SENIOR COURTS
COSTS OFFICE

SCCO Ref: 285/18

Dated: 20 September 2019

ON APPEAL FROM REDETERMINATION

REGINA v YOUNG

CROWN COURT AT PRESTON

APPEAL PURSUANT TO SCHEDULE 2 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20180135

LEGAL AID AGENCY CASE

DATE OF REASONS: 20 December 2018

DATE OF NOTICE OF APPEAL: 11 January 2019 (received)

APPLICANT: Mr J Turner
Kenworthys Chambers
DX 718200
Manchester 3

The appeal has been successful and in addition to the sums due to the Appellant as a result of this decision, I award the Appeal fee of £100.00 plus £500.00 towards costs.

COSTS JUDGE
JENNIFER JAMES

REASONS FOR DECISION

Background to the Case

1. The issue arising in this appeal is as to whether the fee payable to Appellant Counsel under the Criminal Legal Aid (Remuneration) Regulations 2013 for his representation of the Defendant should be on the basis that the case proceeded to Trial or not; if not, it is be regarded as two days of ineffective Trial prior to a 'cracked trial' some months later, for the purposes of the payment of the fee. Pursuant to Schedule 1 of the 2013 Regulations the fees payable to Advocates for cases which proceed to trial are different from those applicable to ineffective hearings prior to a 'cracked trial'.

2. Whilst the appeal was initially listed for an in-person hearing in April 2019, following word that the Appellant was not going to be available on the date listed, both parties were content that I should decide the appeal on the basis of the written submissions of the Appellant and the Written Reasons of the Legal Aid Authority ('the LAA'). Regrettably, I did not then retrieve the file in order to deal with this decision expeditiously, causing a further delay for which I apologise on behalf of the SCCO but for which the responsibility is my own.

3. The Defendant was represented by the Appellant in respect of an indictment for causing serious injury by dangerous driving. On 28 August 2018 the case was listed to begin before HHJ Woolman; the Jury was empanelled and sworn by 15:54 (case called on at 15:38). It appears that the Appellant was at Court for most of that day and was either conferring with his own client, or in discussions with the Prosecution. Given the late hour at which the case was called on, the learned Judge adjourned until the following day and indicated that a bad character application that had been made, would be heard then.

4. There were also (per the Appellant) submissions regarding the Prosecution's reliance upon evidence from two Witnesses who were inconsistent with the Prosecution case and the learned Judge gave a ruling that further Statements ought to be taken from them and that the disclosure had better be in good order by the morning. The learned Judge was specifically asked whether the Trial had begun on 28 August 2018 to which the reply was yes; however, the Court Log does not reflect this and at present the only evidence for this is the Appellant's recollection.

5. On 29 August 2018 there was a further Hearing, commencing at 10:43. It became clear that there was "...an issue with photographs..." which I understand to have been such that the series of photographs, coupled with the Statements of two of the Prosecution Witnesses, revealed that the Defendant could not possibly have been the driver of the car. It is not clear whether these were the two Witnesses in respect of whom submissions were made the previous day, and for reasons which neither party has made clear, this did not result in an acquittal but rather in the Jury being discharged at 12:26 and a new Trial date fixed for 28 (or 21 – both dates are given) November 2018. In other words the issue regarding the photographs and who was driving the car, appears not to have been addressed as a question of exculpatory evidence, but of the case not yet being Trial-ready.

6. The Appellant represented the Defendant at Trial in November, but that Trial cracked; I am not told how it cracked. The LAA's position (as per the Written Reasons) is that the Appellant should submit, EITHER evidence to support his statement that the learned Judge stated in Court that the Trial had begun on 28 August 2018 OR a claim for two ineffective Trial dates (in August) and a cracked Trial (in November). The Appellant has stated in very strong terms that if the LAA doubts his word, they should pay for a transcript and that their doubting the word of a Barrister, is libellous. He also opined that the learned Judge would never remember this case out of all the cases he had heard since (given the LAA's suggestion that the learned Judge be asked for an e-mail confirming that Trial had started). If that was true at the time the Appellant lodged his Appeal it is of course even more so now.

Case Law and guidance

7. As noted by Spencer J in *Lord Chancellor v Ian Henery Solicitors Limited [2011] EWHC 3246 (QB)* there is no definition of the word "trial" in the relevant provisions. There is, however, a definition of "cracked trial". The definition is the same in Schedule 1 (for the advocates' graduated fee scheme) and the material part of the definition is as follows:

"cracked trial" means a case on indictment in which—
(a) the assisted person enters a plea of not guilty to one or more counts at the first hearing at which he or she enters a plea 1 and—
(i) the case does not proceed to trial (whether by reason of pleas of guilty or for other reasons) or the prosecution offers no evidence;
....

