



SENIOR COURTS  
COSTS OFFICE

SCCO Ref: 277/14

Dated: 11 November 2014

**ON APPEAL FROM REDETERMINATION**

**REGINA v SIBANDA**

CROWN COURT – CENTRAL CRIMINAL COURT

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

CASE NO: T20137202

LEGAL AID AGENCY CASE

DATE OF REASONS: LAA REFUSAL LETTER: 18 JUNE 2014

DATE OF NOTICE OF APPEAL: 11 JULY 2014

APPLICANT: SOLICITORS Norman H Barnett & Co Solicitors  
DX 4704  
East Ham

The appeal has been successful (in part) for the reasons set out below.

The appropriate additional payment, to which should be added the sum of £300 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

**J. SIMONS  
COSTS JUDGE  
REASONS FOR DECISION**

1. Norman H Barnett & Co Solicitors appeal against the determination of their Litigator Graduated Fee in which the Legal Aid Agency reduced the solicitors' claim relating to pages of prosecution evidence ("PPE") from 10,000 pages to 3,700 pages.
2. The solicitors represented Thamsanqa Sibanda who was one of nine Defendants facing a charge of rape. The other eight Defendants also faced a charge of conspiracy to engage in sexual activity with a child. The solicitors were acting for their client under a representation order dated 9 April 2013. The prosecution case against the eight other Defendants were that they were an organised ring engaged in sexually exploiting a schoolgirl. The prosecution relied on telephone evidence to show the contact, movement and meetings of these Defendants. This was the only evidence to corroborate the Complainant's account of what had happened to her, and this evidence was crucial in establishing the presence of those Defendants at the time of the alleged offences. Sibanda had evaded arrest and when he was eventually produced to the Inner London Crown Court and his case was transferred to the Central Criminal Court to be joined with the cases against the other Defendants. Although Sibanda was not charged with conspiracy, much of the Crown's case against him was based on establishing connections between the other Defendants and Sibanda, and the victim. This was done through examining various social media accounts and analysing mobile telephone billing records.
3. In all 19,664 PPE was served. The final page count document produced by the Crown dated 4 October 2013 showed items marked "Telephone billing" and this evidence had been served electronically with a page count of 15,964 pages. This is the material which the solicitors state has been excluded from the page count relating to PPE.
4. The Legal Aid Agency reduced the claim for PPE to 3,700 and in written reasons dated 18 June 2014, the Determining Officer stated that it was not "considered appropriate to count them into the calculation of PPE on the basis that they would have been served in paper format in the non-digital age".
5. The solicitors now appeal and in their Grounds of Appeal they state that this was a case where the telephone evidence was considered to be vital to the Crown's case and, ultimately, the Crown became aware of substantial Twitter messaging which ultimately led the Crown to formally offer no evidence. The solicitors subsequently filed a skeleton argument in which they referred to successful appeals to the SCCO by representatives of four other Defendants in the case in which Master Gordon-Saker decided that taking into account the nature of the evidence and other relevant circumstances, it was appropriate to include 5,964 pages of electronically served telephone evidence as PPE.
6. The solicitors further submit that the Determining Officer had failed to recognise the crucial nature of the material to the Crown's case and the need for the solicitor to scrutinise this material.

7. In a letter dated 23 October 2014 the Legal Aid Agency wrote to the solicitors purporting to make a new determination by increasing the PPE by a further 3,053 pages. These pages related to 1,346 pages of Twitter and Facebook material and 1,707 pages of telephone billing material.
8. The Legal Aid Agency further stated that the reason why they were not allowing any further PPE was that as Sibanda was not charged with conspiracy, it would not have been relevant to undertake analysis of the co-Defendants' call history for the purpose of Sibanda's defence.
9. In that letter the Legal Aid Agency stated that if the solicitors were dissatisfied with this new determination, it was open to the solicitors to seek a further redetermination and, if necessary thereafter, to seek written reasons.
10. The solicitors have now filed an addendum to their skeleton argument in which they reject the Legal Aid Agency's decision to distinguish their client's case from that of the other Defendants, and maintain that they are still entitled to their full claim in respect of PPE.
11. They submit that the prosecution evidence showed a relationship between Sibanda and some of the other Defendants. He had confirmed that at least three of them were known to him and, in view of this, it would have been quite wrong for them not to investigate any possible connection between Sibanda and the others since these connections had a profound effect on the viability of Sibanda's defence and would have affected the sentence whether or not he was charged with the conspiracy counts. They state that the evidence certainly permitted such a charge and the defence could not rule out the possibility that the indictment would be amended so as to include Sibanda in the conspiracy charge. The solicitors further state that it is unrealistic to suggest that the defence could have selected which part of the prosecution evidence they should consider or that the only telephone evidence that they should consider was Sibanda's his own records. They maintain that Sibanda was in the same position as the other Defendants in that they had to analyse and scrutinise the material in the same way as the legal representatives for the other Defendants.
12. As the representation order post-dates 1 April 2013, the relevant regulations are the Criminal Legal Aid (Remuneration) Regulations 2013 and not the earlier regulations referred to in the written reasons dated 18 June 2014 or the letter from the Legal Aid Agency dated 23 October 2014.

