SENIOR COURTS COSTS OFFICE

SCCO Ref: 117/17,153/17,144/17,149/17,10/18,168/17,152/17

Dated: 23 August 2018

ON APPEAL FROM REDETERMINATION

REGINA v AMIR ALI
REGINA v AMJID ALI
REGINA v TARIQ MAHMOOD
REGINA v SAJID HUSSAIN

BRADFORD CROWN COURT

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

CASE NO: T20167139 LEGAL AID AGENCY CASE

DATE OF REASONS: 24 August 2017

DATE OF NOTICE OF APPEAL: 15 September 2017

APPLICANTS: ABDUL IQBAL QC SOHEIL KHAN YUNIS VALLI TAHIR KHAN QC SIMON CSOKA QC IAN HOWARD HIGHGATE SOLICITORS	COUNSEL SOLICITORS	

These appeals have been dismissed for the reasons set out below.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. These seven appeals concern payment to defence solicitors and counsel, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013, for working on evidence received from the Crown. I should say that Mr Soheil Khan, who at the appeal represented all seven Appellants, was under the impression that there are eight appeals in total, but the SCCO has no record of an eighth appeal in T20167139.

2. Payment is claimed under the provisions of the Advocates' Graduated Fee Scheme set out at Schedule 1 to the 2013 regulations, and the Litigators' Graduated Fee Scheme set out in Schedule 2.

3. The pertinent provisions of each schedule are identical. Payment for working on evidence served by the Crown is made by reference to the number of Pages of Crown Evidence ("PPE"), subject to an overall "cap" of 10,000 pages. No such payment is made for working on "unused material", which is relevant, or potentially relevant, material delivered by the Crown in accordance with its statutory obligations of disclosure, but not served as Crown evidence. That work is covered by the basic graduated fee.

4. Paragraph 1, (2)-(5) of both schedules explains in identical terms how, for payment purposes, the number of pages of PPE is to be calculated:

> "(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."

Background

5. I am grateful to Mr Rimer (who appeared, on the hearing of these appeals, for the LAA) for setting out in written submissions the relevant history. I have taken from his submissions, along with those made by the Appellants in writing and through Mr Khan, the summary of events set out below.

6. The Appellants represented four of five defendants tried in the Bradford Crown Court on charges of murder and of wounding with intent. The charges followed a large-scale disturbance on 14 April 2016.

7. The defendants (and other parties injured in the incident) were members of an extended family involved in the running of an ice cream business, "Rossi's Ices", in the Bradford area. The four defendants represented by the Appellants were Sajid Hussain, Amjid Ali, Amir Ali and Tariq Mahmoud. The fifth defendant was Mohammed Nasar Ali, whose representatives are not parties to this appeal.

8. In the years building up to the incident on 14 April 2016, a feud had arisen between groups of cousins within the extended family. This had been caused in part by the breakdown of marriages and was exacerbated by the fact that the estranged parties continued to live and work in close proximity.

9. On 14 April 2016 at around 9.30pm, as they were cleaning up the premises at Rossi's Ices, a minor argument broke out between Amir Ali and his cousin Basharat Khan. There was no violence and the argument seemingly petered out after around 10 minutes. However, following the argument, as he was leaving the premises, Mohammed Nasar Ali was overheard saying to Amjid Ali "Let's get this over and done with today, let's finish this."

10. At around 10.08 pm that night Mohammed Nasar Ali encountered his cousin Idris Khan, who had returned from work at Rossi's Ices, and scratched his throat with a sharp object. Mohammed Nasar Ali's father broke up the fight and both men went to their respective homes. At this point Idris Khan realised he was bleeding and had been cut by Mohammed Nasar Ali. When his brother, Basharat Khan, returned home to find Idris Khan injured, he began calling his brothers and cousins telling them what had happened.

11. Later that night Idris Khan's brother Sarfraz Khan returned home from work at Rossi's Ices. He was talking in his car with another family member, Asad Khan, in the presence of another family member, Tahir Khan. Basharat Khan came out and told him to come inside as Idris Khan had been cut with a sharp object. At this point two of the defendants, Amir Ali and Tariq Mahmood, spotted them in the road and began shouting and swearing in an aggressive manner. As he

approached Tahir Khan, Tariq Mahmood pulled a kitchen knife from his pocket. He cut Asad Khan's face and began to hit Tahir Khan, who punched him to the ground.

