SENIOR COURTS
COSTS OFFICE

SCCO Ref: 108/16

Dated: 12 July 2018

SUPPLEMENTAL DECISION

ON APPEAL FROM REDETERMINATION

REGINA v ALI

WARWICK CROWN COURT

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

CASE NO: T20157085

LEGAL AID AGENCY CASE

DATE OF REASONS: 26 May 2016

DATE OF NOTICE OF APPEAL: 20 June 2016

APPLICANT: Salhan & Co	SOLICITORS	

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

Any payment made to the Appellant in consequence of my judgment of 21 June 2017 should be returned forthwith.

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. On 21 June 2017, I allowed the Appellant's appeal against the Determining Officer's decision to limit payment for Pages of Prosecution Evidence ("PPE") to 5122 pages, as opposed to the maximum 10,000 pages for which payment was sought by the Appellant.

2. The appeal turned upon the evidential status of 5865 pages of evidence provided to the Appellant on disc MP/1A by the Crown on 29 July 2015. I found (paragraph 57) that no indication had been given by the Crown, until a letter purporting to "clarify" the position was sent to the Appellant on 16 December 2015, as to whether the contents of disc MP/1A were intended to be treated as served evidence or as unused material.

3. I also found (paragraph 62) that the letter of 16 December 2016 did not, coming as it did after the date originally set for trial had passed and after the defence team had done much of the necessary prepatory work, qualify as "the view initially taken by the prosecution as to the status of the material", as referred to by Mr Justice Holroyde in *The Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB); that (paragraph 64) the Crown had not, before the letter of 16 December 2016 was prepared, yet reached a final conclusion as to the status of the evidence on disc MP/1A; and that (paragraph 67) the status of the material on disc MP/1A not having been resolved between the parties or by a ruling of the trial judge, as contemplated by Holroyde J at paragraph 50 (viii) and (ix) of *The Lord Chancellor v SVS Solicitors,* it was incumbent upon me to determine whether, on the evidence before me, it was appropriate to include its contents in the PPE count.

4. Given my conclusions as to the importance of the data provided on disc MP/1A, and by reference to the guidance given in *The Lord Chancellor v SVS Solicitors* and *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB), I concluded (paragraphs 68 to 74) that the contents of disc MP/1A should be included in the PPE count.

5. After my decision was communicated to the parties, the LAA drew my attention to a number of pertinent matters that had not been put to me in the parties' submissions or evidence before I delivered my decision. Nor had they been drawn to the attention of the LAA until after my decision had been made. They are as follows.

6. On Friday 15 January 2016, Warby J dismissed an application, made on behalf of the defendants including the Appellant's client Hasham Ali, for a ruling that aspects of the Crown's telephone evidence in the prosecution were inadmissible. He gave his reasons for doing so in writing on 5 February 2015. I should say that the copy with which I have been supplied is marked as suitable for handing-down subject to editorial corrections, but it appears to be complete and final for all practical purposes.

7. The application concerned three different categories of telephone data. The first category was billing data showing, in electronic format, details of calls made from mobile telephones. The second category was mobile call mast data, showing to which mast a given phone was connected at a given time. The third category was information downloaded from mobile phones (referred to as "handset reports" or "download reports"). This last category included the contents of disc MP/1A.

8. In each case, the position taken by both the Crown and the defendants before Warby J was that witness evidence, incorporating selected elements of the underlying data, had been served by the Crown but that the data itself had been disclosed (in the form of exhibits to the relevant statements) as unused material.

9. The defendants argued that, in consequence, the billing data and the phone mast data was hearsay evidence, and could only be admitted if all of the data itself was served. As for the "download reports", the defendants argued in addition that the relevant witness, PC Angus, was an expert witness, and that the entirety of his report, including the data from which it had been extracted, should be served in its entirety if his conclusions were to be relied upon.

10. All of these arguments were rejected. Whilst it is not necessary for me to recite the reasoning of Warby J in the coming to those conclusions, I should reproduce some passages from his judgment which appear to me to have a bearing upon the issue before me.

11. Warby J made these observations and drew these conclusions:

> (Paragraphs 9-10): "... It does appear that the Crown changed course mid-stream in its approach to service and disclosure of the material under consideration. But if the approach that it has come to adopt is a legitimate one, the fact that it started off in a different course at an earlier stage cannot undermine its validity. I do not accept a submission that the Crown, having at one stage indicated that would serve all of DC Cox's materials, thereby bound itself to take that course. The key question is whether the material that has in the event been served is sufficient to prove the necessary facts.
>
> It is of course the case that whether material is served or disclosed has cost implications for the Crown and remuneration implications for the defence under the graduated fee scheme. But in reaching a conclusion on the issue I must avoid being diverted by those implications. If my conclusions mean the Crown must spend more, or that the defence page count remains as it is, so be it. Equally, my conclusions must be uninfluenced by the fact that a particular approach is endorsed, recommended, or even prescribed by CPS guidance."
>
> (At paragraph 22, in relation to "download reports"): "... The submission that the entirety of DC Angus's download reports must be served by the Crown must also fail. It is no more persuasive in this

context that in the context of billing data to suggest that the evidence is indivisible in its nature. The reality is that DC Angus has produced a series of reports, each containing a variety of data. Only some of the reports contain relevant data, and only some of the data in relevant reports is itself of relevance to the issues in the case. There is no good reason why the Crown should be obliged to serve data which is not relevant to its own case, and is not relied on. Nor is there any good reason why it should have to disclose irrelevant material, which could not undermine its case or support that of the defence."

