SENIOR COURTS COSTS OFFICE

SCCO Ref: 38/19

Dated: 4 October 2019

ON APPEAL FROM REDETERMINATION

REGINA v SULLIVAN

MANCHESTER CROWN COURT

APPEAL PURSUANT TO THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013 PARAGRAPHS 1(2)-(5) OF SCHEDULE 2

CASE NO: T20170771

LEGAL AID AGENCY CASE

DATE OF REASONS: 27 November 2018

DATE OF NOTICE OF APPEAL: 13 February 2019 (RECEIVED)

APPLICANT: Mark Friend
Lincoln House Chambers
DX 14338
MANCHESTER 1

The appeal has been unsuccessful for the reasons below.

COSTS JUDGE
JENNIFER JAMES

REASONS FOR DECISION

1. The Appellant Advocate appeals the decision of the Determining Officer ("DO") dated 27 November 2018. In that decision, the DO confirmed an earlier decision that the correct number of pages of prosecution evidence (PPE) was 2577, comprising 92 pages of paper evidence from the NAE and 2485 pages from a telephone download. The Appellant's claim was based on there having been 6470 pages of prosecution evidence.

2. In summary, the LAA submits that the DO has correctly exercised his discretion to include some but not all of the electronic evidence within the PPE count on the basis that only the relevant sections from the telephone download that would have required careful consideration were included. The DO allowed calls, contacts and communications data, and excluded technical meta data and images.

Background Facts

3. The Defendant was charged with three offences on the indictment; Count 1 handling a stolen car between 26 April 2017 and 30 April 2017, and Counts 2 and 3 relating to charges of possession of class B drugs (cannabis and amphetamines) on 29 April 2017. The cannabis charge included intent to supply; the amphetamines charge did not. A Police witness statement confirmed that the Defendant's phone was seized from him when he was arrested on 29 April 2019. The LAA surmised from this that the Defendant was arrested on Saturday 29 April 2017, driving the car relating to Count 1, and in possession of quantities of cannabis and amphetamines per Counts 2 and 3 but it is fair to say that the papers do not make this abundantly clear.

4. The Defendant's seized phone was given exhibit reference MH05. Another officer extracted the data which was exhibited as EBL/01 (on a memory stick). The Police witness statement explains that there was a "vast amount of data contained within the report" EBL/01 and so exhibited three sections of the report (called MH06, MH07 and MH08) covering 15 March 2017 to the date of arrest (29 April 2017).

5. In each of these three exhibits there were numerous messages indicating that the Defendant was dealing drugs; the Police witness statement concludes by noting that "*There are also multiple images on the device that show pictures of cannabis plants and cannabis farms. There are also pictures of chemical charts in respect of the paraphernalia required to cultivate cannabis.*

6. An NAE dated 19 April 2018 confirms that the disc EBL/01 was served at the direction of the judge. That Notice states that the relevant pages from EBL/01 had already been extracted and served as evidence (and were among the 77 pages of exhibits listed on the Notice).

7. The Defendant's case was listed for trial on 26 June 2018. On that date he pleaded Guilty, which entitled the Appellant to claim a Cracked Trial Fee. It is unclear how the Defendant was dealt with by the court; at the time of the offence, he was apparently the subject of a 2-year suspended sentence of imprisonment, imposed on 22 December 2015, for offences relating to drug dealing (cannabis, cocaine and amphetamine). That

sentence was imposed on the basis that the Court was on that occasion persuaded that the Defendant was involved only in low level dealing to friends. The offences to which he pleaded Guilty occurred in April 2017, so that it is likely that this triggered the suspended sentence, but no details are provided.

8. The issue before the Court is, is how many pages of prosecution evidence (PPE) should be included in the page count?

The Parties' respective positions

9. The DO explained on pages 2/3 of the Written Reasons, what pages from EBL/01 had been included in, or excluded from, the PPE, as follows:

Description	**Allowed**	**Disallowed**
Summary, source extraction, device info etc.	0	4
Pages 5 to 1900	1,896	0
Cookies, device users, e-mails, installed apps	0	185
Pages 2086 to 2653	568	0
Passwords, powering events, searched items	0	9
Pages 2663 to 2686	24	0
User accounts, user dictionary, web history, wireless networks, data files	0	3,680
Videos are not PPE (page counts not given)	0	0
Images irrelevant (page counts not given)	0	0
Total:	**2,488**	**3,878**

Essentially, per the LAA the call, contacts and communications data has been allowed. The Court was invited by the LAA to find that by allowing large chunks of the report in a broad-brush way, the DO has been overly generous and appears to have allowed (inadvertently it would seem) sections of many hundreds of pages which contain data irrelevant to the case (such as the Cell Towers Section which is 279 pages, and the Locations section which is 566 pages; per the LAA these sections do not provide location data in the conventional sense, but technical information relating to the unique numbers attributed to cell towers.) A full breakdown of the electronic evidence and the reasons for accepting or rejecting it, was provided with the LAA's submissions.

