SENIOR COURTS
COSTS OFFICE

SCCO Ref: 39/19 and 94/19

Dated 1 August 2019

APPEAL FROM REDETERMINATION

REGINA v CAROLINE TIXIE

ISLEWORTH CROWN COURT

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

CASE NO: T20180146

LEGAL AID AGENCY CASE

DATE OF REASONS: 22 January 2019

DATE OF NOTICE OF APPEAL: 14 February 2019

APPLICANT/APPELLANT: Advocate

CASE NO: T20180146

LEGAL AID AGENCY CASE

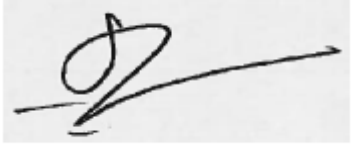
DATE OF REASONS: 14 March 2019

DATE OF NOTICE OF APPEAL: 20 March 2019

APPLICANT/APPELLANT Solicitors/Litigators

These appeals are unsuccessful for the reasons set out below.

SIMON BROWN
COSTS JUDGE



REASONS FOR DECISION

1. The issue arising in these appeals is as to whether material in electronic form is to be regarded as pages of prosecution evidence (PPE) for the purposes of determining the fee due to the litigator and advocate under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known, and explained in more detail in the decision of Holroyde J (as he then was) in *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045, the scheme provides for legal representatives to be remunerated by reference to a formula which takes into account, amongst other things, the number of served pages of prosecution evidence as defined in the 2013 Regulations, the PPE, and the length of the trial.

2. The appeals are brought by the solicitors and counsel acting for the Defendant. It has been agreed, as I understand it, that the appeals be determined together because they raise the same issues.

3. At the appeal hearing on 30 July 2019, Mr Hossain, of counsel, represented himself and Mr Hussain, a solicitor of the Appellant firm, represented the Appellants. Mr Rimer, who is an employed lawyer, represented the Respondent Legal Aid Agency (the LAA). He prepared written submissions shortly before the hearing. I expressed my concern at the hearing as to the late stage at which such submissions were produced, but there was no objection to me considering them.

4. The Appellants represented the Defendant in respect of a single charge of fraudulent evasion of the prohibition of the importation of heroin into the UK on 8 February 2018. Immigration officers noted a possible concealment in the Defendant's bag and forensic testing revealed a powder subsequently shown to be heroin. The Defendant's mobile phone was seized upon arrest.

5. The Defendant denied knowingly bringing drugs into the UK. She claimed she had agreed to bring tobacco leaves into the UK from Kenya in exchange for a fee of £1,000. She had been offered this opportunity by a friend named Gilda Molina and that it was on behalf of legitimate employers: she said she was unaware the bags contained drugs and would have refused to carry them had she been aware.

6. In a detailed Defence Statement, a request was made for disclosure of all the telephone data from the phone seized from the Defendant. In response to the request the CPS informed solicitors in a letter dated 5 June 2018 that it was taking a considerable amount of time to download messages from the Defendant's mobile phone due to the volume of data generated in the two to three months preceding arrest in addition to which the download required translation which was said to have added to the delay. It was said that it was anticipated raw data would be available by disc by the middle of the following week. However, a schedule was to be prepared setting out the evidence the Crown would rely on in the case.

7. A USB stick was served by letter dated 27 June 2018. The letter expressly stated that the USB stick contained raw telephone download in the case and was served as unused material. A further letter dated 28 June 2018 was to similar effect

stating that the USB stick had been disclosed 27 June in accordance with the provisions of section 7A of the Criminal Procedure and Investigations Act 1996, as unused material.

8. A report containing material extracted from the raw data was served by way of Notice of Additional Evidence, as I understand it, on or about 5 July 2019. Its contents were uploaded to the DCS and are included within the PPE. This report contains details - in the form of screenshots- of WhatsApp communications between the Defendant and her friend, Gilda Molina, in which the trip to London was discussed.

9. Neither Determining Officer allowed any of the material contained within the USB stick in addition to the contents of the report which had been uploaded to the DCS. The basis for their decision was that the material had not been served as used material and therefore could not be regarded as PPE.

10. In their Notices of Appeal, the Appellants challenge the determination that the material on the USB stick was unused material and assert that the contents of the USB stick should have allowed. I understand that the USB stick included some 100,632 pages of material of which 80,000 were images. At the hearing it was accepted that not all the contents of the report should count towards the PPE. Mr. Rimer argued that that the USB stick was only ever served as unused material and therefore could not count towards PPE; alternatively and in any event, in the exercise of my discretion pursuant to the relevant provisions even if the material were to be regarded as served, there should be no separate award for the material contained within the USB stick

11. Paragraphs 1(2) to 1(5) of Schedule 2 of the 2013 Regulations provide as follows:

> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (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 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 into account the nature of the document and any other relevant circumstances."

12. At paragraph 50 of his decision in *SVS* Holroyde J considered he effect of this provision and stated 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.

(iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and co-operatively progressing a trial, the advocates dispensed with the need for service of a notice of additional evidence before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.

(v) The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary precondition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages would be excluded from the count of PPE merely because the notice had for some reason not reached the court.

