SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2020-CRI-000066

Dated: 17 June 2020

ON APPEAL FROM REDETERMINATION

REGINA v SYKES

LEEDS CROWN COURT

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

CASE NO: T20187202

LEGAL AID AGENCY CASE

DATE OF REASONS: 5 MARCH 2020

DATE OF NOTICE OF APPEAL: 16 MARCH 2020

APPLICANT: JONATHAN TURNER	COUNSEL	

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, and the £100 paid on appeal, should accordingly be made to the Applicant.

COLUM LEONARD
COSTS JUDGE

REASONS FOR DECISION

1. The Appellant represented Jake Sykes ("the Defendant") in proceedings before the Crown Court at Leeds. On 29 April 2019 the Defendant attended court, along with 12 co-defendants, for trial on charges of conspiracy to supply Class A drugs. The indictment, signed by the court on 6 April 2018, comprised four counts. The first two counts were against all thirteen defendants (Butterworth, Khalid, Sweeney, Sykes, Bastow, Maragh, Howley, S Reynolds, J Reynolds, Timms, Robertshaw, Saddique and Smith). The third and fourth counts related to Smith alone.

2. The following account of what happened between April and May 2019 has been given by the Appellant.

3. By the end of the day on 30 April 2019, the court had determined that it was not practicable to try all of the Defendants together. The prosecution successfully applied for the indictment to be severed in relation to five of the thirteen defendants and the trial continued against Barstow, Maragh, Howley, S and J Reynolds, Robertshaw, Khan and Smith.

4. Following the conclusion of the April 2019 trial, the original indictment against Butterworth, Sweeney, Sykes, Timms and Saddique was, on 24 May 2019, quashed and a new indictment preferred.

5. I did not find on the court file a copy of the new indictment against the Defendant, nor a copy of the court log. I do however have a copy of an indictment against only Barstow, Maragh, Howley, S and J Reynolds, Robertshaw, Khan and Smith, which supports the Appellant's account of events.

6. A trial was listed for the new indictment on 25 November 2019. It started on that date and concluded on 5 December, when the Defendant changed his plea to guilty. On 2 December 2019, the trial was adjourned to 3 December, apparently on the instruction of the Resident Judge who arranged for the adjournment of trials throughout the entire building. This, I understand, was due to "heating and plumbing issues".

7. The appeal turns first on whether the Appellant is entitled to two separate trial fees for the April 2019 and November/December 2019 trials, and second on whether his fee for 2 December 2019 should be for a trial day or for an ineffective trial day.

The Regulations: Indictments and Trials

8. The relevant Representation Order was made on 14 February 2018, so the Appellant's right to payment is governed by the provisions of the Criminal Legal Aid (Remuneration) Regulations 2013, as in effect on that date Payment is governed by the Advocates' Graduated Fee Scheme provisions at Schedule 1.

9. Schedule 1 starts, at paragraph 1(1), with this definition:

"In this Schedule—

"case" means proceedings in the Crown Court against any one assisted person—

(a) on one or more counts of a single indictment;
(b) arising out of a single notice of appeal against conviction or sentence, or a single committal for sentence, whether on one or more charges; or
(c) arising out of a single alleged breach of an order of the Crown Court,

and a case falling within paragraph (c) must be treated as a separate case from the proceedings in which the order was made…"

10. Paragraph 2 of Schedule 1 reads:

"(1) Subject to sub-paragraphs (2) to (11), this Schedule applies to… every case on indictment…"

11. Sub-paragraphs (2) and (11) make provision for trial and retrial. The provisions referred to by the Determining Officer are at sub-paragraph (2):

"(2) Sub-paragraphs (3) and (4) apply where, following a trial, an order is made for a new trial and the same trial advocate appears at both trials where—

(a) the defendant is an assisted person at both trials; or
(b) the defendant is an assisted person at the new trial only; or © the new trial is a cracked trial or guilty plea.

(3) Subject to sub-paragraph (4), in respect of a new trial, or if the trial advocate so elects, in respect of the first trial, the graduated fee payable to the trial advocate must be calculated in accordance with Part 2 or Part 3, as appropriate, except that the fee must be reduced by—

(a) 30%, where the new trial started within one month of the conclusion of the first trial;
(b) 20%, where the new trial did not start within one month of the conclusion of the first trial;
(c) 40%, where the new trial becomes a cracked trial or guilty plea within one month of the conclusion of the first trial; or
(d) 25% where the new trial becomes a cracked trial or guilty plea more than one month after the conclusion of the first trial."

