SENIOR COURTS
COSTS OFFICE

SCCO Ref: 179/15

Dated: 14 June 2016

ON APPEAL FROM REDETERMINATION

REGINA v MOTAUNG

CENTRAL CRIMINAL COURT

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

CASE NO: T20147487

LEGAL AID AGENCY CASE

DATE OF REASONS: 5 September 2015

DATE OF NOTICE OF APPEAL: 1 October 2015

APPLICANT: SOLOMON LAW	SOLICITORS	

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

COLUM LEONARD

COSTS JUDGE

REASONS FOR DECISION

1. This is an appeal against a decision of the Determining Officer assessing PPE at 3285 pages as against a claim of 12,601 pages. The Appellant firm represented the Defendant, Manase Motaung, under a representation order dated 1 August 2014. The appeal is accordingly governed by the Criminal Legal Aid (Remuneration) Regulations 2013.

2. Paragraph 1 (2), Schedule 2 to the 2013 regulations, as applicable to this particular case, defines PPE in these terms:

> "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 committal or served prosecution documents or which are included in any notice of additional evidence".

3. Sub- paragraph (5) of paragraph 1 is not relevant for the purposes of this decision.

4. Payment for PPE is "capped" within the 2013 regulations at a figure of 10,000 and the application of that limit is not in issue for the purposes of this appeal. The PPE Claim Itself is for 10,000 pages. For work undertaken in relation to PPE in excess of that figure the Appellant relies upon paragraph 20 of Schedule 2, which allows a claim for special preparation to be made:

> "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,
>
> and the appropriate officer considers it reasonable to make a payment...

(2) Where this paragraph applies, a special preparation fee may be paid..."

Background

5. The Defendant was charged with trafficking persons within the United Kingdom for sexual exploitation and rape. As part of the police investigation mobile phones were seized from a number of defendants and complainants. The substantial information on those phones was analysed by police communication data investigators.

6. The Crown instructed analyst Gillian Atherton to prepare charts of the telephone evidence relied upon by the prosecution. The Appellant has provided me with samples of those charts, accurately described by the appellant as a meticulous, chronological, second by second, colour-coded tabulation of cell site, telephone and text message contact between the relevant persons.

7. Ms Atherton's charts were included in the PPE count. On that basis, and according to a final Notice of Additional Evidence dated 9 March 2015, the total PPE count was 3285, the figure accepted by the Determining Officer.

8. On 11 February 2015, the Crown provided the Appellant with two discs of raw telephone data. The covering letter read as follows:

> "We enclose herewith the raw data discs for telephone evidence. The used prosecution evidence has been extracted and appears on the charts produced by the analyst Gillian Atherton. These have been served as additional evidence and form part of the page count. The data not on those charts are unused material."

9. The Appellant has kindly supplied me with a printed sample of the data on disc. As with Ms Atherton's charts communications are identified by date, time and the numbers involved (the addition of an identified user would appear to have been that of Ms Atherton). There is in the "raw data" some additional detail not included in her analysis, though for present purposes it does not seem to be material.

The Appellant's Submissions

10. This is a relatively brief summary of some careful and thorough submissions made Mr Wells, counsel for the Appellant.

11. The Appellant argues that the "raw data" served on disc on 11 February 2015 should be included in the PPE count, bringing it to 12,601 pages, because the material on disc, as supplied on 11 February 2015, forms the basis for Ms Atherton's schedules as included by the Crown in the PPE count. In effect, says the Appellant, the material on disc was used by the Crown. It contained the information from which Ms Atherton's charts were derived and as such was part of the evidence relied upon. Notably it was not provided under cover of the form appropriate for unused disclosed material.

12. The prosecution evidence turned on the connections between people, places, and times of communication analysed by Ms Atherton. The Crown relied upon that analysis as the backbone of its case to show associations and connections between the various defendants and complainants over relevant periods, and their movements and communications over relevant periods.

13. It was necessary for the Appellant to review fully the telephone evidence, regardless of whether it was characterised by the Crown as used or unused material. By virtue of that work, the Defendant was able to agree the schedules prepared by Ms Atherton and also to demonstrate that there was limited contact between the Defendant and his co-defendants, and such contact as there had been was not associated with the trafficking of the complainants. This involved a great deal of work, in relation to which the Appellant has furnished the court with a full and carefully prepared record.

14. The volume of work undertaken by the Appellant is illustrated by the fact that some £63,000 rests upon the outcome of this appeal.

15. The Appellant refers me to a number of decided criminal cost cases; *R v Napper* (SCCO 160/14, 4 September 2014, Master Simons); *R v Furniss* [2015] 1 Costs LR 151; and *R v Thompson* (SCCO 325/14, 10 February 2015, Master Gordon-Saker); and to the LAA's written guidance on payment for PPE.

