SENIOR COURTS
COSTS OFFICE

SCCO Ref: 172/19

Dated: 2 October 2019

ON APPEAL FROM REDETERMINATION

REGINA v ANDRAS

BIRMINGHAM CROWN COURT

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

CASE NO: T20170459
LEGAL AID AGENCY CASE

DATE OF REASONS: 12 JUNE 2019

DATE OF NOTICE OF APPEAL: 28 JUNE 2019

APPLICANT: I A LAW	SOLICITORS	

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

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This appeal concerns payment to defence solicitors, pursuant to the Criminal Legal Aid (Remuneration) Regulations 2013 (as applicable before 1 April 2018) for working on evidence received from the Crown. Payment is claimed under the provisions of the Litigators' Graduated Fee Scheme set out at Schedule 2 to the 2013 Regulations. The Representation Order was made on 2 November 2017.

2. The Appellant litigator represented Flaviu Andras ("the Defendant") who, along with three of his co-defendants (two of whom, I understand, were his sisters) was charged with one count of converting criminal property, contrary to section 327(1)(c) of the Proceeds of Crime Act 2002, between October 2015 and January 2016.

3. The other two of three counts on the indictment charged a fourth co-defendant, Mr Gurdeep Singh, with a number of offences of fraud against British Gas plc and Scottish Power.

4. The Crown's case was that Mr Singh had played the lead role in a systematic fraud operation in the course of which he would contact the utility companies purporting to be a genuine customer. He would arrange for the customer's bank account details to be "updated" to a new account. He would then arrange a refund of credit balances into the "updated" bank accounts.

5. The Defendant and his three co-defendants to the charges of converting criminal property held bank accounts into which money fraudulently obtained from Scottish Power had been paid.

6. The Defendant denied any knowledge of Mr Singh, although they lived a short distance apart in the same street. He said that the money had arrived in his account because he had agreed to receive it from an acquaintance who wished to conceal its existence from a partner. In return the Defendant was allowed to keep some of the money. I am told that the case concluded when the Defendant agreed, during the trial, to a plea.

7. In the course of their investigations, police had seized a number of electronic devices belonging to Mr Singh. Downloads of the handset data and sim card data for three of Mr Singh's mobile devices were served on disc as evidence. No data from any other device was served.

8. I was told in oral submissions that the only data extracted from Mr Singh's phones that supported a case to the effect that he and the Defendant were acquainted, was one contact entry under the name "Flav". There was no evidence, other than the obvious implication that "Flav" was an abbreviation of his first name, to counter the Defendant's denial that the contact entry referred to him.

9. The information I have received in relation to the significance of telecommunications data does not seem to have been entirely consistent, but I understand the position to be that although the Crown's case was that telecommunications data did establish a link between Mr Singh and the Defendant, his defence team was able to show that it did not.

The Issues

10. Under Schedule 2 to the 2013 Regulations, 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.

11. Paragraph 1, (2)-(5) of Schedule 2 explains 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."

12. Paragraph 20 of Schedule 2 makes provision for payment on a different basis for served documents which are not considered by the determining officer to be appropriate for inclusion within the PPE:

> 20.— 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
>
> (b) in respect of which a fee is payable under Part 2 (other than paragraph 7), where the number of pages of prosecution evidence, as so defined, exceeds 10,000,
>
> (2) Where this paragraph applies, a special preparation fee may be paid…
>
> (3) The amount of the special preparation fee must be calculated from the number of hours which the appropriate officer considers reasonable…"

13. The Appellant seeks remuneration on the basis of a PPE count of 6,848, including 6,382 pages of electronic evidence served on disc. That represents the total electronic page count, excluding elements of duplication. The determining officer took the view that it was appropriate to allow only 383 of the pages served on disc. That includes communications data including call logs, contacts and messages (but not emails). Nothing else has been included.

The Appellant's Submissions

14. The Appellant argues that it was necessary to go through the entirety of the download reports, in particular photographs, given that the telephone evidence was an important part of the prosecution case and the material had to be carefully scrutinised. The absence of evidence of association can be every bit as important as its presence: the defence team had to be in a position to say (as they did) that they had been through the telephone evidence and found absolutely nothing to support the proposition that Mr Singh knew the Defendant.

15. The Appellant relies upon the judgment of Master Rowley in *R v Mooney* (SCCO 99/18, 28 May 2019) and says that the same considerations apply in this case. In oral submissions Mr Ahmed for the Appellant pointed out that the Crown can rely upon any part of the served evidence at any time. A document that does not obviously play a central role in the prosecution case may take on significance if, for example, it is used to challenge something said by a defendant in evidence. It is not possible to predict that, so to avoid damaging surprises it was necessary to go through the entire body of electronic evidence. If they had not done so the Defendant's solicitors would have been in breach of duty.

