



SENIOR COURTS
COSTS OFFICE

SCCO Ref:
SC-2020-CRI-000195

1 February 2021

ON APPEAL FROM REDETERMINATION

REGINA v WHARTON

CROWN COURT AT LIVERPOOL

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

CASE NO: T20200351

DATE OF REASONS: 5 AUGUST 2020

DATE OF NOTICE OF APPEAL: 18 AUGUST 2020

APPLICANT: COUNSEL JONATHAN TURNER

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

**JASON ROWLEY
COSTS JUDGE**

REASONS FOR DECISION

1. This is an appeal by Jonathan Turner of counsel against the fees allowed to him by the determining officer under the Advocates Graduated Fee Scheme.
2. Counsel was instructed on behalf of Richard Wharton in respect of a two count indictment alleging assault occasioning actual bodily harm and common assault on 21 and 22 March 2020 against his partner Jacqueline Robinson.
3. The indictment was uploaded to the Digital Case System (“DCS”) on 15 April 2020. Counsel made a bail application on 17 April 2020 and the case came before the court on 20 April 2020. During the course of that hearing, the offences with which Wharton was indicted changed in that the assault was alleged to have caused grievous bodily harm rather than actual bodily harm. The count regarding common assault remained the same.
4. On 21 April 2020, Wharton pleaded guilty to occasioning grievous bodily harm and not guilty to the common assault. The latter count was left to lie on the file and the judge adjourned the hearing for sentencing to 30 April 2020. That hearing was adjourned for reports until 21 May when Wharton was sentenced to 18 months’ imprisonment.
5. The issue at the heart of this appeal is the change in the indictment. The case log simply records that an indictment was added to case number T20200351; counts 1 and 2 were added to the indictment and then Wharton was added to those counts. The case log is not illuminating and appears if anything simply to be recording the mechanism by which the court clerk created or amended entries on the court record.
6. In support of his appeal, counsel produced screenshots of the DCS where notes were entered into the record by the judge, prosecuting counsel and Mr Turner. The entries relied upon are as follows:

“20/4/20

I will be prosecuting this case via Skype tomorrow... An application will be made to prefer the indictment at B2 and if granted the indictment at B1 can be stayed. The medical notes at J1 confirm that the complainant received a blow out fracture to the right orbital floor. A VPS can be found at G3. The prosecution would submit that this is a category 2 case. (Mr Paul Blasbery (Crown counsel)).

21/4/20

Paul, I’m going to ask the court for a short conference with the defendant before the hearing starts. I hope to be no more than 5 minutes. If he were willing to plead to ABH would you still be seeking to amend the indictment? (Jonathan Turner)

21/4/20

No this is a s20 case albeit at cat 2 (Paul Blasbery)

21/4/20

Listed for PTPH... Leave to prefer new bill of indictment as at B2.
Existing bill stayed... (Judge Thomas Teague QC)."

7. At the appeal hearing before me, counsel relied upon the entry from Mr Blasbery on 20 April 2020 in which he referred to there being two separate indictments and that if the indictment at B2 on the DCS was granted by the court then the indictment at B1 could be stayed. Two indictments were clearly shown by that reference and by the indictments themselves. Consequently, there should be two fees payable to counsel.
8. The determining officer interpreted the court log as demonstrating that the prosecution amended the existing indictment by revising count one to a more serious offence but that there was only ever one indictment and as such only one "case" as defined in the Criminal Legal Aid (Remuneration) Regulations 2013. On that basis, counsel was only entitled to one fee. Mr Michael Rimer, who appeared on the half of the Legal Aid Agency on the appeal, supported the determining officer's conclusions in both his written and oral submissions.
9. Following the hearing, in accordance with regulation 29(11) of the Criminal Legal Aid (Remuneration) Regulations 2013 I wrote to the trial judge, HHJ Teague QC to see if he was able to shed any light on the issue here. On 25 November 2020, he responded and the relevant part of that response is as follows:

"What tends to happen is that the prosecuting advocate applies for leave to amend. I then make a quick assessment as to whether I should simply grant the application or stay the original bill. If I think the latter course may be easier, I suggest staying the existing bill of indictment and preferring the amended version in its place and ask whether the prosecuting advocate is happy for the application to be dealt with in that way. They nearly always agree to my suggestion, as does defence counsel. That is very likely to be what happened in this case."
10. The trial judge confirmed to me that there is no practical difference as to which option is taken. His practice depended on how much amendment was required. A typographical error or similar would be amended. A more significant change typographically would render it simpler to stay the indictment and prefer an amended version.
11. I was referred to several other cases at the hearing where costs judges have given decisions. But these are fact sensitive questions and the cases to which I was referred could only amount to examples of what occurred in other situations. Nevertheless, I should refer to the case of R v Abbas Khan, where Master Brown distinguished whether there were two indictments as a matter of fact from whether there were two indictments as a matter of law.
12. In this case, Wharton was charged with causing actual bodily harm when the indictment was first produced, but upon consideration by the Crown counsel, a

more serious charge was available. Having pointed out that evidence which was already on the DCS, Crown counsel indicated his intention to revise the indictment at the hearing on the following day. Mr Turner's response specifically referred to whether there was a need to amend the indictment if his client pleaded to the lesser charge. It seems to me that this was an accurate description of the change in the case facing Wharton and that there is no room to suggest that the change in the indictment is any more than an amendment in those circumstances.

13. The fact that two separate documents have been uploaded rather than annotating the original indictment in some fashion is simply how modern technology is likely to be employed. Ease of practice dictates this approach as was confirmed by the trial judge. It does not enable further claims to be made for fees in respect of what is very much the same work. The case of *R v J*, on which counsel relied, regarding the uploading of an indictment automatically being preferred does not assist in this situation. That case clearly came to the conclusion that no more was required than uploading to prefer an indictment in the situation where any more formal preferment had been overlooked before the defendant had been tried. It does not add anything to the question of whether there are two operative indictments.
14. This case reveals another instance where the workings of the 2013 Regulations do not walk entirely in step with criminal practice. The only rationale for counsel's argument is that a stayed indictment may mean there are two cases and therefore two fees. There was no prospect of Wharton ever facing counts of both ABH and GBH. The second superseded the first by what can only be described as an amendment to the indictment faced. Once the amendment had been made, Wharton was never in any danger of being tried for ABH. As such, although there were two indictments in fact produced in order to reflect the change in the offence faced by Wharton, there was, as a matter of law, only one indictment containing offences with which Wharton was being prosecuted. That indictment was amended but this does not mean that there was more than one case as defined in the 2013 Regulations.
15. Accordingly this appeal fails.

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