



Neutral Citation No. [2022] EWHC 2837 (SCCO)

Case No: T20190745

SCCO Reference: SC-2021-CRI-000005 & 000006

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 19/10/2022

Before:

COSTS JUDGE NAGALINGAM

Between:

R

-v-

Umi Noor

and

IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION

Clifford Johnston Solicitors

Appellant

- and -

The Lord Chancellor

Respondent

Hearing date: 14/01/2022

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COSTS JUDGE NAGALINGAM

Costs Judge Nagalingam:

1. The appeals, to a limited extent, have been successful for the reasons set out below. The appropriate additional payment, to which should be added the sum of £100 paid on each appeal, should accordingly be made to the Appellant. The Appellant is also awarded costs in the total sum of £1,300 to cover both appeals.
2. This is an appeal by Clifford Johnston solicitors against the number of pages of prosecution evidence (“PPE”) allowed by the Determining Officer when calculating the appropriate fee under the Criminal Legal Aid (Remuneration) Regulations 2013.

Background

3. The Defendant was originally indicted on two counts of possessing a controlled drug of class A with intent, contrary to section 5(3) of the Misuse of Drugs Act 1971. Namely, that on the 22nd day of November 2019 the Defendant had in her possession a quantity of crack cocaine, a controlled drug of class A (count 1) and diamorphine, a controlled drug of class A (count 2), with intent to supply to another in contravention of section 4(1) of the Misuse of Drugs Act 1971.
4. The Defendant was later charged in a second indictment (labelled as Indictment B) on a count of conspiracy to conceal, convert or transfer criminal property, contrary to section 1(1) of the Criminal Law Act 1977. Namely, that between the 22nd day of September 2018 and the 22nd day of November 2019 the Defendant conspired together with another, namely Michael Hassan, to conceal, convert or transfer criminal property, namely cash.
5. It is accepted that the two indictments were not joined and accordingly the Appellant is entitled to remuneration for each indictment.
6. The Defendant was a nurse who it transpired had been living beyond her salaried means as a consequence of her involvement in drug related offences involving her boyfriend, Michael Hassan. The police visited the Defendant’s house on 22 November 2019 whereupon she immediately divulged the location of drugs and various paraphernalia for the packaging of the same.
7. The police subsequently located hundreds of ‘wraps’ of cocaine and heroin at the Defendant’s address which had been prepared for sale. Further quantities of drugs were located which were sufficient for several hundred more ‘wraps’ to be made up. The police also located bagged rubbish containing hundreds of cut-off ends which were said to be evidence of prior production of ‘wraps’.
8. As well as the quantities of drugs and potential evidence of drug dealing, the police also seized 3 phones from the Defendant’s property. These were two Nokia ‘burner’ phones and the Defendant’s smartphone. The Nokia phones were marked as exhibits PC/2 and PC/3. It is my understanding that the calls and messaging data relating to these phones has been allowed. The Defendant’s smartphone was marked as exhibit SS/1.
9. Following her arrest, the Defendant first denied any knowledge of the drugs and further denied that she had told the police where to find them. The Defendant then changed her

stance to allege a former partner who had recent access to her house had placed the drugs there. This turned out to be false.

10. The police located photographic evidence in the images on Defendant's smartphone which linked her to Mr Hassan, along with messages about drug dealing. The police also concluded that the Defendant had been using one of the 'burner' phones to send out a "flare", being a mass text message communication advertising the sale of drugs, albeit using language that a layperson would not likely understand as being related to the sale of drugs.
11. The communications data also linked the opening of a fast food establishment with the proceeds of drug dealing, and using the appearance of that legitimate trade to launder the drug money earned.
12. The Defendant pleaded guilty to all charges but on the basis of only a limited involvement, instead seeking to shift blame on to Mr Hassan. The crown did not accept the basis of plea, alleging that the Defendant in fact had a leading role. A Newton hearing was therefore required.
13. In relation to the possession charges, a claim for 10,000 PPE is made. The Determining Officer allowed 1,817 pages, increased to 1,822 following redetermination.
14. In relation to the conspiracy charge, a claim for 10,000 PPE is made. The Determining Officer allowed 1,817 pages based on a Class B offence (guilty plea).
15. On the day of the hearing of these appeals, Mr Wells, counsel for the Appellant under both appeal case numbers, clarified that the issues for the court to decide were whether to use the PDF or Excel version of the handset extraction reports for the purpose of arriving at a page count, and what percentage of images to allow.
16. The two issues are linked in that the Appellant argues they simply could not properly view the images in the PDF report because the thumbnail images became blurred upon using the zoom function, and the links to open the thumbnails were broken. It is therefore the Appellant's case that the Excel report had to be considered in relation to the image data, because the links to open the images worked in the Excel version of the report.

Regulations

17. The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), and in particular paragraph 1 of Schedule 2 to the 2013 Regulations provide (where relevant) as follows:

“1. Interpretation

...

(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with subparagraphs (3) to (5).

(3) The number of pages of prosecution 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 prosecution documents or which are included in any notice of additional evidence.