12. The LAA's Crown Court Fee guidance, as in effect at the relevant time, has this to say (at Part 3.1, paragraphs 2 and 3) about the definition of "case" at paragraph 1(1) of Schedule 1:

"2. A case is defined as proceedings against a single person on a single indictment regardless of the number of counts. If counts have been severed so that two or more counts are to be dealt with separately, or two defendants are to be dealt with separately, or if two indictments were committed together but dealt with separately, then there are two cases and the representative may claim two fees.

3. Conversely where defendants are joined onto one indictment or a single defendant has been committed separately for matters which are subsequently joined onto one indictment, this would be considered to be one case and the litigator may claim one fee. Refer to Costs Judge decision: *Eddowes, Perry, and Osbourne* (2011) which held that in cases involving multiple defendants represented by the same solicitor one claim should be submitted with the appropriate uplift for the relevant number of defendants. "

The Regulations: Effective and Ineffective Trial Days

13. Graduated fees for trial are calculated by reference to the provisions of Part 2 of Schedule 1. A basic fee is increased by reference to a number of variables including category of advocate, length of trial and number of Pages of Prosecution Evidence.

14. Paragraph 16 of Schedule 1 provides a lesser fee to be paid for ineffective trial dates:

> "The fee set out in the table following paragraph 24… is payable in respect of each day on which the case was listed for trial but did not proceed on the day for which it was listed, for whatever reason..."

Trial Fees and Timing

15. The Appellant claimed a trial fee for a two-day trial on 29 and 30 April 2019. He claimed a further, separate trial fee for a trial commencing on 25 November 2019 and ending on 5 December 2019. Each claim was dealt with by a different Determining Officer.

16. The Determining Officer who considered the April 2019 trial fee paid it in full. The Determining Officer who considered the November/December 2019 trial fee claim for took the view that this was a case of trial and retrial (one day of the November/December 2019 trial being ineffective) and that payment should be made on that basis. In order to minimise the retrial fee reduction, the Determining Officer applied it to the shorter, April 2019 trial. This resulted in the recoupment of part of the fee paid in respect of that trial.

17. The Appellant submits that this is wrong in principle. It does not, he says, lie within the remit of the Legal Aid Agency to reverse a correct decision in relation to the April 2019 trial. That claim had been settled months before, and in principle, should not be open to review.

18. I do not think that the Appellant can be correct in that respect. The Determining Officer's jurisdiction, like mine, is governed by the 2013 Regulations. Regulation

25 provides for the LAA to recover fees overpaid “for whatever reason” and does not impose any time limit.

19. I have in any case no idea whether the Determining Officer who paid a trial fee for the April 2019 trial had any opportunity to consider its interaction with the trial that started on 25 November 2019. It also seems to me that the Determining Officer who dealt with the later trial claim is right in saying that if she had applied the retrial reduction to the second trial (or, in accordance with the Regulations, offered the Appellant the choice) there could be no argument about inconsistency or timing.

Submissions: Indictments and Trial

20. It would appear from the papers that on 14 February 2020 the Determining Officer, having reviewed the court log, took the view that although the prosecution was successful, in April 2019, in severing the indictment in respect of five of the defendants, there was no new indictment. Rather both indictments were segments of an indictment that already existed. If the Defendant had appeared on both “segments” of the severed indictment, two trial fees would be due, but not otherwise.

21. The Determining Officer, in coming to this conclusion, made reference to *R v Arbas Khan* (SCCO reference 219/18) in which Master Brown found that where two indictments were joined, with a stay of the previous indictment, there was one indictment and one case. In this case, she observed, it made no difference whether the original indictment was quashed and two new indictments preferred, or whether the original indictment was severed into two. The effect was the same: that the allegations against the 13 defendants were split into two substantive indictments and dealt with separately. There was, however, in essence only one case against the Defendant.

22. In her written reasons of 5 March 2020, the Determining Officer appears to have taken a slightly different line. She said that according to the court log, the trial which ran from 28 April 2019 dealt with the same indictment, without amendment, as the trial which run from November 2019. The indictment was not severed. Rather, because of the sheer number of defendants and the lack of space within the court room, the trial under one indictment was split into two “legs”. One group of defendants was severed from the trial, not the indictment, to be tried in the second leg.

23. The Appellant submits that a defendant cannot be severed from a trial, only from an indictment. Nor can a trial, in law, have separate “legs”.

24. As a matter of law, he submits, a defendant can appear on only one indictment for the same criminal behaviour at any one time. Once a properly drafted, lodged and signed indictment comes before the Crown Court it can, he submits, be amended in certain circumstances, but the only ultimate outcome can be a stay, quash or verdict.

