



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 244/19

Dated: 19 December 2019

ON APPEAL FROM REDETERMINATION

REGINA v TRUNG

CROWN COURT AT BIRMINGHAM

APPEAL PURSUANT TO PARAGRAPHS 1(1) AND 27 OF SCHEDULE 1 OF THE
CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20190127

LEGAL AID AGENCY CASE

DATE OF REASONS: 29 JULY 2019

DATE OF NOTICE OF APPEAL: 7 SEPTEMBER 2019 (received)

APPLICANT: COUNSEL

Mr Jonathan Turner
ADVOCATE

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

The appropriate additional payment, to which should be added the sum of £100 paid on lodging the appeal notice, should accordingly be made to the Applicant.

**J. JAMES
COSTS JUDGE**

REASONS FOR DECISION

1. The Appellant is an advocate who seeks to appeal the decision of the Determining Officer ("DO") dated 3 September 2018 to refuse to pay a second graduated fee in respect of a Guilty Plea in this matter. The DO has instead made payment of a graduated fee as appropriate to a cracked trial in a linked matter and indicated that there the matter rests. In addition there is a question mark over Banding, dealt with below.

Background

1. The Defendant was charged with being a producer (grower) of Cannabis on a commercial scale. Per the Appellant there was a question as to whether the Defendant was in fact culpable as a grower, or whether he had been caught up in the offending as a victim of modern slavery. However, that suggestion did not assist the Defendant and in the event he was charged under two separate indictments, for being concerned in the production of a controlled drug of class B contrary to section 4(2)(b) of the Misuse of Drugs Act 1971, as follows:

Matter/ Court.	Arraigned	Trial	Outcome
T20180654 Birmingham	26.11.18	03.04.19	Cracked 29.03.19 change of plea to Guilty
T20190014 Worcester	n/a	n/a	Transferred to Birmingham
T20190127 Birmingham	29.03.19	n/a	Defendant pleaded Guilty upon arraignment, immediately after the above change of plea

2. In April 2019 the Appellant claimed, and was paid, a Cracked Trial fee under Band 9.5 for T20180654 ("the first indictment"). The evidence provided for the Banding (which depends upon the quantity and value of drugs involved) was an MG11 Statement from the Prosecution Expert, DC 8687 Martin Hudson, West Midlands Police, a full-time Drugs Expert Witness. The relevant passage (extracted from page 6 of DC Hudson's MG11 of 09.11.18) reads as follows:

"With the total number of plants being 478 and using the figures of 28-84 grams per plant this would give a crop of 13,384 grams of skunk cannabis at the lower range and 40,152 grams at the upper range."

3. In July 2019, the Appellant claimed a Band 9.5 Guilty plea fee for case T20190127 ("the second indictment"). He provided in support of that claim a two-page extract, being pages 6 and 7 from a Police Statement (MG11). That extract did not contain the Defendant's name nor the case number, but referred to a "grow" site with harvested remains of 532 plants in rooms 1 to 4, plus 363 immature plants in room 5. That gave an overall estimated yield of between 14,952 to 44,856 grams for the harvested plants and 10,164 to 30,492 grams for the immature plants.
4. However, he attached a third page. This was a further page 6 from an MG11, quoting the same extract as relied upon in the above case, namely:

"With the total number of plants being 478 and using the figures of 28-84 grams per plant this would give a crop of 13,384 grams of skunk cannabis at the lower range and 40,152 grams at the upper range."

5. The number of plants was given as 478 instead of 895. The estimated weight was given as 40.152 kilograms when it should have been 75.348 kilograms at the upper range, based upon the figures for the harvested plants and the immature plants. As such, neither the number of plants nor the weight of the drugs matched the two-page extract provided as at paragraph 3 above, not to mention that there were two (different) page 6's relied upon.
6. The Assessor dealing with the Appellant's claim therefore asked for evidence to confirm that 895 plants were involved in this case, indicating that the quantity of drugs would be sufficient to achieve Band 9.5 subject to sight of the evidence linking that number/weight to this case.
7. Instead of providing that evidence, the Appellant requested Written Reasons, and in the process of producing those, the Determining Officer noted that both 'live' cases (disregarding T20190014) came to a head on 29 March 2019. On that date, the first indictment, listed for trial on 3 April 2019, cracked due to Defendant's change of plea to Guilty. The second indictment, in which the Defendant was due to be arraigned on 29 March 2019, was instead resolved later that same day upon the Defendant's plea of Guilty.
8. The Determining Officer took the view, based upon the Court Log, that the two cases were dealt with concurrently and as such that there was only one Graduated Fee payable under the Regulations. The Appellant asserts that although the two cases ended on the same date they were not dealt with concurrently but consecutively. Had the Defendant not changed his plea on the first indictment, the Trial that cracked in that case, would have gone ahead 5 days later, on 3 April 2019. The second indictment was at a much less advanced stage, only being ready for arraignment.
9. The Appellant also asserted, both in the request for Written Reasons and in the Grounds of Appeal, that the Respondent was accusing him of committing a fraud (adding that in doing so the Appellant was accused of having found Statements of the appropriate length, author and date, so as to match the DCS prints, further stressing the absurdity of being, "...prepared to risk his career for a few hundred pounds!")