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

(5) A documentary or pictorial exhibit which –

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

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

Decision

18. I am not going to rehearse the considerable volume of case law concerning the use of PDF and Excel versions of the same extraction report for the purpose of arriving at a page count, specifically for images. Firstly because the parties are well aware of those cases, having cited the same in written and oral submissions, and secondly because the Appellant has made it clear that their preference for the Excel version was simply a consequence of electing the medium which allowed them to open thumbnails of the images in exhibit SS/1.
19. In so far as I endorse the general views expressed by Master Rowley in *R v Mooney*, I do not accept such an approach readily applies to claims for pages of images. Instead I prefer the approach adopted in *R v Sereika*, whereby a percentage of the pages of images was allowed.
20. Indeed that is the approach adopted by the Determining Officer and, contrary to the views expressed by the Appellant, I do not consider the reasons behind deploying such an approach to be either cynical or deliberately objectionable. Such views in any event appear to be based on a misapprehension of what is contained in the image data.
21. For example, the Appellant suggests there are no images of children but that is plainly not the case. Further, it is plainly not the case that images of the Defendant with others are limited to being photographed with Mr Hassan only. It is also wrong of the Appellant to suggest that “Any selfies show lifestyle” because the vast majority of what one might describe as ‘selfie-style’ photos in reality give no hint as to lifestyle at all.

22. I do however concur that there appear to be none or few images of the categories of pets/animals, celebrities or emojis/graphics that often make up hundreds if not thousands of the images contained in a smartphone.
23. As to format, I have no reason to question the Appellant's submission that they could not open the thumbnails in the PDF version of the extraction report. However, save for pictures of receipts or invoices, or screenshots of text, I consider it was perfectly possible to decipher what each image contained by reference to the thumbnails.
24. That means that whether looked at in the PDF version or the Excel version, the process of quickly being able to dismiss images for relevance was the same. Accordingly, the identification of images of potential relevance ought not to have been particularly laborious.
25. One is then left to consider what difference is practically made when comparing the opening of thumbnails of images from an Excel report as compared with the PDF version of the same report? In either instance, the Appellant was not being presented with printed pages of photographs.
26. The regulations dictate that regardless of format presentation, digital images (i.e. a pictorial exhibit that has never existed in paper form) "is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".
27. Images as thumbnails with working links do not readily equate to a paper page, because even though it is widely accepted that a PDF version of a report provides the closest realistic equivalent to a paper page, that does not necessarily lend itself to a fair outcome when it comes to images. This is because it would neither be appropriate to automatically adopt an approach of one image equates to one page or 8-10 thumbnails equates to one page.
28. A nuanced approach is required and in this regard one recalls that the remuneration regulations are often described as a blunt instrument, rather than a precision tool. That said, I do not consider the application of a percentage approach to be so blunt as to lead to injustice.
29. As to applying a nuanced approach, I am not persuaded it is appropriate to deviate from the PDF version of the report for the purpose of arriving at a page count. That is because the vast majority of the images are easily decipherable in that format and save for the broken links remains a sound starting point for a percentage based approach.
30. Balanced against that is the recognition that, on the Appellant's evidence, the Appellant needed to consult the Excel version when they needed to open a particular image. It strikes me that inconvenience may be balanced by the provision of a higher percentage of pages, or endorsing the Respondent's invitation for the Appellant to submit a claim for special preparation for that particular task.
31. In so far as I am minded to consider an allowance in excess of 5%, I am perplexed by the question of to what extent the image evidence could help the Defendant, given her basis of plea. One can readily understand how images identified by the crown might

undermine the Defendant's basis of plea. What is less obvious is how the Appellant finding additional images could assist in seeking to convince the trial court of a lesser role with respect to the possession and conspiracy charges.

32. Ultimately these appeals concern a Newton hearing, following the entering of guilty pleas by the Defendant but where the basis of plea was not accepted. The crown relied on some image evidence but ultimately the image evidence was not of pivotal importance when set against the evidence as to calls, messages, cell site data and transactional evidence including finances relating to the fast food establishment – the rent on which alone did not tally with the Defendant's income through legitimate means.
33. In reviewing the written and oral submissions received, I am unable to conclude that all of the pages of images should be allowed as PPE. The point of principle argument in that respect fails.
34. I am also not minded to accept the Respondent advocate's invitation to conclude the Determining Officer fell into error in allowing the pages of timeline evidence. That is an allowance the Determining Officer made, which is not the subject of these appeals, and no doubt following a diligent application of the regulations and careful analysis of the remuneration claims submitted. In that regard, I decline to be persuaded that where I am minded to allow more than 5% that my view ought to be balanced against the pages of timeline evidence already allowed.
35. Ultimately that leaves me to consider what is an appropriate percentage to allow for images, taking into account the manner in which the same were available to view and the relevant circumstances.
36. Had images of potential relevance been readily discernible by zooming in to the thumbnails or had the image links worked in the PDF version, I would have been minded to dismiss the appeal. However, I accept that where an additional version of the report had to be consulted for the purpose of accessing working links then that must be reflected in the remuneration allowed.
37. My decision is to reflect that additional work by allowing 10% of pages of images in the PDF extraction report, as opposed to the 10% allowed. I would not envisage a claim for special preparation to be submitted in addition, because my allowance of a greater percentage is in lieu of a special preparation claim for what would otherwise be a claim for considering the remaining 95% of the images.
38. Accordingly, the appeal succeeds to the extent set out above.