SENIOR COURTS
COSTS OFFICE

SCCO Ref: SC-2019-CRI-000066 & 230/19

Dated: 26 November 2019

ON APPEAL FROM REDETERMINATION

REGINA v MANNIX & ORS

CROWN COURT: WARWICK

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

CASE NO: T20187163

LEGAL AID AGENCY CASE

DATE OF REASONS: 22/7/19, 10/09/19

DATE OF NOTICES OF APPEAL: AUGUST 2019, 11/10/2019

APPLICANT: DEVINE O' KEEFE	SOLICITORS	
NICHOLAS DEVINE	ADVOCATE	

The appeal has been successful to the extent conceded by the Lord Chancellor, for the reasons set out below. Payment of the additional PPE and of the court fee of £100 paid for this appeal has already been authorised.

COSTS JUDGE
REASONS FOR DECISION

1. This is one of two appeals brought under the Criminal Legal Aid (Remuneration) Regulations 2013 by the litigator and the advocate who represented Rebekah Mannix ("the Defendant"). The Defendant was charged, in the Crown Court of Warwick, with conspiracy to supply Class A drugs. The Representation Order was made on 26 June 2018, so the 2013 Regulations apply as in effect on that date.

2. The advocate's claim has been resolved. The litigator's claim turns upon the correct count for Pages of Prosecution Evidence (PPE") under the provisions of Schedule 2 to the 2013 Regulations. Under Schedule 2 the Graduated Fee due to the Appellant is calculated, along with other factors, by reference to the PPE count, subject to an overall "cap" of 10,000 pages.

3. 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."

4. Schedule 2 also makes, at paragraph 20, provision for additional payment for work done where electronic evidence is not included in the PPE count or the PPE count exceeds the maximum of 10,000 pages:

> 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…

(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…"

The Appellant's Case

5. The case against the Defendant was that she was a drug courier. She had, on about 100 occasions, travelled from Leamington Spa to Birmingham to collect drugs and bring them back to Leamington Spa for distribution to the Warwick and Leamington areas of Warwickshire. The case against her was almost entirely based upon telecommunications data (calls, locations and messages) between the Defendant and her co-conspirators.

6. The Appellant states that other representatives have been paid on the basis of a PPE count of 10,000, and submits that payment should be consistent. All of the electronic evidence upon which they rely in claiming the same PPE count was (and this is common ground) served evidence.

7. The prosecution case, and its presentation through various charts and jury bundles, was based exclusively upon telephone evidence supported in very small part by ANPR material. The Appellant relies upon *Lord Chancellor v Edward Hayes LLP & Anor* [2017] EWHC 138 (QB) and *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB) in arguing that where, as here, the Crown relies upon extracts from data, the defence must be entitled to examine and scrutinise the underlying evidence surrounding it, and to be remunerated for so doing.

8. For that reason, the Appellant argues that the entirety of telephone handset download data, supplied by the prosecution in spreadsheet form, should be included within the PPE count. This data, extracted from the mobile telephones and sim cards of the Defendant and two other defendants, was ordered to be served as evidence by the trial judge and included within an NAE which stated that 19,640 pages of electronic evidence had been served.

9. In particular, the Appellant refers to (by the Appellant's count) 3,860 pages of meta data from the Defendant's mobile phone "Text" directory. The Determining Officer has refused inclusion of this material within the PPE count on the basis that it is merely metadata not showing the content of the text communications in question. This, says the Appellant, is to misunderstand the case as presented to the jury. The Defendant, along with co-defendant Deborah Walsh, who accompanied her on about 30 drug collections, deleted most of the texts that might incriminate her. As a result, the Crown put to the jury a great deal of evidence to the effect that texts were exchanged between particular persons at particular locations at particular times. It was the fact of those text communications, not the content, that was relied on.

