Neutral Citation No. [2023] EWHC 1329 (SCCO)

Case No: T20190484

SCCO Reference: SC-2022-CRI-000116

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 30 March 2023

Before:

COSTS JUDGE LEONARD

R
v
Campbell & Sobers

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

Appellant: **(Ashcott Solicitors)**

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

COSTS JUDGE LEONARD

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013, under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2. The Representation Order was made on 22 June 2019 and the 2013 Regulations apply as in effect on that date.

2. The graduated fee due to the Appellant is calculated, along with other factors, by reference to the number of served Pages of Prosecution Evidence ("PPE"). The issue on this appeal is the appropriate PPE count.

3. The relevant provisions of Schedule 2 for calculating the PPE count are at paragraph 1, subsections (1) and (2)-(5), which explain how, for payment purposes, the number of pages of PPE is to be calculated:

> "(1)… "PPE Cut-off" means the number of pages of prosecution evidence for use in determining the fee payable to a litigator under this Schedule, as set out in the tables following paragraph 5(1) and (2).
>
> (2) For the purposes of this Schedule, the number of pages of Crown evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).
>
> (3) The number of pages of Crown 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 Crown documents or which are included in any notice of additional evidence.
>
> (4) Subject to sub-paragraph (5), a document served by the Crown in electronic form is included in the number of pages of Crown evidence.
>
> (5) A documentary or pictorial exhibit which—
>
> (a) has been served by the Crown in electronic form; and
>
> (b) has never existed in paper form,
>
> is not included within the number of pages of Crown evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of Crown evidence taking into account the nature of the document and any other relevant circumstances."

4. Schedule 2 at paragraph 20 makes provision for additional payment for work done where electronic evidence is not included in the PPE count or the PPE count exceeds the maximum (which for present purposes is 10,000 pages):

> 20.— Fees for special preparation
>
> (1) This paragraph applies in any case on indictment in the Crown Court—
>
> (a) where a documentary or pictorial exhibit is served by the prosecution in electronic form
> and—
>
> (i) the exhibit has never existed in paper form; and
>
> (ii) the appropriate officer does not consider it appropriate to include the exhibit in the pages of prosecution evidence or
>
> (b) in respect of which a fee is payable under Part 2 (other than paragraph 7), where the number of pages of prosecution evidence, as so defined, exceeds 10,000,
>
> (2) Where this paragraph applies, a special preparation fee may be paid…
>
> (3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable…"

The Background

5. The Appellant represented Everton Campbell ("the Defendant") and his co-defendant Mary Sobers in proceedings before the Crown Court at Manchester, on three counts of possession with intent to supply Class A and Class B drugs. The Defendant, who admitted to cannabis possession and use both by virtue of his Rastafarian religion and for health reasons, pleaded Not Guilty but was convicted after a jury trial.

6. On 13 September 2018, the Defendant and Mary Sobers were arrested at their shared home address on a warrant executed in relation to a firearm. A firearm was not found on the premises, but a large number of Class A and Class B drugs was found. The Crown's case was that the drugs belonged to both defendants, the only occupants of the premises. The Defendant accepted ownership of the Class B drugs (cannabis) but denied drug dealing.

7. Three phones were also seized at the premises. They were a suspected "burner" phone for drug dealing (JW/01/1309/18) and two of the Defendants' personal phones, MG2 and MG3.

8. The Appellant submitted a claim for payment based upon a PPE count of 10,000. The determining officer assessed the PPE count at 7,086. Of this, 6968 pages was electronic evidence from telephone download reports. This comprised the call logs, contacts, email and messaging data from MG2 and MG3, along with 10% of the images from each phone.

9. The issue in this appeal is whether, as the Appellant contends, the Determining Officer should have included more of the download data within the PPE count, sufficient to bring the total count over 10,000.

10. The Appellant's case originally rested upon the proposition that all of the download data from MG2 and MG3 should have been included within the PPE count. In the Appellant's Grounds of Appeal, the focus was exclusively on allowing all of the images from MG2 and MG3, the Appellant relying in that respect upon *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB) and *R v Mooney* (SCCO 99/18,).