12. After the judgment of Warby J had been drawn to my attention a hearing was arranged for review and reconsideration of my judgment of 21 June 2017. Mr Bell appeared on that hearing as counsel for the Appellant, and Mr Rimer for the LAA.

13. The Appellant has provided me with a note from Mr Iqbal QC, counsel for Hasham Ali's co-defendant Zaker Khan, who (supported by counsel for the other defendants including Mr Miskin QC, advanced some discrete arguments on behalf of Hasham Ali) took on the main burden of advancing the arguments for the defendants before Warby J. I have also been supplied with copies of two skeleton arguments prepared, at the time, by Mr Iqbal. These are dated 15 and 17 January 2016.

14. Mr Iqbal explained in his note that he had not sought from Warby J any declaration or comment as to the categorisation of any evidential material. The legal submissions he pursued were designed solely to seek to exclude the evidence that was before the court relating to the telecommunications data, telephone cell mast data, and mobile telephone handset downloads. Warby J ruled that the evidential material was admissible in its current form.

15. Mr Bell, in essence, submitted that one must distinguish between service upon Mr Iqbal's client and service upon Hasham Ali, and that one must also distinguish between the arguments advanced on behalf of Mr Iqbal QC's client and the arguments advanced on behalf of Hasham Ali, as advanced by Mr Miskin QC.

16. Warby J, Mr Bell submits, did not make any specific finding, in respect of Hasham Ali, as to the status of the content of disc MP/1A. He merely found, on the premise that it was not served, that the Crown did not have to serve it. Whether it was, as a matter of fact, served is a different question. The Appellant submits that it was.

17. It will not be necessary for me to refer in any detail to Mr Rimer's submissions, because it will be evident from this decision that I accept most or all of them.

18. The difficulty I find with the approach urged on me both by Mr Iqbal and by Mr Bell is that all the arguments put to Warby J by Mr Iqbal were adopted by all the defendants. They were based upon the premise, accepted by both the Crown

and the defendants, that the Crown had not served the underlying data from which it had extracted the material that was treated, by all concerned, as served.

19. It is clear from Mr Iqbal's skeleton arguments that it was, before Warby J, common ground between the Crown and the Defendants that the raw data (including the content of disc MP/1A) from which the Crown's served evidence had been prepared, had not itself been served.

20. For example the first skeleton argument, at paragraphs 13 to 16, says:

> "The prosecution witness PC Mark Angus, a trained mobile telephone handset examiner, examined various mobile telephones of relevance using specialist software and hardware. He produced several examination reports (MPA/1 to MPA/5) ...None of the telephone download reports has been served in evidence by the prosecution. The reports remain categorised as unused material... Thereafter the same approach outlined above has been used by the prosecution in relation to the download reports... Accordingly, an analysis of (unused) download reports by (the civilian and non-expert) Derek Dolan has resulted in him producing "extracts" of the telephone download reports setting out those aspects of the unused download reports relied on by the Crown".

21. The separate arguments put by Mr Miskin QC on behalf of Hasham Ali were consistent with that. He complained that the Crown had originally intended to serve and put in evidence all of the data, but that it had changed its position. He did not argue that, in consequence, all of the data must be treated as served: he argued rather that the data actually served was inadequate to prove the Crown's case. Warby J did not agree.

22. If Warby J did not make any finding as to whether the electronic data from which the served evidence had been extracted was itself served or merely disclosed, it is because he did not need to do so. It was common ground between the Crown and all of the defendants that it had not been served and his judgment, necessarily, started from that premise.

23. Further, it is evident from the observations of Warby J at paragraph 10 of his judgment, referred to above, that one possible consequence of his judgment would be that the Crown would be obliged to serve that underlying data. He might, for example, have made a finding to the effect that if the Crown were to rely upon its witness evidence, it would have to serve it. The effect of his judgment was that evidence which, it was mutually agreed, had to date been unused material would continue to be unused material.

24. Under those circumstances it is impossible for me to avoid the conclusion that my finding at paragraph 67 of my judgment of 21 June 2017 was based upon incomplete evidence and was, accordingly, incorrect. It was not the case, as I concluded on the evidence before me, that the status of the material on disc MP/1A had not been resolved by the parties or by a ruling of the trial judge. The parties had, by mid-January 2016, in effect agreed that it was unused material:

much time and energy was spent before and by the court by the Crown and the representatives of four defendants on precisely that premise.

25. For those reasons, I find it necessary to review and to change the conclusions I reached in my judgment of 21 June 2017. The material on disc MP/1A had not been served and it should not be included within the PPE count.

26. Mr Salhan of the Appellant firm has explained (and I accept) that he was, at the time of the hearing of this appeal, not aware of Warby J's judgment. If he had been, he would have brought it to the court's attention on this appeal. Nonetheless the appeal should not have been made without reference to that judgment, and it must fail. The Appellant must refund to the LAA all payments made in consequence of my decision 21 June 2017.

TO: Mr T Salhan
Salhan and Co Ltd
10th floor, McLaren building
46 The Priory Queensway
Birmingham **B4 7LR**

COPIES TO: Helen Garton
Senior Caseworker
Legal Aid Agency
DX10035 Nottingham