16. The Crown did rely upon the association between Mr Singh, the Defendant and the other co-defendants in support of its case to the effect that the Defendant must have known or suspected that the money he was receiving represented the proceeds of crime. Telecommunications data, the diversion of funds to the Defendant's account and the proximity of the Defendant's address to that of Mr Singh were all part of the Crown's case. For that reason, photographs from Mr Singh's phone had particular significance. One photograph of the Defendant (or any member of his family) on a device belonging Mr Singh would have severely undermined the Defendant's credibility and helped establish an association between him and Mr Singh.

17. The Appellant points out that counsel was in fact paid by reference to a PPE count including 2,312 pages of electronic evidence, which, Mr Ahmed advised me, represented the entirety of the telephone download reports in PDF format.

The LAA's Submissions

18. Mr Rimer for the Lord Chancellor says that the correct page count for the telephone download data allowed is 387 pages, rather than 383 which would allow a total PPE count (including non-electronic evidence) of 838 pages. That is the only concession the Respondent is willing to make.

19. The case against the Defendant, says Mr Rimer, was primarily based on documentary evidence demonstrating that money had been paid into his account by Scottish Power. Everything else was of peripheral significance.

20. It is not in issue that the evidence was served. Paragraph 1 of Schedule 2 to the 2013 Regulations provides however that served telephone download evidence is not included within the PPE count unless the appropriate officer decides that it would be appropriate to do so. The importance of that discretion, in allowing for appropriate remuneration and avoiding overpayment, was emphasised by Mr Justice Holroyde in *Lord Chancellor v SVS* [2017] EWHC 1045 (QB).

21. Evidence does not fall to be included within the PPE count merely by reference to the fact that it must be read by the defence team. Advocates and litigators will have a duty to consider all material, whether served or unused. The base fee payable under the regulations covers that work. As the authorities, including *Lord Chancellor v SVS* confirm, whether it is appropriate to exercise discretion

to include electronic data within the PPE count will depend primarily upon its importance and relevance for the purposes of the case against the relevant defendant. *R v Mooney* is not authority (and there is no authority) to the effect that one must avoid the use of "hindsight" in considering that importance and relevance.

22. Mr Rimer has prepared a detailed breakdown of the data served on disc. Most of it, he submits, is self-evidently irrelevant. Mr Singh's Internet use, for example, would have no relevance to his connections with the Defendant, even if (which Mr Rimer does not accept) telephone evidence of his possible connections with the Defendant was of key importance.

23. The Defendant lived in close proximity to Mr Singh. He and three of the four defendants who had received money from utility companies lived in the same (quite small) street as Mr Singh. Two of those defendants were his sisters. Money had been received into his account not from an associate but from Scottish Power. Photographs, for example, of the Defendant or members of his family on Mr Singh's phone were unlikely to add much to that.

24. Mr Rimer confirmed to me that the LAA would still consider a special preparation claim, under paragraph 20 of Schedule 2, for considering this sort of evidence but it does not, he says, have sufficient significance, in the circumstances of this case, to be included within the PPE count.

25. If I were to find that images, for the reasons advanced by the Appellant, should be included within the PPE, the page count should not be measured by a page for each photograph, but by reference to the pages of the PDF download reports which incorporate copies of those images. Those copies are in themselves reasonably large and clear, and clicking on a hyperlink will take the viewer to the original image, if it needs to be seen.

Conclusions

26. I should start by saying that the PPE count used for the purposes of calculating counsel's remuneration is of no assistance to me. It would quite obviously be wrong for me to find that the Appellant should be remunerated by reference to a particular PPE count only because a determining officer has reached that conclusion in relation to counsel. It is my task, applying the 2013 Regulations, to identify the correct PPE count for the purposes of remunerating the Appellant.

27. I have been referred to a number of decisions on the inclusion of electronic evidence within the PPE count. The most pertinent authority is *Lord Chancellor v SVS*.

28. In *Lord Chancellor v SVS* the Lord Chancellor had refused to include electronic material within the PPE count on the basis that it was not "served". In consequence, the judgment of Holroyd J focused upon disputed service, but his judgment nonetheless addressed the key criteria for inclusion within the

PPE count. At paragraph 50(viii), in particular, he referred to whether "the material was of central importance to the trial (and not merely helpful to the defence)…". He also emphasised, at paragraph 50(ix), the importance of a determining officer's discretion in applying that criterion to material that was in fact served.

