



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 173/18

21 January 2019

ON APPEAL FROM REDETERMINATION

REGINA v DAY

CROWN COURT AT BIRMINGHAM

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

CASE NO: T20177438

LEGAL AID AGENCY CASE

DATE OF REASONS: 13 JULY 2018

DATE OF NOTICE OF APPEAL: 13 SEPTEMBER 2018

APPLICANT: COUNSEL

WILLIAM DUDLEY

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

The appropriate additional payment, to which should be added the sum of £450 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

**JASON ROWLEY
COSTS JUDGE**

RECEIVED 30 JAN 2019

REASONS FOR DECISION

1. This is an appeal by William Dudley of counsel in respect of the determining officer's decision when determining fees payable under the Advocates Graduated Fee Scheme.
2. Counsel was instructed on behalf of Alex Day who faced a one count indictment for robbery contrary to section 8(1) of the Theft Act 1968. The police report describes the particulars of the offence as follows:

"The victim has entered the South car park of the Barclaycard arena and has parked his motorbike on level 4. As he walked away after securing his bike he has seen the offenders enter the car park and drive around. They have then pulled up next to the victim's motorcycle. As a result, the victim has watched them from a distance.

The victim has then started filming the offenders and has approached them to ask them what they were doing and why they were next to his bike. After a short conversation, the offenders have then seen the victim recording them and they have assaulted him by hitting him over the head with one of their helmets.

The victim has been grabbed and they have continued to punch a few times. They have taken his backpack from him containing various items. The victim has then run from the car park pursued by the offenders who have then made good their escape on the motorcycle."

3. Counsel says that these facts amount to armed robbery whereas the determining officer says that it was simply an ordinary robbery. The question of whether a robbery was "armed" or not is one regularly posed in appeals from the written reasons of determining officers. Indictments, as here, do not distinguish between robbery or armed robbery and simply refer to a robbery that is contrary to section 8(1) of the Theft Act 1968. Nor do the sentencing guidelines require a distinction to be made between robbery and armed robbery. Instead the sentencing judge has to consider the level of culpability and harm in determining the seriousness of the particular offence.
4. The only reason to distinguish between the two forms of robbery is because of the different categorisation of offence in the 2013 Regulations (between class B and class C) and consequently a significant difference in the amount of the graduated fee.
5. The Serious Crime Act 2007 defines an armed robbery in schedule 1 paragraph 5 as "an offence under s8(1) of the Theft Act 1968 (c.60) (robbery) where the use or threat of force involves a firearm, an imitation firearm or an offensive weapon." An "offensive weapon" is said to be any weapon to which section 141 of the Criminal Justice Act 1988 (c.33) applies.

6. In the Criminal Justice Act 1988 (Offensive Weapons) Order 1988 offensive weapons are described as being knuckledusters, swordsticks and various other esoteric weapons. The determining officer relies upon these definitions following their use by Master Gordon-Saker in R v Kendrick.
7. Prior to the coming into force of the Serious Crime Act 2007 the term "offensive weapon" was defined by reference to the Prevention of Crime Act 1953 at s1(4): *"offensive weapon" means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him or by some other person.*"
8. That definition of an offensive weapon formed the backbone of the decision of Master Rogers in R v Stables (1999) in which it was held that for a robbery to be treated as an armed robbery, one of two examples must apply:
 - A robbery where a defendant or co-defendant to the offence was armed with a firearm or imitation firearm, or the victim thought that they were so armed, e.g. the defendant purported to be armed with a gun and the victim believed him to be so armed - although it subsequently turned out that he was not - should be classified as an armed robbery.
 - A robbery where the defendant or co-defendant to the offence was in possession of an offensive weapon, namely a weapon that had been made or adapted for use for causing injury to or incapacitating a person, or intended by the person having it with him for such use, should also be classified as an armed robbery. However, where the defendant, or co-defendant, only intimate that they are so armed, the case should not be classified as an armed robbery.
9. Mr Binks who appeared on behalf of counsel at the appeal hearing, relies on the Stables definition and seeks to distinguish the Kendrick line of authority.
10. He produced the novel (to me at least) argument that the categories of offensive weapon in the Offensive Weapons Order 1988 simply do not apply. That was because the schedule to the Serious Crime Act 2007 defines "offensive weapon" as being any weapon to which section 141 of the Criminal Justice Act 1988 applies. That section applies to manufacturers, handlers and sellers of offensive weapons rather than to the users of them. Strictly speaking, therefore, the definitions are only relevant to those who may be guilty of an offence relating to the manufacture, sale hire et cetera of such weapons. The defendant in this case was not such a person.
11. Mr Binks may well be right in this argument but I do not think that I have to resort to such potential technicalities. I have always taken the view that the list of offensive weapons in the Offensive Weapons Order 1988 cannot possibly be exhaustive. By way of example, the determining officer in her written reasons describes the implements in that Order as being "generally knives, swords, knuckledusters et cetera." However, of those three identified implements, knives and swords do not come within any of the categories in the list (save that a sword might be contained within a sword stick).

12. I have no doubt that a graduated fee claimed in respect of defending a robber who had brandished a knife or sword would be paid as a class B offence without ado. That is so, notwithstanding the fact that those implements do not come within the relevant legislation. Consequently, it must be the case that the determining officer cannot simply look at the Offensive Weapons Order to decide whether whatever is being carried is an offensive weapon or not.
13. In this case, I have no doubt that the reason that Day was carrying his motorcycle helmet was originally because he had just been riding his motorcycle. If, as seems to be implied by the police report, Day and his counterpart were considering doing something illegal with the victim's motorcycle, then any such robbery would have been a simple robbery. But, at the point when they noticed that they were being watched and filmed, the circumstances altered. They robbed the victim of his rucksack and its contents and whilst doing so assaulted him with the motorcycle helmet. In any common parlance, they used the motorcycle helmet as an offensive weapon.
14. The definition of an armed robbery, according to the case of Stables, would require the helmet either to have been made or adapted for use for causing injury, which seems unlikely. Alternatively, that it was "intended by the person having it with him for such use." As I have indicated, I do not think that it was carried on the off chance that an armed robbery might be undertaken. But once the victim had been spotted, Day was no longer using his motorcycle and the use of his helmet was purely for the purposes of assaulting the victim. There can be no argument regarding intention given that he actually used it to cause injury.
15. In my view Day was clearly charged with an armed robbery within the meaning of the 2013 Regulations and that as such the fee for his legal representatives should be calculated based on a class B offence rather than a class C offence as the determining officer has allowed. As such this appeal succeeds.

TO: WILLIAM DUDLEY
CITADEL CHAMBERS
DX 23503 BIRMINGHAM 3

COPIES TO: SHELLEY MARCH
LEGAL AID AGENCY
DX 100035 NOTTINGHAM

The Senior Courts Costs Office, Thomas More Building, Royal Courts of Justice, Strand, London WC2A 2LL: DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247. When corresponding with the court, please address letters to the Criminal Clerk and quote the SCCO number.