11. Before me, however, Mr Wells for the Appellant accepted that the percentage-based approach adopted by the Senior Costs Judge in *R v Sereika* (SCCO 168/13) and *R v Barrass* (SC-2020-CRI-000083), by Costs Judge Brown in *R v. Mucktar Khan* (SCCO 2/18) and by me in *R v Gyamfi* [2022] EWHC 2550 (SCCO), was appropriate.

12. The question then was the percentage of it, that should be allowed and the nature of the data of which a percentage should be awarded. Mr Wells argued for up to 50% of the total, which would bring the PPE count comfortably over 10,000.

The Appellant's Submissions

13. MG2 and MG3 were not, as I understand it, relied upon by the Crown as offering any direct evidence of drug dealing by the Defendant. However, a witness statement from DS Andrew Vizard for the Crown stated that incoming and outgoing calls recorded on MG3 included the phone number for JW/01/1309/18. DS Vizard's statement exhibited screenshots of the suspected drug phone's download report including the call log.

14. The statement also explained that the JW/01/1309/18's number was, on Mary Sobers' personal phone, labelled "Badras", which was the Defendant's stage name as a music artist. The statement exhibited screenshots from online YouTube videos of Badras' songs. It confirmed that MG2 used the email address "badras454@icloud.com" and referred to other evidence of the Defendant being referred to as "Badras" in different formats and on different platforms.

15. All of this was relied on in support of the proposition that the Defendant controlled JW/01/1309/18.

16. DS Vizard's statement did not refer to phone images, but the significance of the data from MG2 and MG3, according to the Appellant, is that it was particularly relevant to attribution.

17. Before the trial, the Defendant disputed attribution of JW/01/1309/18. In order to establish attribution the Crown relied on the data from MG2 and MG3 and looked for similarities in usage, content and contacts.

18. This was not straightforward, because exhibit MG/2 was originally owned and used by Mary Sobers before being passed to the Defendant for his use. Historical data found in web history, passwords, Facebook and images were considered to establish when one user signed out of their accounts and the new user began to use the device.

19. Material garnered from this analysis was then compared with that on JW/01/1309/18 to point towards attribution, including consideration of media, both photograph and video. Everton Campbell was a music producer and rapper who would publish his videos and images on social media and YouTube. The dated presence of these images and videos assisted in showing when MG/2 changed users.

20. Payment was sought for 10,000 pages of PPE across the three mobile telephone devices to represent the sections comprising: contacts, messaging, MMS, WhatsApp, passwords, web history, Bluetooth connections to home devices, Facebook, calendar, images and videos and metadata (to show deletion of apps, opening of accounts to establish change of user).

21. In relation to attribution of the Defendant as "Badras" there were on MG/2 and MG/3 many images of the Jamaican music scene and associated with the use of Cannabis, which was admitted by the Defendant, allegedly for the sake of his health. The issue was whether the images could be taken as evidence of intention of supply. In this respect the Appellant has identified a number of images of cannabis, some images that might be associated with class A drugs (white powder), some images relating to guns and one relating to a money transfer.

22. There were also many images of the Defendant and Mary Sobers. It was only after the Defence had considered all the downloaded material and on the trial date that the Defendant finally admitted the attribution of JW/01/1309/18.

Conclusions

23. PPE appeals concerning electronic evidence may turn upon whether evidence which an appellant wishes to include within the PPE count should properly be considered as served.

24. Service is not the issue in this case. The issue is the extent to which served electronic evidence which has never existed in paper form, and which will accordingly only be included within the PPE count if the Determining Officer considers that appropriate, is of sufficient importance to the case against the Defendant to justify inclusion within the PPE count.

25. Detailed guidance in this respect was offered by Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB). The focus of that judgment was on service, but whilst emphasising that decisions must be case-specific Holroyde J identified, at paragraph 50(viii) of his judgement, a key criterion for the inclusion of served electronic evidence within the PPE count. That was whether it was of central importance to the trial and not merely helpful or even important to the defence.