Regulations

10. "Case" is defined under paragraph 1(1) of both Schedules 1 and 2 in the following way:

"“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.”
11. "Main hearing" is defined under paragraph 1(1) as follows:

"“main hearing” means—

 - (d) in relation to a case which goes to trial, the trial;*
 - (e) in relation to a guilty plea (within the meaning of Schedule 1), the hearing at which pleas are taken or, where there is more than one such hearing, the last such hearing;*
 - (f) in relation to a cracked trial, the hearing at which –*
 - (i) the case becomes a cracked trial by meeting the conditions in the definition of a cracked trial, whether or not any pleas were taken at that hearing; or*
 - (ii) a formal verdict of not guilty was entered as a result of the prosecution offering no evidence, whether or not the parties attended the hearing”*

12. Paragraph 27 of Schedule 1 makes provision for circumstances where two or more cases involving a single trial advocate are heard concurrently:

“(1) Where an assisted person is charged with more than one offence on one indictment, the fee payable to the trial advocate under this Schedule must be based on whichever of those offences the trial advocate selects.

(2) Where two or more cases to which this Schedule applies involving the same trial advocate are heard concurrently (whether involving the same or different assisted persons)—

(g) the trial advocate must select one case (“the principal case”), which must be treated for the purposes of remuneration in accordance with this Schedule;

(h) in respect of the main hearing in each of the other cases the trial advocate must be paid a fixed fee of 20% of—

(i) the basic fee (B) specified in the table following paragraph 5 or that following paragraph 8, as appropriate, for the principal case, where that is a case falling within paragraph 2(1)(a); or

(ii) the fixed fee for the principal case, where that is a case falling within paragraph 2(1)(b) or paragraph 10.”

13. Per the most up to date version (June 2019) of the Crown Court Fee Guidance,

“2.27 Additional charges and additional cases

1. An uplift of 20% of the main hearing fee (basic fee on indictment, fixed fee for appeals and committals) of the principal case is allowed for each additional case involving the advocate that had been heard concurrently and/or each additional defendant that the advocate represents.

2. For two cases to be heard concurrently, the main hearing in each case will have been heard at the same time. As held in Costs Judge decisions: R. v. Fletcher (1998) and R. v. Fairhurst (1999) cases where the main hearings are held on different days are not heard concurrently, counsel is entitled to separate fees for each case.

3. Only the pages and witnesses for the principal case are counted when there is more than one case.

4. Where an advocate selects one offence, in preference to another, or one case as the principal case, in preference to another, the advocate is still entitled to claim such fixed fees to which they would have been entitled had they selected a different offence or principal case.

5. For the following ancillary hearings, an uplift of 20% of the hearing fee is allowed for each additional defendant that the advocate represents at that hearing:

- ☐ *Fees for plea and trial preparation hearings and standard appearances*
- ☐ *Fees for abuse of process, disclosure, admissibility and withdrawal of plea hearings*
- ☐ *Fees for confiscation hearings*
- ☐ *Fees for sentencing hearings*
- ☐ *Fees for ineffective trials.*

6. Uplifts are never allowed for ancillary hearings for additional cases, or for additional defendants at hearings not on the list in paragraph 2.27.5.”

14. Finally, in the **Banding of Offences in the Advocates' Graduated Fee Scheme (AGFS)** guidance, Band 9.5 is described as follows:

Band 9.5:

Class B:

1,000 pages of evidence;

Or weight over:

4kg of amphetamine

40kg of cannabis

1kg ketamine

To get to the next Band would involve 200kg of cannabis, which neither case involving the Defendant, nor even both added together, would justify.

