



SENIOR COURTS  
COSTS OFFICE

SCCO Ref: 132/19

Dated: 21 October 2019

**APPEAL FROM REDETERMINATION**

**REGINA v PURCELL**

THE CROWN COURT IN LIVERPOOL

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

CASE NO: T20177363

LEGAL AID AGENCY CASE

DATE OF REASONS: 26 April 2019

DATE OF NOTICE OF APPEAL: 16 May 2019

APPLICANT/APPELLANT: Litigators: Broudie  
Jackson Canter

This appeal is unsuccessful for the reasons set out below.

**SIMON BROWN  
COSTS JUDGE**

## REASONS FOR DECISION

1. The issue arising in this appeal is as to correct assessment of the number of pages of prosecution evidence ('PPE') when determining the fees due under the Criminal Legal Aid (Remuneration) Regulations 2013. As is well known, and explained in more detailed 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 (subject to a cap of 10,000 pages), and the length of the trial. The particular dispute in this case concerns the extent to which telephone evidence served in electronic form should count toward the PPE.

2. At the hearing on 14 October 2019 the Appellants were represented by Mr. O'Brien Counsel. The Legal Aid Authority ('the LAA') were represented by Mr. Rimer, an employed barrister.

3. The Defendant had the benefit of a representation order dated 1 November 2017. She and her father were charged with manslaughter and neglect (of a person who lacked capacity) following the death of the Defendant's mother on 24 July 2016. The deceased died in circumstances which the police described as "putrid and disgusting". The Prosecution case was founded primarily upon the physical state of the deceased and the state of her living conditions, in particular her bedroom. It was contended that the deceased had been left to die without sufficient food or water over a period of months. She was last seen by health professionals on 17 December 2015, some seven months prior to her death. The Defendant's case was that her mother's death was relatively sudden and unexpected and she cared for her mother in the best way she could. The central issue arising in the trial was with the length of time the deceased had been in a poor state of health, prior to her death.

4. All the communications data, call logs, Chats, SMS and MMS messages have been allowed. The disputed material is found in exhibit AG6, downloaded from the Defendant's telephone, and is in the Images section only. This section consists of some 11,231 pages of which 18 pages were counted as PPE, the balance to be subject to an application for a special preparation fee. Accepting that some of the material is obviously irrelevant (consisting of emojis, banners, other pre-loaded material and the like) the Appellant does not seek an allowance for the full sum. The Appellant seeks an allowance of 6,242 pages being the photographs, which were identified as family photographs (as I understood it) although a revised schedule consisting of about 865 pages was submitted as part of the Appellant's note in this appeal. The Determining Officer was not satisfied that the balance of the pictures in the relevant section were relevant and as he put it, pivotal to the case.

7 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.”*

8 There is no dispute that the relevant material is to be treated as “served”. It is however clear that downloaded material need not be regarded as one integral whole, (as a witness statement would be) but when exercising discretion under paragraph 1(5) a qualitative assessment of the material is required, having regard to the guidance in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) and *SVS* (including in particular para. 44 to 48), and the Crown Court Fee Guidance, (updated in March 2017) and I have considered them in this context.

9 In his judgement Holroyde J, when dealing with the issue as to whether served material should count as PPE, said this:

*“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.*

*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”.*

10 The Crown Court Fee Guidance, which was updated in March 2017, prior to the decision in *SVS*, provides as follows:

*“In relation to documentary or pictorial exhibits served in electronic form (i.e. those which may be the subject of the Determining Officer’s discretion under paragraph 1(5) of the Schedule 2) the table indicates –*

*“The Determining Officer will take into account whether the document would have been printed by the prosecution and served in paper form prior to 1 April 2012. If so, then it will be counted as PPE. If the Determining Officer is unable to make that assessment, they will take into account ‘any other relevant circumstances’ such as the importance of the evidence to the case, the amount and the nature of the work that was required to be done, and by whom, and the extent to which the electronic evidence featured in the case against the defendant.”*

11 At paragraph 38 of Appendix D, the Guidance gives examples of documentary or pictorial exhibits which will ordinarily be counted as PPE. They include –

*“Raw phone data where a detailed schedule has been created by the prosecution which is served and relied on and is relevant to the defendant’s case.*