25. Having decided on 30 April 2019 that the Defendant and four others should be tried separately, the trial judge had, he submits, no choice but to quash the indictment in relation to those defendants. That could not be done until the remaining eight defendants had been tried on the original indictment and the Crown had drafted a new indictment against the five defendants who had been severed from the original.

26. The indictment preferred and signed on 24 May 2019 was preferred pursuant to the Administration of Justice (Miscellaneous Provisions) act 1933. It was accordingly, in law, a new indictment. It reached the Crown Court not (as had the original indictment) by being sent from the Magistrates' court pursuant to section 51 of the Crime and Disorder Act, as had the original indictment of 6 April 2018, but with the leave of the Crown Court judge, leading to trial on 25 November 2019.

27. In summary there were two separate indictments against the Defendant, one preferred on 6 April 2018 and quashed on 24 May 2019, and a second indictment preferred on 24 May 2019. This, says the Appellant, justifies a claim for payment for two trials in two separate and unlinked cases.

2 December 2019

28. The Appellant argues that the decision to adjourn on 2 December 2019 was a judicial decision made by the Resident Judge which does not alter the fee to be paid. The fee structure makes provision for a daily rate, irrespective of the time spent in court. If upon attendance at court a decision is taken by the trial judge (or the Resident Judge) to adjourn until the following day then it remains the fact that a refresher must be paid. The fact that the working day ended prematurely does not change the nature of the hearing, only its length.

29. The Determining Officer has in her written reasons included extracts from the court log, which indicates that, as at 9:21 AM, the case listed for 10.30 on a 2 December 2019 was adjourned to the following day. The court did not sit.

30. The Determining Officer referred to *R. v Budai (Costs)* [2011] 6 Costs L.R. 1073 in which, during the currency of the trial, there had been a day when one juror could not attend. The trial judge had directed all counsel to attend an order that agreement should be reached as to how to reduce one part of the evidence. He had indicated that he was available, but his assistance was not required. Master Simons found that counsel had correctly been paid a non-effective hearing fee for that day, notwithstanding that counsel had been obliged to attend and that the judge was available. The trial, he found, did not proceed on that day.

31. The Determining Officer also referred to the judgment of Master Gordon-Saker in *R v Durnin* (SCCO 57/13, 9 May 2013). In that case, which was governed by similar provisions in the Criminal Defence Service (Funding) Order 2007, the trial had been taken out of the list the day before. Refusing, on appeal, to allow the appellant to claim a fee for an ineffective trial date under the provisions of paragraph 13 of Schedule 1 to the 2007 Order, the Master observed:

> “The obvious intention of paragraph 13 is to compensate advocates who attend for a trial on the day on which the trial is listed but have a wasted day because the trial does not proceed”.

32. Such, she concluded, was the case here.

Conclusions on the Number of Indictments

33. I had, in the course of preparing this decision, considered asking for a copy of the court log, but I do not find that to be necessary.

34. Court logs can be cryptic and vague and they are not always helpful. In this case, having reviewed the court log the Determining Officer clearly accepted, as at February 2020, that the indictment had been severed and the original indictment against the Defendant quashed. By 5 March 2020 she did not accept that the indictment had been severed at all. If the court log is so unclear as to support such conflicting conclusions, it is not going to be of any assistance to me.

35. In fact, as I have already mentioned, the documentation I have to hand indicates clearly that the indictment of 6 April 2018 was severed. As to whether the original indictment was then quashed, I have no reason not to accept the specific and clear recollection of counsel. He was present at the relevant time and his recollection seems to me to make procedural sense.

36. I am, in contrast, unable to identify any legal or procedural foundation for the Determining Officer’s conclusion that the Defendant, rather than the indictment, was “severed”, so as to be tried in the “second leg” of the trial.

37. In my view the determining Officer has overextended and inverted the logic of Master Brown’s judgment in *R v Arbas Khan*. The Master found that where two separate indictments are joined, there is then one indictment and one case. He did not find that if one indictment is severed into two, it remains one indictment.

38. In fact, as the Crown Court Fee Guidance to which I have referred indicates, the two situations are different and justify different conclusions.

39. A number of decided cases reflect this difference. Master Brown’s decision refers back to the principles identified by Spencer J in *Lord Chancellor v Eddowes Perry and Osbourne Ltd* [2011] EWHC 420 (QB). Master Rowley came to similar conclusions in *R v Deakin* (SCCO 56/19, 6 June 2019) and *R v Morrow* (SCCO 241/19, 25 October 2019).

40. In *R v Deakin* Master Rowley made this observation on the effect, as to payment, of joining indictments:

> “… in principle, two separate cases could be run for some time before being joined and then one of the fees would essentially disappear. The length of the trial and the other proxies, including PPE might increase, but that would not necessarily compensate the solicitors for

> the work done…Nevertheless, it is regularly said that there is no equity in the regulations and they must be applied as they stand."