The Parties' Submissions

15. There is no dispute that there were two separate indictments in this matter; I have seen the first indictment, which refers to being concerned in the production of a controlled drug of class B contrary to section 4(2)(b) of the Misuse of Drugs Act 1971 referring to a date of 13 December 2013 (URN 22CA0394118, which appears on a Legal Aid Agency Report for this Defendant dated 4 August 2019). I have not seen the second indictment, but I note the URN 20BE2316218 appears on a Legal Aid Agency Report for this Defendant, also dated 4 August 2019 – that date is the same as the date of the Appellant's Grounds of Appeal and I take it that is simply the date upon which both Legal Aid Agency Reports were downloaded from the relevant system in order to annexe them to those Grounds.
16. Be that as it may, two separate indictments mean there were two separate "cases". The narrow issue which arises on this appeal is whether the two cases were "heard concurrently" as per paragraph 27(2) of Schedule 1. If the two cases were heard concurrently then (per the Respondent) a single graduated fee plus case uplift is payable. If they were not heard concurrently, then the advocate would be entitled to two separate graduated fees, as has been claimed by the Appellant.
17. The Respondent submitted that the Court Log showed both cases were dealt with concurrently on 29 March 2019 and further relied upon the case of *R v Fury* [2011] 5 Costs LR 919. In that case, the Costs Judge concluded that where the court deals with one case and then the other case independently of each other, it hears them consecutively, asserting that Hearings are concurrent only if they are combined or conjoined or somehow interlinked. The Respondent does not accept the Appellant's submissions that the "main hearing" for the cracked trial and guilty plea took place consecutively. As per paragraph 1(1) of Schedule 1 the "main hearing" in a case that proceeds to trial is the full length of trial. As per the Crown Court Fee Guidance a 'trial' includes all hearings that pertain to the main case i.e. from when the jury is sworn (or before if legal argument is part of trial process) and evidence is called to the day of the verdict.
18. The Respondent submitted that as both cases were before the court on 29 March 2019 they can still be said to have been dealt with concurrently. The Respondent submitted that the matters do not have to have been dealt with together for the entire length of the trial, or at the first day of trial in order to be concurrent. As per *Fury* it is not the precise timing of how matters unfolded, but rather the extent that the cases comingled and were dependent on one another that determines whether the cases were heard concurrently or consecutively; the specific quote given is as follows:

"In my judgment hearings are concurrent only if they are combined or conjoined or somehow interlinked. This will be so in the more common situation where the main hearings of a number of cases against the same Defendant are listed together and the Defendant pleads guilty or is

to be sentenced in all of the cases. The cases will impact on each other either as to the directions that are given for sentencing or as to the sentences that are imposed. The cases will not be considered independently of each other. For example there would be one speech in mitigation covering all of the cases, not a separate speech for each."

19. Applying the decision of *Fury* to this case the Respondent submitted that these two cases were heard concurrently within the meaning of paragraph 27(2). The Respondent submitted that both cases were 'dealt with together' at trial; specifically, the two cases were listed together for hearing, they were sentenced together and there was only one speech in mitigation. The Respondent submitted that the hearing in respect of both cases meant that they were conjoined/interlinked and therefore should properly be regarded as concurrent as per the decision in *Fury*. The outcome of case 1 had a clear and direct impact on case 2. The Respondent therefore invited the Court to dismiss the Appellant's claim for a separate graduated fee as applicable for a guilty plea on the basis that the two cases were heard concurrently and therefore only a case uplift fee is payable in respect of the guilty plea, in addition to the cracked trial fee already paid.
20. The Appellant, in summary, submitted that a separate graduated fee as applicable to a guilty plea is payable in respect of the new indictment on the basis that, although the Judge dealt with sentencing concurrently, the cases were plainly dealt with consecutively. Had the Defendant not changed his plea to Guilty on the first indictment, that trial would have gone ahead a few days later (on 3 April 2019). This was a turn of events that was not foreseen when planning to attend on the arraignment on the second indictment, in which the Defendant pleaded Guilty as well, immediately after changing his plea on the first indictment. The Appellant sought to distinguish *R v Fury*, asserting that that judgment envisages an instance of all indictments resulting in the same type of main hearing, e.g. all Guilty pleas or all cracked trials, not a "mixed bag" as was the case here.