(vi) 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.

(vii) Where the prosecution seek 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.

(viii) 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.

(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. As I have indicated above, 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.

(x) If an exhibit is served in electronic form but the determining officer or costs judge considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2 .

(xi) 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.

13. It seems to me to be clear, applying this guidance, that the relevant material was correctly regarded by the Determining Officers as having been served as unused material and therefore should not count towards the PPE. As I understand it, at no

stage was a ruling made that the Prosecution be directed either to exhibit the underlying material on the USB stick or to present their case without the extracted material on which they sought to rely. The Prosecution only ever relied upon the material extracted from the USB stick, which was presented in the form of a report which was uploaded onto the DCS. It is clear from these circumstances that the Prosecution view was always that the balance of the material on the USB stick was not relevant to its case and would not be relied upon; it seems to me that this is a decisive factor in this case. It plainly does not follow that because the material used in the report and uploaded to the DCS was extracted from the body of telecommunications data generally, that the whole of that material was to be regarded as qualifying for PPE.

14. The Appellants' case was that the extracted material could not properly be considered without also considering the material on the USB stick from which it was extracted as context. Their point being that because it was necessary to look at the material it was should be regarded as used material notwithstanding the description given to it by the Prosecution. However, it seems to me simply because it was necessary to consider the material it does not follow that it should be regarded as used material. The normal expectation is that the defence solicitors will indeed consider unused material for anything that might assist their client.

15. The Appellants did not come to the appeal hearing with a copy of the relevant USB stick. A copy was produced by Mr Rimer. He took me to the section of WhatsApp messages which, as set out above, were in the form of screenshots on the USB stick; om the basis of his analysis this section included all 17 pages of screenshots as they appeared in the report uploaded onto the DCS; his point being that the context of the of the WhatsApp communications would be found in the extracted report and there was nothing further that he was able to access which could have provided any context to the communications. Clicking on the section Messages Chat in the hearing, revealed only images. Mr. Hossain told me that there were more messages - although they could not be accessed in the course of the hearing. However, he did not seek an opportunity to put in further evidence so that a view might be taken on the extent to which the WhatsApp communications relied upon might be qualified by other material found on the USB stick. Nor did the schedule, which was apparently produced by an employee of the Appellant solicitors, make any reference to any relevant communication in the material on the USB stick. However even accepting that there was further material perhaps in the Messages Chat section that might have assisted the Appellants' point it is clear from the decision in *SVS* that these pages would not be regarded as PPE: it is not sufficient that the material may be helpful to the defence. As I understood Mr. Hossain's description of this evidence the material was of assistance to the defence in rebutting the inferences that were to be drawn from the communications evidenced by the WhatsApp messages as to the Defendant's knowledge of the true contents of her luggage.

16. However, even if had reached a different conclusion on the issue of service, on the basis of the information that was provided to me and available on appeal it would be difficult to have concluded that there was any or any substantial material on the USB stick that, though not included in any part of the report, should in the exercise of my discretion be regarded as PPE. As indicated above, the vast bulk of the material

on the memory stick consisted of images: neither of the Appellants were able to satisfy me that they had any or any significant relevance to the case.

17. I am told by Mr Hussain that an employee spent two weeks considering the material on the USB stick and, as I understand it, producing the schedule which was in the papers produced to me. It is not clear to me that this work revealed anything of relevance. Moreover, it is difficult, notwithstanding the very considerable volume of material, to see why such an amount of time was spent going through obviously irrelevant material in circumstances where the Defendant can be assumed to give instructions on the contents of her own telephone. This was not a conspiracy case or similar (cf. *SVS. Lord Chancellor v Edward Hayes LLP*). The issue arising was as to the Defendant's knowledge of the contents of her luggage- and the WhatsApp messages relied upon were said to contain representations which went to this issue.

18. It is not necessary for me to set out in any further detail the judgement of Holroyde J on the issue the discretion. However, it is to be noted that Holroyde J cited, with apparent approval, part of the decision of Senior Costs Judge Gordon-Saker in *R v Jalibaghodelezhi [2014]* 4 Costs LR 781. That decision concerned a Funding Order, which was in force at the material time and is, in material respects, similar to the 2013 Regulations; the relevant passages are 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. <u>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.</u> 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*." [my underlining]

Applying this guidance, it is clear that at the very least the vast bulk of the contested evidence could not have required any close consideration such that it is appropriate for inclusion in the PPE. As indicated above, the presence of further communications in the USB stick providing context (or otherwise qualifying communications in the WhatsApp messages relied upon by the Prosecution) was not demonstrated to me in the hearing. Even if there were other such material, it would appear that at best only a tiny fraction of the additional material on the USB disc could require consideration in any detail.

19. The Appellants have been unsuccessful on the issues raised in their Grounds of Appeal and the appeals are, accordingly, dismissed.

20. I note that there was an error in the page count in respect of the material uploaded to the DCS. The LAA are content that this be amended to reflect the material uploaded to this system and an appropriate fee adjustment can be made. I assume, unless told otherwise, that this calls for no direction from me.

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