The LAA's Submissions

16. Mr Rimer, for the LAA, did not in his submissions take issue with the relevance of the records which the Appellant seeks to include within the PPE count, nor with the amount of work undertaken by the Appellant in relation to them. His point is simply that the "raw data" included in the disc sent to the Appellant on 11 February 2015 does not fall within the definition of PPE provided in the 2013 regulations. It was not, he says, served upon the court. It was not an "exhibit", nor served upon the Defendant as such. It was simply disclosed to the Defendant in accordance with the Crown's obligations to disclose potentially relevant evidence upon which it did not rely.

17. The Crown's letter of 11 February 2015, says Mr Rimer, made that entirely clear. Whether any particular form should have been used is beside the point: at most that would have been a procedural error. If in any doubt as to the status of the unused material the Appellant could have requested written clarification from the Crown in accordance with paragraph 18 at Appendix D to the LAA's written guidance. Unlike the appellant in *R v Samoon & Baryali* (SCCO 222/15, 12 May 2016, Master Simons) the Appellant did not do so, and the Appellant did not need to do so because the position was entirely clear. Nor did the Appellant, as recommended (where appropriate) at paragraph 28 of the LAA's guidance, ask for any further Notice of Additional Evidence to be served.

18. The Crown did rely upon, and serve upon the court and as an exhibit, the information extracted from the data on disc and incorporated in the schedules prepared by Ms Atherton. Those schedules were properly included in the PPE count. On that basis, Mr Rimer submits that the Determining Officer's decision was entirely correct and there is no basis either for a PPE count of 10,000 pages or for a Special Preparation claim in addition.

19. Mr Rimer draws my attention to *R v Rigelsford* (SCCO 289/04, Master Campbell) and *R v Samoon & Baryali* in which the court distinguished between PPE and a larger body of evidence from which the PPE was extracted, as supplied to the defendant but not put before a jury (*R v Rigelsford*) or included in a Notice of Additional Evidence *(R v Samoon & Baryali).*

Conclusions

20. I am unable to accept that it must follow, because the schedules prepared by Ms Atherton and included in the PPE were derived from a larger body of telecommunications data, that the entire body of underlying telecommunications data must also qualify as PPE. It seems to me that this argument blurs the distinction between Pages of Prosecution Evidence, as served upon a defendant, served upon the court and relied upon by the Prosecution, and the wider body of evidence from which it is derived, which may properly be identified as unused material upon which the Prosecution does not rely but which must be disclosed to a defendant.

21. Mr Wells suggested, in the course of his submissions, that it is not possible, from the schedules prepared by Ms Atherton, to identify those parts of the "raw data" from which they were derived: the Appellant had to review all the material supplied and claims PPE accordingly. Whilst I am sure that the Appellant had to do that work, as far as I see it should be perfectly possible to correlate Ms Atherton's precise and detailed schedules with the detailed telephone records from which they were derived.

22. It follows that, if I were to accept (and I do not) that the Appellant's argument to the effect that as the basis for Ms Atherton's schedules, the "raw data" sent under cover of the Crown's letter of 11 February 2015 qualifies as PPE, the page count would be based only upon those parts of that data from which Ms Atherton's schedules were actually derived. That would be a small fraction of the total page count claimed by the Appellant. It would also be subject to an obvious objection to the effect that a PPE count on that basis would be entirely duplicative, the relevant contents of Ms Atherton's schedules and of the underlying data being identical.

23. Whether or not the unused material was served with the correct covering form seems to me to be, for the purposes of considering a PPE claim, beside the point provided that the status of that material is clear, and the Crown's letter of 11 February 2015 made it entirely clear. Procedural formalities seem to me to be beside the point.

24. The Appellant is entirely correct in pointing out that a great deal of work may have to be undertaken, as in this case, in relation to unused material. As Haddon-Cave J however observed in *R v Furniss,* a defence team does not normally get remunerated for work on unused material, despite the fact that it may run to many hundreds or thousands of pages and may require many hours to read and study. I fully appreciate the Appellant's wish to be properly remunerated for that work, but I must apply the 2013 Regulations as they stand.

25. The judicial decisions, authorities and LAA guidance otherwise relied upon by the Appellant seem to me to identify a number of essential principles which assist in quantifying an appropriate PPE figure, but only in relation to documentation which qualifies as PPE within the appropriate regulations. They do not assist the Appellant in claiming PPE payment for reviewing evidence which does not meet that definition.

26. This case seems to me to be similar on its facts to *R v Samoon & Baryali*, in which used and unused material was included on the same CD sent by the Crown to a defendant's solicitor. It did not follow in that case that all the material supplied on the CD qualified as PPE. Nor does it follow in this case.

27. For those reasons, the appeal fails.

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