*Raw phone data if it is served without a schedule having been created by the prosecution, but the evidence nevertheless remains important to the prosecution case and is relevant to the defendant’s case, e.g. it can be shown that a careful analysis had to be carried out on the data to dispute the extent of the defendant’s involvement.*

*Raw phone data where the case is a conspiracy and the electronic evidence relates to the defendant and co-conspirators with whom the defendant had direct contact.”*

12 In his decision Holroyde J also 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. 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.” [my underlining]*

13 Even if the material is not appropriately to be regarded as PPE then it may be remunerated by a special preparation fee, pursuant to Para. 20 Schedule 2 of the 2013 Regulations which provides, so far as is relevant, as follows:

*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*

...

*(2) Where this paragraph applies, a special preparation fee may be paid, in addition to the fee payable under Part 2.*

*(3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable—*

*(a) where sub-paragraph (1)(a) applies, to view the prosecution evidence; and*

..

*(4) A litigator claiming a special preparation fee must supply such information and documents as may be required by the appropriate officer in support of the claim.*

*(5) In determining a claim under this paragraph, the appropriate officer must take into account all the relevant circumstances of the case.*

14 Such a fee would be based on time actually spent; that is to say, the number of hours the Determining Officer considers reasonable to view the evidence. The LAA say that much of the material in this case, which I have considered to be served, should be compensated by such a fee. I take note of the following passage from *R v Sana* [2016] 6 Cost LR 1143:

*“A line has to be drawn as to what evidence can be considered as PPE and what evidence we considered the subject of a special preparation claim. Each case depends on its own facts. The regulations do not state that every piece of electronically served evidence, whether relevant or not, should be remunerated as PPE. Quite the contrary, as electronically served exhibits can only be remunerated as PPE if the Determining Officer side is that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances.”*

15. Turning back then to the facts of this case, it is common ground that the relevant section of images contained a substantial amount of obviously irrelevant material. I understand that photographs of the deceased were of potential relevance in particular if one could be dated between 17 December 2015 and 24<sup>th</sup> of July 2016, the latter being her date of death, then that would indicate her appearance upon which the medical professionals could comment, for instance, as to her weight loss. Similarly, if there were photographs within the house of her bedroom during that period they could indicate its appearance over time.

16. However I understand the defence were unable to identify any photographs of any relevance. I understand that it was suspected that a photograph, at page 2,715 of the section, showed an older lady lying on a pillow seemingly in the bedroom. In this photograph dated 3 June 2016 the female looked relatively healthy. If this photograph were of the deceased, it would, so it is argued, have been in the 'Timeline' document prepared for the jury. However, that photograph was not the deceased. The suggestion that there might be photographs of relevance, came from the Defendant in respect of the material on her own telephone. In the event however none of it was considered relevant. Indeed the prosecution did not rely upon any of this material.

15 I have looked through the samples provided of this material. I accept that it needed to be considered. However that does not of itself merit inclusion of this material within the PPE. Consideration of this material can be compensated as part of a special preparation fee claim. The photographs identified in the samples are in part of relatively poor quality and I understand that it was not considered appropriate or necessary to call for better quality photographs that might have been on the telephone. There is force in Mr. Rimer's point that it would be relatively easy for the Defendant herself to identify potentially relevant photographs in advance of any discussion. Mr O'Brien told me that there were medical or other impediments to this process. Even accepting that were the case, nevertheless it seems to me that she must have been able to give some instructions on the material.

16 Having considered the guidance deriving from SVS and the approved section of the relevant Crown Court guidance, it is clear to me that consideration of this material fell short of what was required for its inclusion in the PPE. It appears that the LAA have allowed 18 images as ones requiring closer consideration; that includes the photograph of 3 June 2016 identified above. Mr. Rimer says that was, if anything, a generous approach. I am not however asked to revise the PPE downwards. In the event the material was not of importance in respect of the case; and having regard to the time it would be taken to consider this material and the nature of that exercise the balance is appropriately compensated by a special preparation fee.

17 I would add that it is clear to me that if material of this sort were to count as PPE it would very substantially distort the operation of the fee scheme.

18 I will leave it to the parties to agree a date by which any application for a special preparation fee is made. However for the reasons set out above the appeal is dismissed.

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