10. The Appellant asserts that all of the material was served as evidence, and that it was necessary to consider all of it. He gives as examples, "user accounts" "web history" and "data files" which were in the 3,680 pages disallowed at (g) above and which, it would be fair to say, are the nub of this Appeal, the other disallowed pages together totalling just 198 pages. In the Appellant's submission, each of those pages could have informed the advice to be given to the Defendant as to whether there was material to suggest the phone had been used by someone other than him which would (per the Appellant) have been significant in the context of this case. As such, the LAA's objective examination of the material in order to determine relevance was said to be inappropriate, artificial and incapable of properly accounting for the detail of the Defendant's instructions and the vagaries of the Prosecution case.

Relevant provisions from the regulations

11. Paragraphs 1(2)-(5) of Schedule 2 to the Criminal Legal Aid (Remuneration) Regulations 2013 provide:

"(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 committal or 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."

12. Further at paragraph 17(1)(c) an Advocate may claim special preparation where:

"17.—(1) This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under Part 2 or Part 3—

(c) a documentary or pictorial exhibit is served by the prosecution in electronic form where—

(i) the exhibit has never existed in paper form; and
(ii) the appropriate officer—
(aa) does not consider it appropriate to include the exhibit in the pages of prosecution evidence; and
(bb) considers it reasonable to make a payment in respect of the exhibit in excess of the graduated fee."

Respondent's written submissions

13. The LAA submits that the DO properly exercised his discretion to allow some but not all of the electronic material contained in the report and asserts that the DO's assessment was arguably over-generous in that he allowed at least 500 pages more

than necessary, and allowed material that appears to be duplicated in the 77 pages of paper exhibits, in particular, those pages from the report exhibited to the Police witness statement as MH06-8.

14. The LAA also points out that the Appellant's argument that, as the report was served, all of it should be included in the PPE would infer that he wished to be paid for irrelevant sections of metadata and what the LAA asserts are *"many thousands of pages of irrelevant images"*.

15. The LAA assert that the basic position under the Regulations is that electronically served evidence is not included in the number of pages of prosecution evidence. However, the DO can decide to include this evidence taking into account the nature of the document and any other relevant circumstances; see *R v Tunstall* SCCO Ref: 220/15.The range of factors that the DO may take into account when determining whether to include electronically served material within the pages of prosecution evidence is not limited. However, generally, the DO will consider whether the material was pivotal to the case and the amount and nature of the work required to be done. Pausing here; that is too high a bar to set. The material must certainly be relevant but it need not be pivotal, in order to be recoverable. It is of course something very fact-specific to each case.

16. The LAA adds that where, taking into account the nature of the document and any relevant circumstances, the DO does not consider it appropriate to include electronically served evidence within the pages of prosecution evidence, an additional payment, at the appropriate hourly rates, may be made in respect of reasonable time spent viewing or considering the electronically served material under paragraph 17(1)(a) of Schedule 1 to the Remuneration Regulations. In other words, the Appellant may recover "special preparation" for such work but not a fee based on pages of prosecution evidence (PPE). Although the per page rate here is relatively low (at £0.48 per page) it would generate a fee in the order of £1,861.44 plus VAT for material which, in the LAA's view, was of no relevance and could have been skimmed through in a fairly short time at lower cost.

17. The LAA's primary submission is therefore that the DO correctly exercised his discretion to include some but not all of the material on the disc; the data relating to calls, contacts and communications were all allowed, but more technical information comprising meta data about the applications, and searched items and web browsing history, were disallowed. The Defendant's phone was seized from him when he was arrested (in a stolen car) on 29 April 2017 so that attribution of the phone could not be an issue, besides which the phone's contents show that it clearly belongs to someone called "Anthony" (the Defendant's name as on the indictment, is Anthony Martin Sullivan).

18. The Police witness statement also notes "*There is a vast amount of data contained within the report; as a result I have concentrated between the time periods from Wednesday 15 March 2017 until SULLIVAN's arrest [29 March 2017]".* The exhibits (MH06, MH07, MH08) exhibited Facebook messages relating to strains of cannabis, text messages and WhatsApp messages including images of cannabis plants, cannabis farms and drug paraphernalia. These paper exhibits were taken from the phone download, yet the DO also allowed the electronic (duplicated) versions of them, totalling some 77 pages. Technically, per the LAA, there should have been a deduction so that

the overlap from those 77 pages was not duplicated in the material allowed as PPE from the disc. No request is made for any adjustment, but the LAA asserts that in all the circumstances no more should be allowed by way of PPE.