26. At paragraph 50(vii) (again focusing on service, but in doing so clarifying the correct approach to inclusion in the PPE count) Holroyde J explained that where the prosecution seeks to rely on only part of the data recovered from a particular source, issues may arise as to whether all of the data should be included in the PPE count. The resolution of such issues will depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data.

27. He also explained, at paragraph 50(ix):

> "If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE… This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately."

28. Holroyde J's guidance reflects the fact that the starting point under paragraph 1(5) of Schedule 2 is that served electronic evidence which has never existed in paper form is not included within the PPE count unless the Determining Officer, exercising his or her discretion, finds it appropriate to do so.

29. Holroyde J also mentioned the observations of Costs Judge Gordon-Saker in *R v Jalibaghodelehzi [*2014] 4 Costs LR 781, in which (referring to similar provisions in the Criminal Defence Service (Funding) Order 2007) the Costs Judge said, at paragraph 11:

> "The Funding Order requires the Agency to consider whether it is appropriate to include evidence which has only ever existed electronically "taking into account the nature of the document and any other relevant circumstances". Had it been intended to limit those circumstances only to the issue of whether the evidence would previously have been served in paper format, the Funding Order could easily so have provided. It seems to me that the more obvious intention of the Funding Order is that documents which are served electronically and have never existed in paper form should be treated as pages of prosecution evidence if they require a similar degree of consideration to evidence served on paper. So in a case where, for example, thousands of pages of raw telephone data have been served and the task of the defence lawyers is simply to see whether their client's mobile phone number appears anywhere (a task more easily done by electronic search), it would be difficult to conclude that the pages should be treated as part of the page count. Where however the evidence served electronically is an important part of the prosecution case, it would be difficult to conclude that the pages should not be treated as part of the page count."

30. The telephone download data I have seen in this case is in the usual PDF format. It is, as usual, divided into sections, much of which has little or no evidential relevance.

31. The percentage-based approach adopted in *R v Sereika* and the other cases to which I have referred has been adopted where it is accepted that a percentage of images is relevant, but where it would plainly be wrong to include all of them. I do not accept that the same approach can be extended across a body of data clearly subdivided into discrete bodies, most of which can be seen at a glance to be of no real relevance. There will be few if any cases in which metadata, for example, will have any real evidential value compared to call logs or message data.

32. It seems to me that such data as can be seen to pass the test identified by Holroyde J in *Lord Chancellor v SVS Solicitors* has already been allowed by the Determining Officer.

33. The Appellant seems to me to have overstated the significance of images in the case. The statement of DS Vizard, with a view to establishing that the Defendant is "Badras", exhibits images taken from public sources, not from telephone downloads. Obviously the Defendant's email address incorporating that name was of significance, but the Determining Officer has already allowed emails within the PPE count.

34. The image files can be skimmed through quickly, and as noted by the Determining Officer (and again typically) most are clearly irrelevant, comprising as they do the usual personal photos, internet jokes, memes and quotes, pre-installed graphics, logos and screenshots.

35. In my view the Determining Officer's 10% image allowance of images has been very reasonable. It does not appear that the Crown relied to any significant extent upon images from MG/2 and MG/3. The images referred to in the Appellant's submissions are quite limited in number and most of them are related to cannabis, which does not have any obvious significance given that the Defendant accepted that regular cannabis use was an inherent part of his lifestyle.

36. It is not obvious to me that the precise date of the handover of MG/2 (could have been of central importance to this case. The question of attribution did not focus on MG/2 or MG/3 but on JW/01/1309/18.

37. In any case, the body of data which might identify the date that MG/2 changed hands has not been quantified by the Appellant (perhaps because of the way in which the Appellant's case has shifted between its presentation to the Determining Officer and the hearing of this appeal), so I can make nothing of it. Presumably, being limited to a short period, it would not have been substantial.

38. The fact that it was necessary for the Appellant, in performing its duties as part of the defence team, to consider any particular body of data is not in itself a basis for including a body of evidence within the PPE count. I note that the Appellant kept a worklog, so I would hope that the LAA would be willing to consider a special preparation claim for the review of material falling outside it.

39. In the meantime, however, for the reasons I have given, this appeal fails and must be dismissed.