12. At this point, various family members from both sides came outside and many became involved in the fighting. Both Tariq Mahmood and Mohammed Nasar Ali were armed with knives. Amjid Ali joined in the fighting, throwing chilli powder into the faces of his cousins and using a brush to hit them. Aftab Khan was stabbed by both Tariq Mahmood and Mohammed Nasar Ali and sustained serious injuries. Sarfraz Khan and Mohammed Asad Khan were also stabbed, Sarfraz Khan subsequently dying from his injuries. There were many eyewitnesses to the fighting and much of it was captured on CCTV cameras.

13. Following a 9-week trial listed for 7 November 2016, Mohammed Nasar Ali and Tariq Mahmood were convicted of the murder of Sarfraz Khan and found guilty of wounding Aftab Khan and Asad Khan with intent to cause them grievous bodily harm. Amjid Ali and Amir Ali were found guilty of the manslaughter of Sarfraz Khan and the unlawful wounding of Aftab Khan and Asad Khan. Sajid Hussain was found not guilty of all the charges against him.

The Evidence

14. As part of the police investigation into the incident of 14 April 2016, CCTV footage was compiled and a number of witnesses to the attack were interviewed. In addition, Communications Data Investigator Hollie Blackburn was given authorisation under the Regulation of Investigatory Powers Act 2000 to obtain telecommunications data in relation to several telephones (as I understand it, for the defendants and key prosecution witnesses) for the period between 1 February 2016 and 14 April 2016.

15. Ms Blackburn placed the records she obtained on compact discs. A "Major Incident Room Analyst", Lynne Thompson, then reviewed copies of the discs and concluded that only the records of telephone contact (call data, rather than data downloaded from mobile phones) relating to the events on the evening of 14 April 2016 were relevant to the enquiry.

16. Ms Thompson extracted the data she considered relevant and transferred it to disc LT/2, which was served as an exhibit. From the data on disc LT/2 and the relevant CCTV footage Ms Thompson prepared a timeline setting out the events that took place on the evening of 14 April 2016, based on call and CCTV evidence and served as Exhibit LT1A. That is a schedule in spreadsheet format, timing voice calls, texts and CCTV evidence between just after 9 p.m. and just after 1130 p.m. on 14 April 2016. The CCTV information includes a brief description of its content: the call evidence does not. The parties to calls are identified along with their times and duration.

17. The wider data was, on the evidence, expressly provided to the defence as disclosed, unused material. It was provided (depending on what one reads) either on three compact discs entitled "93967 POLYBURG", "94498 POLYBURG" and "POLYBURG 93967 x 2" or on two discs, "93967

POLYBURG" and "94498 POLYBURG". In any event the content of the discs, top which I shall refer as "the "Polyburg discs", is not in dispute. It would appear that the discs were provided to the defence on 31 October 2016, although witness evidence produced by Ms Blackburn and identifying the data copied on to each disc dates from 17 August 2016 and 6 October 2016.

18. On 4 January 2017, Ms Thompson was cross-examined by Mr Simon Csoka, leading counsel representing Sajid Hussain, on the content of the Polyburg discs. The Appellants rely in their written submissions on an extract from that cross-examination.

19. In his written submissions for the LAA Mr Rimer, who had made enquiries with the CPS, put this into context. The defendants had applied to the trial judge, Cheema-Grubb J, for the entirety of the data on the Polyburg discs to be categorised as served evidence rather than unused material. This was opposed by the Crown. The application was unsuccessful. Instead Ms Thompson was required to review LT/2 and to confirm that the data relied upon by the Crown had been properly extracted.

20. I have seen a note produced by the Crown for the purposes of arguing this issue. The note (mis-dated 3 January 2016) stated that the approach taken by the Crown was in accordance with the CPS's national guidance. It explained the process of preparation of the Polyburg discs and emphasised that the three discs were not exhibited. It explained the process of extracting data relevant to the period relied on by the Crown. It confirmed that the defence team for each defendant had been given access to the full information held by the police, so as to allow verification that it had been properly extracted; to allow it to be put in context; and to consider the remainder of the evidence with a view to identifying other material which might assist the defence case or undermine the Crown's.

The Determining Officer's decision

21. Each Appellant claims payment for the maximum 10,000 pages of PPE, on the basis that they each received in excess of 45,000 pages of served Crown evidence including 42,232 pages of electronic evidence on the Polyburg discs. It was however conceded before me by Mr Khan that if one eliminates duplication between PDF and Spreadsheet format, and takes the PDF count as the appropriate measure, the page count on the Polyburg discs would be 1916 pages.