10. The Appellant also put some emphasis upon the timeline directories produced by the extraction software as part of the download reports organising relevant data into a timeline which assisted in putting it into context. The Determining Officer has refused to include this within the PPE count on the basis that the relevant data is presented twice, both within the timeline and separately. It is right in principle, says the Appellant, to count both. Again, the Appellant relies upon *Lord Chancellor v Edward Hayes LLP* in submitting that this was extracted information and that the defence should be properly remunerated both by reference to that information and the underlying data from which it was extracted.

11. The Appellant also relies upon the judgment of Master Rowley in *R v Mooney* (SCCO 99/18, 28 May 2019) and of Master Gordon-Saker in R *v Jalibaghodelezhi* [2014] 4 Costs LR 781 in arguing that where it is right to allow a particular category of document within the PPE count, it is right to include all of the documents in that category.

12. It was not possible, at the time of service, to know for example whether mobile telephone calendar data would or would not be relevant. It was necessary to examine it in detail as a result. It was always possible for the Crown to refer to any part of the served evidence, for example, by way of a challenge in cross-examination.

13. The position was complicated by the fact that the Defendant and her co-defendant Ms Walsh tended to swap sim cards between each other's mobile phones or just swap phones, depending for example upon which of them had the available resources to make calls or send messages.

The Lord Chancellor's submissions

14. Mr Rimer, for the LAA, has performed an analysis of the electronic evidence which the Appellant seeks to include within the PPE count. On the basis that the PPE count should focus on core communications and location data, by his calculation it should be increased from the 3,605 pages allowed by the Determining Officer to 5,273 pages. He has already requested a fee to be paid accordingly, along with the £100 court fee paid by the Appellant for this appeal.

15. This includes, for example, messaging data (even though it may have been duplicated in other telecommunications information received from phone service providers), call logs and contact data. It excludes general advice information, statistical analytics and metadata, including that relating to text messages.

16. Mr Rimer demonstrated, in the course of the hearing, that the Crown had relied upon an analysis of telecommunications, including the content of texts and the existence of texts without content, showing in comprehensive form when the conspirators had communicated with each other and where they had been when the communications took place. This was used to establish the pattern of travel, collection of drugs and return home, followed by the sending of mass texts announcing to local drug users that drugs were now on sale.

17. The telephone handset data was not relied upon in that way. Whilst Mr Rimer's PPE count includes obviously relevant material, he resists the inclusion of, for example, metadata from the "text" directory. He says first that the directory name is misunderstood. It refers to text documents, not just text messages. Insofar as it does relate text messages it adds nothing material. One can see that, he says, from an examination of it.

18. As for the timeline, it is wrong in principle, he argues, to include within the PPE count a double count of the same data, presented in "raw" and in organised, timeline form.

Conclusions

19. I am not assisted by the reference to another litigator being paid by reference to 10,000 pages of PPE. My task is to identify an appropriate page count, not to follow a determining officer's decision. That would be the case even if I had some details of the relevant decision, which I do not.

20. In *Lord Chancellor v Edward Hayes LLP & Anor* Mrs Justice Nicola Davies DBE (as she then was) concluded that, given the importance to the prosecution in that case of text messages, it was incumbent upon the defence team look at all the data on the disc to test the veracity of the text messages, to assess the context in which they were sent, to extrapolate any data that was relevant to the messages relied on by the Crown and to check the accuracy of the data finally relied on by the Crown.

21. As Mr Rimer says, each case must turn upon its own facts. *Hayes* is often quoted, wrongly, as authority for the proposition that if the Crown relies upon a report of any part of the served electronic evidence, all of it must all be included within the PPE count. I do not mean that this Appellant's case is so crudely put, but the point is that one must look at *Hayes* in context.

22. More general guidance was offered by Mr Justice Holroyde (as he then was) in *Lord Chancellor v SVS Solicitors*. At paragraph 50(viii) he identified as a criterion whether the material was of central importance to the trial and not merely helpful to the defence. As to service generally, he observed, at paragraph 50(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."

23. Holroyde J's guidance reflects the fact that the starting point under paragraph 1(5) of Schedule 2 is that served electronic evidence which has never existed in paper form is not included within the PPE count unless the Determining Officer, exercising his or her discretion, finds it appropriate to do so.