Discussion

19. I have reminded myself of the decision in *R v Sana* [2014] 6 Costs LR 1143 cited below (emphasis added) as authority for the proposition that special preparation does not apply only to pages over the 10,000 "cap"; if there are pages below 10,000 that require attention, but do not warrant the level of attention (or fee) generated by PPE, they can be remunerated by way of special preparation.

    "A line has to be drawn as to what evidence can be considered as PPE and what evidence can be considered to be 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 decides that it is appropriate to do so, taking into account the nature of the documentation and all the relevant circumstances."*

20. I also note the LAA's submissions on peripheral or wholly irrelevant data producing a fee disproportionate to other cases of similar nature and disrupting the fair and predicted economic balance of remuneration for the case contrary to paragraph 29 of *R v Napper* [2014] 5 Costs LR 947.

21. One case not cited by the LAA is ***Lord Chancellor v Edward Hayes LLP*** **[2017] EWHC 138 (QB);** in that case, Nicola Davies J noted that the Prosecution relied on a schedule of text messages which were 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 enabled the Defendant's legal representatives to satisfy themselves of the veracity of the extracted data and to place the same in a context having examined and considered the surrounding and/or underlying data. It also enabled the Defendant's legal team to extract any communications which they deemed to be relevant*."

22. 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.

23. 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]

Decision

24. The Appellant has not demonstrated that the disallowed pages were of sufficient relevance to the case against the Defendant, to warrant claiming them as PPE. In the Grounds of Objection, the Appellant suggests that the material that was disallowed could have shown that the phone was being used by someone other than the Defendant. However, on this facts of this case, it appears that the Defendant was arrested in a stolen car, in possession of two separate class B drugs at the time of his arrest, including enough cannabis to suggest supply rather than personal use. At the time the Representation Order was granted there were seven offences listed including driving without a licence, driving without insurance, driving under the influence of drugs and another offence of handling stolen goods (presumably, as well as the count in respect of the stolen car).

25. Clearly a number of those offences fell by the wayside, but even so it is unclear how use of the phone by any other individual could have been presented as a defence. The Appellant appears to suggest that, upon instructions, he spent time trawling through the internet browsing history and images in order to suggest that the phone may have been used by someone else at various times, but on the facts of this case, even if it could be shown that some of the internet browsing history had been by a third party, how could that help the Defendant in respect of charges which all depended primarily upon his being behind the wheel of a stolen car and in possession of Class B drugs?

26. The extracts from the phone report, exhibited to the Police witness statement, were clearly central to the prosecution case, but (from that statement) it is clear that the Police considered the balance of the material in the report to be irrelevant to the prosecution case. It was the Defence who apparently sought an Order requiring the entire report to be served as evidence. This included 2,978 pages of images (which appear in the report

as 23,526 thumbnails). Once explicit images, pictures of celebrities and stock icons and emojis were put to one side, the remaining photographs could only be used to demonstrate that the Defendant did not appear to be living a particularly lavish lifestyle.

27. This (lack of a lavish lifestyle) is a point in mitigation, rather than a point of guilt or innocence, and I accept the LAA's submission that it is unnecessary to include material going to such an issue, within the PPE on the facts in this case. The fact that it is at best peripherally relevant to the offences and is really only helpful in terms of mitigation for the Defendant, is a factor that the DO and this court can take into account when considering the nature of the document and any other relevant circumstances, under para 1(5) of Schedule 1.

28. I also find that the DO was correct to disallow technical metadata relating to the operation of the phone. This can have had no bearing on the offences of 29 April 2017 and no explanation has been given about how this required any careful consideration. This case is clearly not on a footing with ***Lord Chancellor v Edward Hayes LLP*** **[2017] EWHC 138 (QB).** In that case the telephone material exonerated the Defendant and the same could never realistically be said here, in that the Defendant was caught red-handed in the manner above described.

29. The LAA does not seek any reduction to the pages already allowed and therefore I make none, but it follows that the Appeal has been unsuccessful and that the Appellant does not recover anything for the costs of the Appeal, either. However, the LAA has indicated that it would entertain a claim for special preparation upon the material not allowed as PPE, and it should be possible for the parties to agree a sensible timescale for submission of such a claim, now that the PPE issue has been adjudicated upon.

TO:	Mark Friend Lincoln House Chambers DX 14338 MANCHESTER 1	COPIES TO:	The Legal Aid Agency, Graduated Fee Team DX 10035 Nottingham 1 (Joe Gallagher)