SENIOR COURTS
COSTS OFFICE

SCCO Ref: 103/18

Dated: 9 January 2019

# APPEAL FROM REDETERMINATION

## REGINA v SINGH

WOLVERHAMPTON CROWN COURT

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

CASE NO: T20167072

NATIONAL TAXING TEAM / LEGAL AID AGENCY CASE

DATE OF REASONS: 8 May 2018

DATE OF NOTICE OF APPEAL: 4 June 2018

APPLICANTS/APPELLANTS: Solicitors

This appeal is partially successful for the reasons set out below. The work done in respect of the relevant electronic material shall be compensated by way of a Special Preparation Fee to be determined on such material as may be requested by the LAA; further, the Appellants should be paid the appeal fee of £100 together with a contribution to their costs of £320 plus VAT.

SIMON BROWN
COSTS JUDGE

**REASONS FOR DECISION**

1. The issue arising in this appeal was whether the Determining Officer was correct in the 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 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. Following an adjournment of the initial listing, the appeal hearing took place on 7 December 2018 when the Appellants was represented by Mr. Kuliar, who is a solicitor. The Legal Aid Agency ('LAA') was represented by Mr Rimer, an employed lawyer.

3. The background can be shortly stated. A Representation Order was issued to the Appellants on 4 March 2016 in respect of the Defendant, who had been charged with doing an act tending to pervert the course of justice. It was the Prosecution's case that the Defendant attempted to coerce a complainant in a sexual assault case into dropping charges in return for money. The Prosecution ultimately offered no evidence against the Defendant.

4. As part of the investigation the police undertook an examination of the Defendant's phone. The material was downloaded and served on a disc which included a report in respect of the handset and a further report in respect of the SIM card . The Determining Officer accepted that the electronic material should be treated as 'served material' for the purposes of the claim. On consideration of the relevant material the Officer increased the previous allowance of 49 pages to 270 pages. He did so against a claim of 3,578 in respect of the handset and SIM card reports found on the disc; this was on the basis that the material was duplicated and had been served in various formats; it also appears that he was not satisfied that much of the material was relevant to the case against the Defendant. It is against this decision that the Appellant's appealed.

5. In the appeal, and in submissions submitted prior to the first (adjourned) hearing, the LAA accepted that there had been an error in the approach of Determining Officer and submitted that the correct allowance was 463 pages. The Appellant initially submitted that all of the contents of the downloaded report should be regarded as PPE for the purposes of calculating their fee but at the outset of the hearing Mr. Kuliar limited his appeal (at least initially) to some 526 pages in respect of section of the material containing various images.

6. 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."*

7. In SVS Holroyde J (as he then was) observed:

*"Importantly for present purposes, one feature of the scheme is that it generally does not provide remuneration for defence lawyers to review and consider material which is disclosed by the prosecution as unused material, however extensive that material may be and however important it may be to the defence case: a fee for special preparation may be claimed in specified (and very limited) circumstances, but in general the remuneration for considering unused material is deemed to be "wrapped up" in the fees calculated in accordance with the statutory formula.*

8. It is not necessary for me to set out in detail the judgement of Holroyde J in *SVS* as the appeal in that case centred primarily on the issue as to whether relevant material should be treated as served, which is not in issue in this case. But his judgement in *SVS* and the judgement of Nicola Davies J (as she then was) in *Lord Chancellor v Edward Hayes LLP* [2017] EWHC 138 (QB) also provide some assistance in determining the issue that arises in respect of Paragraph 1 (5) of the Schedule in this appeal, that it is to say whether it is appropriate and, if so, to what extent to include electronic material as PPE taking into account the nature of the document and any other relevant circumstances.

9. In *Edward Hayes* Nicola Davies J noted that the prosecution relied on a schedule of text messages which she held to have been at the core of the Crown's

case. She said, at para 20:

*"Given the importance of the evidence it is unsurprising that the defence refused to agree to admission of the extracted data until it was able to examine all the data on the download. This was the defence application to the trial judge which he granted. The request was not only reasonable, it enabled the Defendant's legal team to properly fulfil its duty to the Defendant. It also enabled the Defendant's legal team to extract any communications which they deemed to be relevant. Given the importance of the extracted material to the Crown's case and resultant duty upon the Defendant's team to satisfy itself of the veracity and context of the same, I am satisfied that this was additional evidence which should have been accompanied by a Notice in the prescribed form."*

10. This passage is cited in *SVS* by Holroyde J, who went on to say:

*"44. I respectfully agree with those general observations as to the duties of the defence when asked to agree a schedule or some proposed agreed facts. The agreement of schedules and/or agreed facts, which reduce a mass of evidence and exhibits to a much more convenient and efficient form, is central to the proper progression of very many criminal trials. But it is important to bear in mind that the role of the defence lawyer is often not confined to checking the accuracy of the summaries of the material which the prosecution has chosen to include: it often extends also to checking the surrounding material to ensure that the schedule does not omit anything which should properly be included in order to present a fair summary of the totality of the evidence and exhibits which are being summarised. It may therefore often be necessary to review what has been omitted before being able to agree to the accuracy of that which has been included.*

*45. It is, of course, also important to bear in mind that the prosecution are not obliged to call every witness who may have some admissible evidence to give about the facts of a case, and that the prosecution are obliged to follow the provisions of the CPIA in relation to disclosure of unused material. The distinction between evidence and exhibits which are served, and unused material which is disclosed, is a crucial one.*