24. I am not persuaded by the Appellant's arguments in this case. As Mr Rimer has demonstrated, the prosecution case focused not on mobile telephone downloads but on telecommunications data obtained from mobile telephone providers. That incorporated all of the relevant call, messaging (whether content or just parties and times) and location data in real time. All of the raw material from which the prosecution's attribution charts were compiled has, consistently with *Hayes*, been included within the PPE count.

25. Mr Rimer has also included material from the telephone download reports where it appears to bear directly on the prosecution case, though much of the same data is likely, logically, to be duplicated in the PPE already allowed. I do not accept that that should extend, for example, to "Text" directory metadata, which was not the source of the evidence put to the jury.

26. Nor do I accept that it would have been essential for the defence team to consider in great (or any) detail such parts of the telephone download reports that have not already been conceded by Mr Rimer. In any event those parts would not have been of central importance to the case.

27. It does not seem to me that *R v Mooney* assists the Appellant. In that case, as I read it, Master Rowley was saying only that where a given body of data merits inclusion in

the PPE count it is appropriate to allow all of it within the count, rather than picking through it in detail. The judgment of Master Gordon-Saker in R *v Jalibaghodelezhi* does not seem to me to have much bearing on the particular issues in this case, and to the extent that it does it weighs against the Appellant rather than in favour.

28. Having reviewed the "Text" directory from the download reports I cannot easily tell whether, as Mr Rimer says, it refers to text documents generally rather than to text messages specifically, but it seems to me in any case to be of peripheral if any significance. To the extent that it applies to text records it may well duplicate to some extent the information already provided in the telecommunications data relied upon by the Crown, but that does not render it of central importance to the case against the Defendant and it does not justify inclusion within the PPE count. As Mr Rimer says, it may well justify a claim for special preparation.

29. Generally, I have not been able to identify any truly relevant evidence within the telephone download reports that has not already been conceded by Mr Rimer. I have not overlooked the point about the Defendant and Ms Walsh swapping phones or sim cards, but given that both Defendants were part of the same conspiracy, the importance of that factor to the case is not clear to me, nor has any particular body of handset data been identified that might have any specific bearing on it. The Appellant does refer to "device general information" in its comments upon Mr Rimer's schedule, but does not explain exactly what importance it has.

30. As for the timeline, I have had occasion previously to consider whether it is right to count twice data presented both within a timeline report and, separately, without a timeline. I have concluded that it is not. It is not a question, for the defence team, of considering edited material against the data from which that edited material has been extracted. It is merely a question of the same data being organised by extraction software in two different ways, of which one (the timeline) is obviously more useful. It is not unfair to refuse to include the same data twice within the PPE count.

31. I appreciate that it is always possible that some unexpected part of the served evidence might at some point be relied upon by the Crown. As Mr Rimer says, the necessity to consider this possibility may well justify a claim for special preparation under paragraph 20 of Schedule 2.

32. Accepting that possibility as a basis for inclusion within the PPE count would however necessarily bring within the count all of the served evidence, just in case it might have been referred to. That would remove any element of discretion on the part of the Determining Officer and would clearly be contrary to the principles set out in *Lord Chancellor v SVS Solicitors*. The test is whether the evidence really was of central importance to the prosecution, not whether some part of it might, by some unexpected turn, have become so.

33. For those reasons, the appeal succeeds only to the extent already conceded by Mr Rimer, who has made it clear that the LAA will accept a claim, under Schedule 2 paragraph 20, for special preparation in respect of the electronic evidence excluded from the PPE count.

34. I do not believe that the Appellant addressed me on the costs of the appeal, but given the outcome and the concessions already made by Mr Rimer it seems to me that the Appellant has already been adequately compensated by the refund of the appeal fee.

Copies to:

1. Devine O'Keeffe, 7 Clarendon Place, Leamington Spa, CV32 5QL
2. Scott Smith, Legal Aid Agency, **DX 100035 NOTTINGHAM**