22. In each case the PPE was assessed by the Determining Officer (with some variations from case to case) at in the region of 3,000 pages. The claim for the material on disc was refused on the basis that the Polyburg discs had been provided to the defence as unused material only, and therefore could not be included in the pages of Crown evidence for the purposes of calculating the graduated fee.

23. In coming to this view the Determining Officer noted that the Polyburg discs had been clearly identified as unused material in multiple witness statements served

in the case. None of the defence teams had been able to supply any information or evidence to suggest that the status of the material had changed during the case, or that any steps had been taken by them to resolve the status of the material, prior to submitting their bill to the Legal Aid Agency.

24. The Determining Officer stated that having considered and applied the principles set out at paragraph 50 of the judgment of Mr Justice Holroyde (as he was then) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB) she was unable to conclude that the material had been served as used material.

Authorities

25. I have been referred to a number of decisions in relation to the PPE count, most of which are decisions of other Costs Judges or otherwise non-binding. I will mention those that I think have (on the facts of this case) some bearing, but by far the most important are two binding decisions: *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *Lord Chancellor v SVS*. Of those two decisions, the Appellants rely in particular upon *Lord Chancellor v Edward Hayes*, but it seems to me (for reasons that I shall explain) that the principles identified in *Lord Chancellor v SVS* have a more obvious application to the facts of this case.

26. In *Lord Chancellor v Edward Hayes,* a disc containing the complete data downloaded from two mobile phones had (for purely practical reasons) been handed by prosecuting counsel to defence counsel at court, and subsequently re-sent to defence counsel's chambers by courier. That had followed the defence's refusal to agree the admission into evidence of selected text messages and schedules derived from that evidence, without sight of the underlying source material. The source material itself had never been listed as an exhibit, served with a NAE or listed in a schedule of unused material.

27. In the absence of such markers, the court (Mrs Justice Nicola Davies DBE, as she then was) made its own determination of the evidential nature of the phone download data served by disc. Nicola Davies J noted that the text messages extracted from that data had been an important part of the Crown's case; that the defence had refused to agree to the admission of that extracted data until it was able to examine all of the downloaded data; that their examination satisfied the defendant's legal representatives of the veracity of the extracted data, and put it in context; that it enabled the defendant's legal team to extract any communications which they (as opposed to the prosecution) deemed to be relevant; and that the trial judge had entertained, and approved, an application for the full downloaded evidence to be served.

28. Nicola Davies J concluded that the electronic evidence for which PPE was claimed was central to the matters in issue. Notwithstanding that the Crown had not served a NAE, the entirety of the download served on disc was in fact additional evidence, served both on the defence and on the court. Accordingly it all fell within the definition of PPE for the purposes of the 2013 Regulations.

29. As to the fact that the evidence was served in electronic form, so falling within subparagraph (5) of paragraph 1 of Schedule 2 to the 2013 Regulations, the Lord Chancellor argued that there would be material on the disc that would not require much by way of examination and that legal aid funds should not be spent on such an examination, which if appropriate might be claimed as special preparation. Nicola Davies J said this (at paragraph 24):

> "Given the importance of the text messages to the prosecution case it was, in my view, incumbent on those acting on behalf of the defendant to look at all the data on the disc to test the veracity of the text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown and to check the accuracy of the data finally relied on by the Crown. I regard the stance taken by the appellant in respect of the surrounding material on this disc as unrealistic. It fails to properly understand still less appreciate the duty on those who represent defendants in criminal proceedings to examine evidence served upon them by the prosecution."

30. In *Lord Chancellor v SVS* Mr Justice Holroyde also observed that the role of a defence lawyer is not confined to checking the accuracy of the summaries of the material which the prosecution has chosen to include. It often extends to also checking the surrounding material to ensure that the schedule does not omit anything which should properly be included in order to present a fair summary of the totality of the evidence and exhibits which are being summarised. It may often be necessary to review what has been omitted before being able to agree the accuracy of that which has been included.

31. The learned judge formulated a number of useful guidelines for judging PPE claims They are set out at paragraph 50, (i)-(xi) of his judgement. Insofar as pertinent for the purposes of this case, they are (paraphrasing and renumbering where appropriate) as follows:

    i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.

    ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.

    iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number

of PPE "comprises only" such material. "Service" may therefore be informal.

iv) In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.

v) Where the prosecution seeks to rely on only part of the data recovered from a particular source, and therefore serve an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. 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. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.

vi) If – regrettably - the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Officer (or, on appeal, the Costs Judge) will have to determine it in the light of all the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) would be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining Officer (or Costs Judge) would be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.

vii) If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) mentioned above, 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. The LAA's Crown Court Fee Guidance explains the factors which should be considered.