*46. I make those general observations because it seems to me that difficulty has arisen in the present case because both the CPS and the determining officer assumed that only the evidence and exhibits on which the prosecution rely can ever be "served", and that "served" evidence is necessarily identical to the evidence and exhibits on which the prosecution rely. Sometimes that will be so; but it is in my judgment a mistake to think that it will always be so. It is frequently the case that the prosecution evidence and exhibits include material which cannot realistically be said to be "relied upon" by the prosecution, for example because it is an irrelevant part of a statement or exhibit which also contains relevant material, or because it is a part of the material which is inconsistent with the way the prosecution case is put but is necessarily included in order to be fair to the defence. In the present case, as I have indicated, the prosecution exhibited the complete downloads of data relating to seven of the ten seized phones: it seems unlikely that they "relied on" every piece of those data.*

*47. It will, of course, sometimes be possible for the prosecution to sub-divide an exhibit and serve only the part of it on which they rely as relevant to, and supportive*

*of, their case: if a filing cabinet is seized by the police, but found to contain only one file which is relevant to the case, that one file may be exhibited and the remaining files treated as unused material; and the same may apply where the police seize an electronic database rather than a physical filing cabinet. Sub-division of this kind may be proper in relation to the data recovered from, or relevant to, a mobile phone: if for example one particular platform was used by a suspect solely to communicate with his young children, on matters of no conceivable relevance to the criminal case, it may be proper to exclude that part of the data from the served exhibit and to treat it as unused material. But it seems to me that such situations will not arise very often, because even in the example I have given, fairness may demand that the whole of the data be served, for example in order to enable the defence to see what other use the Defendant was making of his phone around the times of calls which are important to the prosecution case. The key point, as it seems to me, is that if the prosecution do wish to rely on a sub-set of the data obtained from a particular source, it will often be necessary for all of the data from that source to be exhibited so that the parts on which the prosecution rely can fairly be seen in their proper context.*

*48. This means, of course, that decisions as to the service of evidence and exhibits, and therefore as to the inclusion of material in the PPE, will be case-specific. In so far as Haddon-Cave J in Furniss may have suggested a blanket approach (which I am not sure he did) I must respectfully disagree with him. But I agree with him that it will very often be the case that, where the prosecution rely on part of the data in relation to a mobile phone, and seek agreement of either those data or a summary of them, fairness will demand that all of the data be exhibited so that the full picture is available to all parties*". (my underlining)

11. Earlier in his judgement Holroyde J, when dealing with the issue as to whether served material should be regarded 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".*

12. 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."*

13. 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, eg 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."*

14. 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. <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]

15. Following the guidance set out above I do not accept that it is correct to regard all the downloaded material as one integral whole, as a witness statement would be. To use the analogy of Holroyde J, the downloaded material, which was itself a copy of the material held electronically on the Defendant's telephone, was more in the nature of the contents of a filing cabinet. Nor does it follow simply because the material was served that it was relevant and appropriately dealt with as part of the PPE: that is apparent from the rules themselves.

16. For the reasons I gave in *R v Daugintis*, SCCO 154/17 I would also not accept, although Mr. Kuliar did not argue otherwise at the hearing, that it is necessary to count the material in both formats for the purposes of determining the PPE.

17. Mr. Kuliar's case on appeal was that there were some two images amongst a section of 526 images that were relevant to the case against his client; they were images which were said have included the complainant at two social events and potentially contradicted her account as to the extent to which she was acquainted with the Defendant. However it is difficult to see that such images should be regarded as "*surrounding material*" in relation to the material which was relied upon. The material relied upon was limited to evidence in respect of two telephone calls said to have been between the complainant and the Defendant and it was not suggested that such material might be regarded as 'surrounding' such calls. In any event looked at as a whole the material in respect of such images would not have required the same degree of consideration as material served in paper form. It would have been a straightforward matter for the Defendant to have identified any relevant photographs without the Appellants needing to go through them in any detail. Thus, applying the guidance set out above, I do not regard of this material as appropriately included in the PPE.

18. Having initially limited his claim on appeal to the section dealing with images in later in his submissions Mr. Kuliar contended that it was appropriate to include 12 (as I understand it) photographs of the telephone and the SIM card. Mr. Rimer objected to this matter being raised in this way and asserted that this material was not in any event the subject of the appeal. I think it was too late to raise this issue at this stage. The photographs were not, as I understand it, part of the handset report or SIM card report and as I read the Explanatory Note prepared by the Appellants to assist the Determining Officer (and the Breakdown attached to the Note) the photographs were not the subject of the relevant determination by the Officer; they were not therefore the subject of the appeal. Moreover it was not clear to me that they should necessarily be taken as having been excluded from the PPE already allowed.

19. By Regulation 20 (1) (a) of Schedule 1 of the 2013 Regulations provision is made for a Special Preparation Fee, which may be awarded where material served in electronic form is not included within the PPE. It is based on an assessment of reasonable time spent by the litigator. As I understand it if it were appropriate for the relevant work to be compensated by a Special Preparation Fee, the difference between such a fee and increase in the fee otherwise payable following a modest increase to the PPE may itself be modest.

20. Whilst on the submissions and material put to me there was no sufficient basis for considering the relevant electronic material as PPE I am satisfied that work necessarily done in respect of this material by the Appellants, was not insubstantial and it seems to me having regard to all the circumstances of the case, that it is appropriate (it not being substantially resisted) that the Appellant be compensated by way of a Special Preparation Fee to be assessed in accordance Regulation 20 (1) (a) of Schedule 1 of the 2013 Regulations (and subject to any request that may be made pursuant to Regulation 20 (4)).

21. The Appellants have succeeded only partially and, moreover, the LAA were in advance of this hearing, it seems, quite open to the proposal that the relevant work be compensated for by way of a Special Preparation Fee. The Appellants have nevertheless achieved some improvement of their position in the appeal and it seems to me they should receive the fee associated with the issuing the notice but only a proportion of their reasonable costs in the sum stated above.

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