencing lifestyle), it is inappropriate and unnecessary to go through it page by page, evaluating the relevance of each image. It qualifies as a whole.
33. I entirely agree with Master Rowley on that, but it does not follow that if part of a telephone download report counts as PPE, all of it must be counted. In the course of PPE appeals, Costs Judges review many such reports and allow those parts of the reports which clearly qualify as PPE, whilst disallowing discrete sections which are plainly of no material significance and require little or no scrutiny. Master Nagalingam in *R v King* gave very clear and cogent reasons for taking a different approach, but his decision has no bearing on the facts of this case.
34. I am not persuaded that the PPE count should be increased to include social media files and image files. The lack of evidence of any social connection between the Defendant and his co-defendants, as Mr Turner says, was evidently an important part of the defence and I appreciate that each defence team will have scrutinised much of the download report evidence from all three phones, including images, but that is not the test.
35. The test is, as Holroyde J pointed out, not whether the material in question is helpful or even important to the defence but whether it was of central importance to the case against the Defendant. As far as I can see, the Crown did not rely upon social media evidence or images except for the purposes of attribution.
36. The Crown's attribution evidence included four images, used to attribute Hughes' phone to him. I cannot see that those images could have had any material bearing on the case against this Defendant, or that it offers any basis for extending the PPE count in respect of this Defendant to include large numbers of images on his own mobile phone or those of his co-defendants.
37. The attribution evidence against the Defendant himself comprised confirmation of the registered address for his sim card, which appears to have been obtained from his telecommunications provider rather than from a download report; messaging and contact information (his parents' phone numbers under "Mum" and "Dad"), which is already included in the PPE; and the names of the email and social media accounts on his phone, which indicated that the phone was

his. No significance was attributed by the Crown to the content, as opposed to the names, of those accounts, and one would not need to review that content to understand the significance of the fact that, for example, the phone found on the Defendant's person hosted the Defendant's Facebook and WhatsApp accounts.

38. It seems to me that the Determining officer recognised that the case against this Defendant turned on contact, call and communication data and that she appropriately allowed, as *Lord Chancellor v Hayes* requires, all of that data. I can find no sound basis for including other served data within the PPE count.
39. For those reasons, this appeal fails.

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