This is an important and valuable control mechanism which ensures that public funds are not expended inappropriately…

viii) If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply.

32. I should also refer to an observation made by Holroyde J at paragraph 47 of his judgment in *Lord Chancellor v SVS*:

> "It will of course sometimes be possible for the prosecution to sub-divide an exhibit and serve only the part of it on which they rely as relevant to, and supportive of, their case: if a filing cabinet is seized by the police, but found to contain only one file which is relevant to the case, that one file may be exhibited and the remaining files treated as unused material; and the same may apply where the police seize an electronic database rather than a physical filing cabinet".

The Appellants' Submissions

33. The submissions made on behalf of all of the Appellants are, in effect, identical. They submit that in avoiding, in Mr Blackburn's witness evidence, the word "exhibit" to describe the "Polyburg" discs the Crown sought to circumvent judicial decisions, such as that of Master Rowley in *R v Begum & Others* (SCCO, 71/16 and others, 26 July 2016), by reference to which they would otherwise have had to accept that the data served upon those discs should be included within the PPE count.

34. The fact that Ms Thompson was called as a witness is, the Appellants submit, an obvious example of the evidence referred to by her being specifically put before the court and relied upon by the Crown. The Crown took time to examine the complete telephone record between February and April 2016 before coming to the conclusion that it would serve only evidence from the evening of 14 April. That5 is because it was searching, just as the defence teams had to search, for evidence of previous hostility or incidents.

35. Exhibit LT1A (the sequence of events on 14 April) was, the Appellants submit, referred to repeatedly on a daily basis during the trial. It was the evidential basis upon which the Crown contended that various parties, prosecution witnesses and defendants, are communicated at critically important times. It follows that the data contained on the Polyburg discs, as the foundation of exhibit LT/2, formed the evidential basis upon which the Crime was able to compile LT1A.

36. The Polyburg discs were not included in a schedule of unused material of a notice of additional evidence. The Appellants submit that on *Lord Chancellor v Edward Hayes* principles, and bearing in mind the duty of the defence team for

each defendant to consider the entirety of the data on those two discs, that data falls to be assessed as PPE.

37. Before me, Mr Khan accepted that Cheema-Grubb J did not, despite the representations made by the defendants at trial, direct that the evidence on the Polyburg discs should be categorised as served evidence. That, he submitted, does not fetter the discretion to be exercised by a Costs Judge. The facts, at this stage, will be clearer (for example the amount of work that had to be done on the relevant evidence) and a trial judge may often have had other priorities.

38. The Crown, he says, placed much emphasis during trial upon the history of bad feeling within the defendants' extended family, which led to the very serious incident on 14 April 2016. That included previous violent incidents in January and February, to which the Crown referred in suggesting that this was not an ad hoc incident but a planned attack. It was necessary for the defence teams to counter an overemphasis put upon that history in order to provide a motive for violent conduct on the part of the defendants, culminating upon their attending the scene, in several cases with weapons and with the intention of causing very serious harm. It was essential for the defence teams to consider all disclosed material in that context. The telephone evidence, for example, showed that there had been no telephone contact between prosecution witnesses and the defendants for a significant period, suggesting a state of hostility.

39. Even at the conclusion of the trial it was unclear who had delivered the fatal stab wound. Phone contact details had been used to piece together events and to assert that the five defendants were acting together. It was necessary for the defence to examine the phone evidence from before the date of the incident. All of this had to be considered in the context of long accounts of the historical family dispute, as provided by witnesses to the police. Witnesses were cross-examined for hours, and all of the evidence, including the basic phone data, was of central importance.

Conclusions

40. Grateful as I am for Mr Rimer's submissions, I do not consider it necessary to refer to them in detail, primarily because it will be evident from my conclusions that I agree with him. I will mention that he describes the telephone evidence on the Polyburg discs as "abandoned" evidence, which in the circumstances seems to me to be an apt description. He also refers me to the judgment of Warby J in *R v Thompson and others* (Warwick Crown Court, 5 February 2016, unreported) as an example (albeit in the context of determining an issue as to admissibility) of a principled refusal by a trial judge to bring unused evidence within the PPE count.