29. The emphasis, in short, is on the importance of the served evidence for the purposes of the prosecution's case against a defendant, not on its value to the defence. As Mr Rimer says, defence litigators will have to consider all of the evidence, whether served or unused, but that is not the test.

30. I believe that the Appellant has misunderstood the judgment of Master Rowley in *R v Mooney.* I understand Master Rowley's point to have been that where a given body of served electronic data, such as photographs, merits inclusion within the PPE count it is not appropriate to undertake a page by page analysis for the purposes of identifying the relevance of each individual image.

31. It is to my mind self-evidently wrong (as well as contrary to established authority, in particular *Lord Chancellor v SVS*) to argue that all of the electronic material served on disc must be included within the PPE count (even after eliminating elements of duplication). That would be to eliminate the discretion which the 2013 Regulations confer upon a determining officer.

32. In my view it is equally wrong to say that the mere possibility that a significant piece or pieces of evidence might have emerged from a larger body of evidence of no real evidential significance, justifies the inclusion of the body of irrelevant evidence within the PPE count.

33. The Defendant's purported explanation for the receipt of money into his account does not seem likely to have stood up against the fact that the money he received actually came from Scottish Power, but it was still necessary for the Crown to show that the Defendant knew or suspected that the money being paid into his account represented the proceeds of crime. To that end the proximity of his and Mr Singh's addresses, the fact that he was one of the parties who happened to receive monies obtained from utility companies by Mr Singh's fraud and the fact that two other defendants, who had also received such monies, were closely related to him, were all, as Mr Rimer submits, pertinent.

34. I accept however that any further evidence that was said to establish a direct association between the Defendant and Mr Singh would also have been important enough to justify inclusion within the PPE count. So, for example, where the Crown asserted (even if wrongly) that telecommunications data within the PDF download reports evidenced an association between the Defendant and Mr Singh, then (as the determining officer evidently concluded) it is right to include those parts of the reports within the PPE count. Similarly, where there was a contact on Mr Singh's phone which appeared to name the Defendant then it was right for the determining officer to include Mr Singh's contacts database within the PPE count.

35. It is far from evident to me that the same can be said for any of the other material served on disc, whether within the PDF download reports or provided separately. I agree with Mr Rimer that most of it is self-evidently of little or no evidential significance. Mr Singh's browsing history, purely technical data recording activity on his phone, his user dictionary, etc. is distinguishable from the telecommunications and messaging data and cannot be said ever to have been of importance to the case against the Defendant.

36. Mr Ahmed emphasised in particular the potential importance of image files from Mr Singh's devices. I have been through the image files, on a disc provided to me by Mr Rimer. They comprise a fairly standard mobile phone mixture of stock images, internet downloads and assorted snapshots.

37. Mr Ahmed's point was that even one image evidencing a personal connection between the Defendant and Mr Singh would potentially damage the Defendant's case. I appreciate that, but it in fact there were none. This case is, accordingly, quite different from *R v Mooney*. It does not concern a number of irrelevant images within a larger body of relevant images. It concerns only the unrealised possibility of relevant images within a body of irrelevant images.

38. That does not seem to me to be enough to establish that the image files extracted from Mr Singh's devices were of such importance to the case against the Defendant as to merit inclusion within the PPE count: quite the contrary.

39. Given that Mr Rimer has been able to confirm that the LAA would, at this stage, entertain a claim for special preparation in relation to the need to go through a large body of electronic data, I would suggest instead that the Appellant submit such a claim now.

40. In that respect, I should mention that I did not find (as Mr Rimer indicated that I should) that I could move via hyperlink from a small image within each PDF report to a full sized image on disc. In fact, none of the links within the PDF reports, when tested on two different DVD drives, worked at all. Further, an automated count of the files in the image folders on disc suggested that in fact more images were included in the PDF reports that were provided separately on the disc served. I will leave it to the parties to work that out, but it may have a bearing on any special preparation claim.

41. In summary, the PPE count should be increased by four pages in accordance with Mr Rimer's correction and the LAA should accept a special preparation claim, if made by the Appellant, in respect of the rest of the data served on disc. The appeal itself fails.

TO: I A Law
359 Birchfield Road
Perry Barry
Birmingham

B20 3BJ

COPIES TO: Scott Smith
Senior Caseworker
Litigator Graduated Fee
Scheme Team
Legal Aid Agency

DX10035 Nottingham