41. A different approach has, of necessity, been taken where multiple indictments against the dame defendant have not been joined. In *R v Sharif* (SCCO 168/13, 19 February 2014) Master Campbell addressed a situation in which one count of conspiracy on an original indictment against a defendant had been quashed. He was then arraigned on a new indictment which contained one count of fraud. That indictment went to trial.

42. Master Campbell disagreed with the Determining Officer's conclusion that there had been only one case, based upon the same criminal conduct, in which the later indictment was simply substituted for the earlier one. He took the view that an indictment that has been quashed has ceased to exist and that there were, in consequence, two indictments (and two cases).

43. In *R v Hussain and Others* [2011] 4 Costs L.R. 689 Master Gordon-Saker considered a prosecution in which there were in effect three indictments. Two of the indictments were joined into one, but not proceeded with. The third went to trial. The Master found that there had been two cases and that a cracked trial fee was payable for the (joined) indictment that did not proceed. He observed:

> "Had the second and third indictments been joined, then there would only be one case. However there is nothing to suggest that happened. There is nothing which prevents two indictments being in existence at the same time for the same offence against the same person on the same facts. The court will not however permit both to proceed and will require the prosecution to elect which will proceed to trial: Practice Direction (Criminal Proceedings: Consolidation), para IV.34.2…
>
> … It may be thought that the solicitors have obtained something of a windfall for, in layman's terms, this was really only one case. However the regulations have to be applied mechanistically and if, as here, there were two indictments which were not joined, then there must be two cases and two fees."

44. Notably both Master Rowley and Master Gordon-Saker emphasised that the Regulations must be applied as they stand, whether that results in what might reasonably be seen as an underpayment or as a windfall.

45. Here, as in *R v Sharif*, the Determining Officer has taken the view that there was only ever really one case against the Defendant, based upon the same criminal conduct. In doing so, to my mind, she lost sight of paragraph 1(1) of Schedule 1 and of the Crown Court Fee Guidance that explains the consequences of severing an indictment.

46. The Appellant's contention that as a matter of law, a defendant can at any time only appear on one indictment for the same criminal behaviour, runs directly contrary to the conclusions reached by Master Gordon-Saker in *R v Hussain*

and Others . The point, as Master Gordon-Saker said, seems to be rather that the court will not allow multiple indictments for the same offences to proceed.

47. That does not, however, undermine the Appellant's case. As Master Campbell would put it, before the new indictment of 24 May 2019 was preferred the original indictment of 6 April 2018 had ceased to exist. It had been quashed. That the counts against the Defendant on the 6 April 2018 indictment and the 24 May 2019 indictment related to the same criminal behaviour is, in my view, not to the point. They were two distinct and separate indictments.

48. In summary the Appellant acted in two separate sets of proceedings against the Defendant, each of them on one or more counts of a single indictment. Applying the definition of "case" at paragraph 1(1) of Schedule 1 to the 2013 Regulations, it follows that he acted for the Defendant in two cases and is entitled to be paid a separate graduated fee for each of those cases.

49. For those reasons, the Appellant is entitled to be paid for two trials, the first on 29 and 30 April 2019 and the second between 25 November and 5 December 2019. The appeal is successful to that extent.

Conclusions: 2 December 2019

50. As to what happened in 2 December 2019, at least, the court log seems reasonably clear. I do not think that the Appellant really has an arguable case. The Determining Officer is right to refer to *R. v Budai* and *R v Durnin*, which are very much to the point.

51. It cannot be right for the Appellant to argue that there had been no change to the nature of the hearing on 2 December 2019. There was no hearing at all. As change goes, that is quite fundamental. If counsel were entitled to be paid a day's trial fee on attending court for a trial that did not proceed, paragraph 16 of Schedule 1 would not exist.

52. This part of the appeal, accordingly, fails.

Summary of Conclusions

53. This was not a case of trial and re-trial. The Appellant represented the Defendant at trial on one indictment in April 2019 and at trial on another, separate indictment in November and December 2019. Applying the definition of "case" at paragraph 1(1) of Schedule 1 to the 2013 Regulations there were two cases for which the Appellant is entitled to two separate graduated fees.

54. It follows that the Appellant was right to claim two separate trial fees for the trials of April 2019 and November/December 2019, and he should be paid accordingly.

55. With regard to the abortive trial day on 2 December 2019, he is however entitled only to the fee for an ineffective trial date in accordance with paragraph 16 of Schedule 1 to the 2013 Regulations.

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