Decision

21. Dealing first with Banding, as it was the original issue between the parties, under URN 20BE2316218 a Legal Aid Agency Report for this Defendant lists as Key Witness Statement 0003 a 7-page Witness Statement of 8687 Hudson; that name ties the MG11 regarding 478 plants and 40.152 kilograms of Cannabis, to the first indictment. It does not explain how page 6 from that same MG11 ended up attached to the claim for the second indictment as well. That was clearly a clerical error by the Appellant (which in turn was the start of this whole dispute).
22. Under URN 22CA0394118 a Legal Aid Agency Report for this Defendant lists as Key Witness Statement 0005 an 8-page Witness Statement of Nick Lobo. That name matches the pages 6 and 7 attached to the claim in the second indictment and ties that MG11 regarding 895 plants and 75.348 kilograms of Cannabis, to the second indictment. As such, although neither MG11 bears this Defendant's name, they can be linked to him and to the relevant case by the URN and Legal Aid Agency Reports and, as the Respondent had already indicated, 895 plants and 75.348 kilograms of Cannabis puts the second indictment into Band 9.5 as claimed by the Appellant from the outset and any requisite additional payment to reflect Band 9.5 for the second indictment, should now be made.
23. As to whether the cases were heard consecutively or concurrently, Form AF1(A) dated 2 July 2019 for the second indictment, stated that this was a cracked trial (last third) and gave the date set for trial as 3 April 2019 and the date it cracked as 29 March 2019. That is another clerical error by the Appellant; per the above, it was the first indictment that cracked on 29 March 2019, a few days ahead of its listed trial date. That case was paid on the basis of a cracked trial, some time ago.

24. The second indictment (the case now under Appeal) was at a much earlier stage, being due for arraignment on 29 March 2019. Having pleaded Guilty on the first indictment earlier that day, the Defendant pleaded Guilty later on the same day, on the second indictment. Per the Legal Aid Agency's Crown Court Fee Guidance, at paragraph 2.27, for two cases to be heard concurrently, the main hearing in each case will have been heard **at the same time**. As held in Costs Judge decisions: *R. v. Fletcher* (1998) and *R. v. Fairhurst* (1999) cases where the main hearings are held on different days are not heard concurrently, so that counsel is entitled to separate fees for each case. These were on the same day and (per the Respondent) one was immediately after the other.

25. In my judgement, the Appellant prevails. I have read *R v Tooth* [2007] 2 Costs LR, *R v Fairhurst (Brett)* [2000] 1 Costs LR 34 as well as *R v Fury*, *R v McCarthy* and *R v Sharif*, and in my view the sequence of events here clearly represents matters being dealt with "consecutively" rather than "concurrently". The quote from Master Leonard in *R v McCarthy* as he states (paragraph 27, quoting the LAA's published 2017 Guidance):

"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."

26. In *R v Fury*, the Court held that (paragraphs 21 and 22):

*" 'Concurrently' means in a concurrent or concurring manner; in concurrence...concurrent means running together in space, as parallel lines; going on side by side, as proceedings; occurring together, as events or circumstances; existing or arising together; conjoint, associated...Proceedings or indictments can exist at the same time and run in parallel independently of each other. A Hearing, on the other hand, cannot deal with two or more cases in parallel. Either the Hearing deals with one case then the other case, or it deals with the two cases together – that is, in some form of combination. **If the Court deals with one case then the other case independently of each other, then it hears them consecutively...Where however the Defendant pleads Guilty in one case and the other case is dismissed, the cases will have no bearing on each other. The second case will end, the first case may end or go to another Hearing. But the Hearing of the second case will have absolutely no bearing on the first...there may be confluence of people and place but the cases exist and are heard independently.**" (my emphasis)*

27. Here, I appreciate that the second indictment was dealt with immediately after the first but the point is that they were not heard "concurrently". The first indictment was being heard preparatory to trial listed in a few days' time; the second was due only to be arraigned on the day upon which, having pleaded Guilty to the first indictment, presumably after advice from the Appellant, the Defendant opted to plead Guilty to the second indictment as well. Even so, and even in such a short timeframe, I find that the first indictment was dealt with before the second, and at a very different stage in its preparation; hence on the facts in this case I find that the two indictments/cases were dealt with consecutively, not concurrently.

28. As Master Gordon-Saker observed in *R v Hussain* [2011] Costs LR 689:

"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..."

29. Putting it another way, the question is perhaps not whether the Appellant has “earned” payment for one or two indictments but whether, under the 2013 Regulations, two fees are payable. In my view, on the facts in this case, they are.
30. It therefore follows that the Appellant has succeeded on his Appeal and to the relevant extra payment should be added the sum of £100.00 (Appeal fee). However, the clerical errors in his claims for costs, as set out in paragraphs 21 and 23 above, have led to a great deal of the Respondent’s and this Court’s time being wasted. The Respondent’s perfectly polite and understandable request for clarification, could have been met with an explanation of how each MG11 could be tied to the relevant indictment months ago. In the circumstances, nothing beyond the Appeal fee, is allowed by way of costs of Appeal.

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