## **Schedule 2**

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

*(3) The number of pages of prosecution evidence includes all*

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

(5) *A document 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 into account the nature of the document and any other relevant circumstances.*

13. On the morning of the hearing of this appeal, I received written submissions on behalf of the Lord Chancellor. In those submissions the Lord Chancellor submitted that Sibanda was the only Defendant that had not been charged with conspiracy and consequently the decision made by Master Gordon-Saker relating to the other defendants would have no relevance to this particular appeal.
14. The Lord Chancellor rejected the submission made on behalf of the solicitors that there was concern that the charge of conspiracy against Sibanda might have been added to the indictment. The Lord Chancellor submitted that it is entitled to assume that defence teams undertake work that is reasonable and necessary in respect of the offence with which their client is actually charged. In this case this was a charge of rape and the only realistic defence was that the offence never took place, and this could have been asserted by reference to the Defendant's own telephone records which may or may not provide evidence that the Defendant was somewhere else other than where the alleged offence had taken place. The Lord Chancellor had already conceded that PPE should be allowed in relation to the telephone evidence that specifically related to Sibanda, but not the PPE evidence that related to the co-Defendants.
15. Mr Andrews, a costs draftsman instructed by the solicitors, and Mr Rimer on behalf of the Lord Chancellor, attended before me at the hearing of this appeal.

16. Mr Andrews submitted that all the electronically served evidence was served ~~on solicitors acting for all the Defendants. This meant that all of the solicitors~~ had to make the same analysis of this evidence and Sibanda's case should not be distinguished from the cases of the other Defendants. It was necessary for his instructing solicitors to go through the material in the same way as the solicitors acting for the other Defendants would have done. Furthermore, the solicitors were concerned that the prosecution would add Sibanda to the conspiracy charge.
17. In response Mr Rimer submitted that many months elapsed from the time the representation order was issued on Sibanda's behalf in April 2013 until the case was finally dropped, for the prosecution to have added Sibanda to the conspiracy charge. They did not do so and consequently it is not reasonable for the Legal Aid Agency to have to pay for preparation work for an offence for which the Defendant was not charged. Consequently, it was not necessary for Sibanda's solicitors to carry out the same in depth analysis that would be necessary had their client been charged with conspiracy.
18. This appeal must succeed simply on the basis that it is an appeal from the original redetermination made at which the Determining Officer made her decision to reduce the PPE on the grounds that the evidence has never existed in paper form. The Determining Officer did not take into account the nature of the documentation and any other relevant circumstances. The Determining Officer's error has been recognised by the Lord Chancellor in that he now accepts that an additional 3,053 pages should count as PPE as she now accepts that it would be necessary for the solicitors' defence team to undertake a careful analysis of material relating to Sibanda's call history and an analysis of the disc containing social media accounts.
19. The issue that I now have to decide is as to whether or not the balance of the electronically served evidence consisting in the main of details of the co-Defendants' telephone evidence should also be regarded as PPE. Mr Andrews was unable to supply me with any information as to who carried out the analysis of the co-Defendants' billing evidence, when such an analysis took place, and how long it took. He was also unable to show how relevant that material was to Sibanda's own defence.
20. I accept Mr Rimer's submission that as Sibanda was never charged with conspiracy, Master Gordon-Saker's decision in dealing with the appeals of some of the other defendants is not of relevance to this case. In my judgment, in taking into account the nature of the documentation, ie the other Defendants' call records, and all of the circumstances, including the fact that Sibanda was not charged with conspiracy, I do not consider it appropriate for the electronically served evidence relating to the co-Defendants' telephone records to be included as PPE. As has been conceded by Mr Rimer, if a significant amount of preparation time was involved in the analysis of these co-Defendants' telephonic records, a claim can be made for special preparation.

21. Consequently, this appeal only succeeds in part and I direct the Determining Officer to make payment to the solicitors on the basis of additional 3,053 PPE.
22. With regard to the costs of the appeal, Mr Rimer submitted that if I did not allow more PPE than that offered by the Legal Aid Agency in their letter of 23 October 2014, then the Legal Aid Agency should receive their costs of the appeal. Whilst I have not allowed any more PPE than that offered in the letter of 23 October 2014, I am not satisfied that I have any power under the Regulations to award costs in favour of the Lord Chancellor at a hearing of an appeal against a redetermination.
23. In my judgment the solicitors are entitled to their costs of making the appeal, but in view of the concession made by the Legal Aid Agency on 23 October 2014, their costs should be limited to preparation costs only which I assess in the sum of £300, plus VAT, and payment of the court fee.

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