Neutral Citation No. [2024] EWHC 14 (SCCO)

Case No: T20211089

SCCO Reference: SC-2023-CRI-000088

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 9 January 2024

Before:

COSTS JUDGE LEONARD

R
v
SAMAD ALI

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: **Adam Law (Solicitors)**

This Appeal has been dismissed for the reasons set out below.

COSTS JUDGE LEONARD

1. This appeal is governed by the Graduated Fee provisions of the Criminal Legal Aid (Remuneration) Regulations 2013. The relevant Representation Order was made on 10 November 2021, and the 2013 Regulations apply as in force at that date.

2. The issue on this appeal is whether the Appellant solicitors, who represented Samad Ali ("the Defendant") in the Crown Court at Sheffield, should be paid the Graduated Fee appropriate to a trial that has started, or to a cracked trial (as defined below). The Appellant has been paid for a cracked trial, but maintains that a trial fee is payable.

3. Schedule 2 to the 2013 Regulations governs payment to Litigators under the Graduated Fee Scheme. Paragraph 1(1) of Schedule 2 provides definitions that are pertinent for the purposes of this appeal:

> "…'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 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; and
> >
> > (ii) either—
> >
> > (aa) in respect of one or more counts to which the assisted person pleaded guilty, the assisted person did not so plead at the first hearing at which he or she entered a plea; or
> >
> > (bb) in respect of one or more counts which did not proceed, the prosecution did not, before or at the first hearing at which he or she entered a plea,
>
> declare an intention of not proceeding with them; or
>
> (b) the case is listed for trial without a hearing at which the assisted person enters a plea…"

4. "Trial" is not defined in the 2013 regulations, and in many cases (including this one) the question of whether a trial fee or a cracked trial fee is payable will depend on whether a trial had begun in a "meaningful sense", the test identified by Mr Justice Spencer in *Lord Chancellor v. Henery* [2011] EWHC 3246 (QB).

5. Whether that is so will depend upon the facts of the case. At paragraph 96 of his judgment Spencer J set out the principles by reference to which a court can determine the question:

> "(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…
(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…
(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 because before the case can be opened the defendant pleads guilty…
(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…
(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… in the light of the relevant principles explained in this judgment."

The Background

6. The Defendant faced two charges of possessing controlled drugs of Class A with intent to supply. A Plea and Trial Preparation Hearing (PTPH) was held on 16 December 2021, at which the Defendant entered pleas of not guilty. The defence relied upon section 45 of the Modern Slavery Act 2015, which provides a defence where a person is compelled to commit an offence due to slavery or exploitation attributable to human trafficking.

7. Whilst I do not have details, I understand that a "positive" National Referral Mechanism (NRM) decision, meaning a decision that the Defendant was either potentially or actually a victim of modern slavery, was disclosed via the Crown Court's Digital Case Management system ("DCS").

8. However the Court of Appeal, on 19 May 2021, handed down a judgment in *R v Brecani* [2021] EWCA Crim 731, [2021] 1 W.L.R. 5851 that (whilst decided on its own facts) effectively established that such decisions were not admissible as evidence in criminal proceedings because the caseworkers signing them did not have the requisite expertise to offer admissible opinion evidence. A further finding, significant for the purposes of this appeal, was that the NRM decision, in so far as it relied upon, and in an annex recited, evidence given by Brecani, was hearsay in respect of which no application would have succeeded.

9. I understand that a copy of *R v Brecani* was uploaded to DCS on 22 June 2023, the date the Defendant's case was listed for a two day trial before Mr Recorder Brooke KC.

10. I do not have a copy of the court log for 22 June 2023, but Mr Yasin Patel, who represented the Defendant on 22 June, has produced a note of the proceedings, supplemented by a short note from the Appellant. Mr Patel explained to Mr Recorder Brooke KC that there were two matters upon which Prosecution Defence were not agreed. Both concerned the evidence of Dr Grace Robinson, described by the Appellant as an expert in the field of modern slavery, and who had produced a report upon which the Defence wished to rely as expert evidence.

11. The first issue was that the Defence wished to apply for an adjournment of the trial, because Dr Robinson was not available on the dates listed for trial. This is difficult to understand, given that (according to the Appellant) both Prosecution and Defence had served certificate of readiness for trial after Dr Robinson's report was served, and there appears to have been no indication that she would be unavailable until the trial date itself. Nonetheless that appears to have been the case.

12. According to Mr Patel's note, Mr Recorder Brooke KC indicated immediately, and without hearing from the Prosecution, that he was not prepared to adjourn, given that the case had already been delayed by some years.

13. The second issue was the admissibility of Dr Robinson's report, which was largely based upon the Defendant's account of events. Unsurprisingly, in the light of *R v Brecani* the Prosecution's position was that Dr Robinson's report was inadmissible as hearsay and that it was in effect a self-supporting statement by the Defendant. The Prosecution also submitted that the report did not in any case support the Defence.

14. In the course of what appears to have been a short discussion with counsel for both parties, Mr Recorder Brooke KC indicated that those parts of the report that relied upon an interview with the Defendant would be inadmissible as hearsay and that he did not wish, at that stage, to say that the report was wholly inadmissible. He invited the Prosecution and Defence to agree upon non-contentious features of the report, such as the operation of County Lines in drugs trafficking cases.

15. It would appear that no such discussion took place. The position was explained to the Defendant conference and he decided to plead guilty to both counts in the indictment. A basis of plea was prepared and agreed. A pre-sentencing report was directed and sentencing was set for 3 August 2023.

Conclusions

16. Both parties have referred me to various decisions of Costs Judges as to whether a trial has started. None are binding and, as I have observed, all are of necessity fact specific.

17. The question in this case is whether the Appellant can rely upon subparagraph (6) of paragraph 96 of the judgment Spencer J in *Lord Chancellor v. Henery*, in which he indicated that if 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.

18. Mr McCarthy for the Appellant has referred me to a number of decisions of Costs Judges which may indicate that the question of whether a jury has been selected is less important than whether substantial matters of case management have been addressed; and that even a short hearing may address such substantial matters.

19. That may well be the case, but it does not assist the Appellant, because it seems to me clear that no substantial matters of case management were addressed, and that it could not be right to conclude that trial began in a meaningful sense.

20. The observations of Mr Recorder Brooke KC have been described as a ruling, or at least a provisional ruling, to the effect that the expert report upon which the Defendant wished to rely was inadmissible. To my mind, Mr Patel's note of the proceedings indicates rather that, having stated what was obvious following *R v Brecani*, Mr Recorder Brooke KC declined at that stage to make a specific ruling, inviting the parties instead to reach agreement on which part of Dr Robinson's report might still be admitted in evidence.

21. In any event whether there was a "ruling" as such is not really to the point. Evidently Mr Patel felt duty bound to support the admission in evidence of Dr Robinson's report, but as with the application for adjournment, the Defendant's position in that respect was quite hopeless. From the point that *R v Brecani* was handed down, the Defendant never had any prospect of relying upon the substance of Dr Robinson's report, even had she been available to support it at the trial. All that Mr Recorder Brooke KC did was to point that out. Obviously that gave the Defendant's advisers an appropriate opportunity to explain the position to him, bringing about his change of plea.

22. It does not follow that substantial matters of case management, as envisaged by Spencer J, were dealt with. The Defendant's brief and unsuccessful attempts to secure an adjournment, and to rely upon evidence which had, following *R v Brecani*, no real prospect of being admitted, cannot lead to the conclusion that trial began in any meaningful sense.

23. For those reasons, this appeal must be dismissed.