41. The principal difficulty with the Appellants' case is that in effect they submit that it is wrong to treat as unused material any form of data which has been reviewed by the prosecution for the purposes of extracting served evidence. That leaves no room for the exercise of judgment clearly required by the 2013 Rules. To borrow Holroyde J's "filing cabinet" analogy, the Appellants' logic would extend

the PPE count not only to the entire content of the filing cabinet, but to the entire content of the office in which it stands. That is not a sustainable approach.

42. In my view this case does not bear comparison with *Lord Chancellor v Hayes*, in which the status of the evidence served had always been unclear, there was no proper basis for distinguishing between the served evidence and the body of unused material from which it had been extracted, and the purported unused material was actually of central importance.

43. The timeline upon which the Crown relied was limited to almost exactly 2½ hours on the evening of 14 April 2016, during which time all the significant events took place. The telephone data from which the timeline evidence was prepared was clearly of key significance and was accordingly properly served and included within the PPE count. It simply does not follow, as the Appellants would have it, that records of telephone calls and texts made by the defendants and others between the beginning of February 2016 and 14 April 2016 were also of key importance.

44. On the contrary, the earlier data from which the served material had been separated was evidently of peripheral if any relevance, and it was properly treated by the Crown as such. The Crown's opening note for the trial, to which I been referred, puts a great deal of emphasis upon events between 9 p.m. and 11.32 p.m. on 14 April 2016. The bad history between the families is briefly mentioned as a matter of background, putting into context the real issues: those responsible for the use of weapons to inflict serious injury, and in one case death, during that narrow period on 14 April 2016.

45. Evidence of the making and length of other telephone communications between members of the same family involved in the running of the same business before the night of 14 April 2016 could never have been of key importance in this case. Even the absence of calls over a given period, which would have taken very little time to identify, would have been of limited significance. It has not been suggested that it was part of any defendant's case that the defendants and the relatives who had suffered such serious injuries had consistently been getting on well.

46. I have to express some concern about two of the submissions put to me by the Appellants. The first is the contention, vigorously pursued both in writing and before me, that the Crown manipulated the position by refusing to refer to the Polyburg discs as exhibits, in an attempt to exclude evidence that should properly have been included within the PPE count.

47. That seems to me to be both unfair and wrong. As I have mentioned, in his judgment in *Lord Chancellor v SVS*, to which the Appellants have referred in their submissions, Holroyde J made it clear that it may be entirely appropriate for the prosecution to sever, from a body of electronic data, that which is truly relevant; to exhibit that evidence; and to treat the remainder as unused. It was plainly appropriate here.

48. Holroyde J also explained the importance of a clear statement by the prosecution as to whether material supplied to the defence was intended to be served evidence or unused material. A clear statement was made here to the effect that the data on the Polyburg discs was unused material. That the Crown was careful to avoid doing anything that might undermine that position, is not a ground for criticism.

49. My second concern is that the Appellants' submissions relied upon an extract from the cross-examination of Ms Thomson without adequately explaining the context. I appreciate that that was not intended. Before me, Mr Khan readily and immediately confirmed that the context was an unsuccessful application before the trial judge for the data on the Polyburg discs to be treated as served evidence, which Cheema-Grubb J (who evidently took no issue with the way in which the Crown dealt with the Polyburg discs) refused.

50. That is important. Holroyde J in *Lord Chancellor v* SVS emphasised the importance of resolving any dispute about the status of evidence as soon as possible and if necessary before the trial judge. The suggestion that the matter, having been put to the trial judge, should be revisited at a later point before a Costs Judge seems to me to be contrary to his guidance, much of the point of which is surely to avoid the delay and expense involved in a costs appeal. Nor can I accept the suggestion that a Costs Judge would generally be better placed to determine the issue than the trial judge.

51. *R v Thompson and others* was cited by Mr Rimer as an example of a principled refusal by a trial judge to treat unused evidence as served evidence. In that particular case, an appeal on the PPE count was heard by me without any mention of that decision which, when it came to light, obliged me to review and reverse my initial decision (*R v Ali*, SCCO 108/16, 12 July 2018). I concluded that that initial decision was inconsistent with the conclusions already reached by Warby J and with the position taken by the parties before him, and so had to be reversed. That all entailed a significant waste of time and resources, both on the appeal itself and the subsequent review.

52. I should make it clear that if the status of evidence as unused or served has been raised before a trial judge, as recommended by Holroyde J, then it is incumbent upon any Appellant putting the same issue to a Costs Judge to provide full information about that and to justify raising the issue again. It should not be necessary for the LAA to make its own enquiries.

53. In any event, for the reasons I have given, these appeals fail.

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