8. In *Henery* at [96] Spencer J gave the following guidance as to whether or not a trial has begun:

(1) Whether or not a jury has been sworn is not the conclusive factor in determining whether a trial has begun.

(2) There can be no doubt that a trial has begun if the jury has been sworn, the case opened, and evidence has been called. This is so even if the trial comes to an end very soon afterwards through a change of plea by a defendant, or a decision by the prosecution not to continue (R v Maynard, R v Karra).

(3) A trial will also have begun if the jury has been sworn and the case has been opened by the prosecution to any extent, even if only for a very few minutes (Meek and Taylor v Secretary of State for Constitutional Affairs).

(4) A trial will not have begun, even if the jury has been sworn (and whether or not the defendant has been put in the charge of the jury) if there has been no trial in a meaningful sense, for example this (R v Brook, R v Baker and Fowler, R v Sanghera, Lord Chancellor v Ian Henery Solicitors Ltd [the present appeal]).

(5) A trial will have begun even if no jury has been sworn, if submissions have begun in a continuous process resulting in the empanelling of the jury, the

opening of the case, and the leading of evidence (R v Dean Smith, R v Bullingham, R v Wembo).

(6) If, in accordance with modern practice in long cases, a jury has been selected but not sworn, then provided the court is dealing with substantial matters of case management it may well be that the trial has begun in a meaningful sense.

(7) It may not always be possible to determine, at the time, whether a trial has begun and is proceeding for the purpose of the graduated fee schemes. It will often be necessary to see how events have unfolded to determine whether there has been a trial in any meaningful sense.

(8) Where there is likely to be any difficulty in deciding whether a trial has begun, and if so when it began, the judge should be prepared, upon request, to indicate his or her view on the matter for the benefit of the parties and the determining officer, as Mitting J did in R v Dean Smith, in the light of the relevant principles explained in this judgment."

9. To expand on Principle 5, the ***R v Bullingham*** 2011 judgment states:

i. The LSC's contention that as no jury was sworn, the trial could not have started, is wrong since it is plain from the authorities that the swearing of the jury is not the conclusive factor in deciding under the scheme when the trial begins.

ii. Even if a jury is sworn, the trial will not start unless it begins "in a meaningful sense", that is to say otherwise than for the mere convenience of the jurors or so that the legal representatives will be paid a trial fee rather than a cracked trial fee.

iii. If the jury is sworn and the prosecution opens its case only for the defendant to change his plea, a trial, not a cracked trial fee is payable.

Where...no jury is sworn, but the judge directs that there will be a voir dire involving substantial argument which may affect the evidence that the prosecution can use in the case, the trial starts when he gives that direction.

10. The Appellant contends that given a jury was selected and sworn in this case, and given that the Court was dealing with substantial matters of case management (literally, whether the case was fit to proceed) I should conclude that the trial had commenced. Reliance is placed in particular upon what was said by Spencer J at paragraph 96 of *Henery* (above). The Determining Officer commented that this was not to be a lengthy trial, it was estimated to last three days. On her reading of the Court Log, there were no substantial matters of case management nor any evidence heard, nor any legal argument in August 2018, justifying the conclusion that the trial had not commenced in a meaningful way.

Decision

11. I respectfully disagree with the decision of the Determining Officer. Looking at the above extracts from *Henery* it seems clear that the Trial had started in a meaningful sense on 28 August 2018 with the Jury sworn in, discussion of bad character, and submissions regarding two Witnesses; there was then further argument in the learned Judge's Chambers on 29 August 2018 but the Trial was then aborted on the second day, when it became clear that it could not proceed, and it was re-listed for several months hence.

12. The LAA assert that paragraph 96(4) of *Henery* fits the facts in this case, saying that a Trial will not have begun, even if the jury has been sworn "*...if there has been no trial in a meaningful sense...*" The cases cited as examples of no Trial in a meaningful sense having taken place, include *Henery* in which the Judge, being part-heard in another Trial, but being assured that Henery was a firm Trial, empanelled, swore in and sent away the Jury. However, next day and before the Defendant was formally put in the Jury's charge the Prosecution decided to accept a plea of Guilty to a lesser charge.

13. Given those facts (from *Henery*) it is very clear that no Trial took place in a meaningful sense as indeed Spencer J held at paragraph 95. However, are those facts really on par with the facts in this case? In my view they are not; in this case, there were discussions of evidence that, on the face of it, could have led to an acquittal but in respect of which the learned Judge (who of course had much fuller papers than I have) instead decided to adjourn for several months to enable the Prosecution to get its case in order.

14. The principal discussions about whether the Trial was ready to proceed, apparently took place in the learned Judge's Chambers (presumably because, the Jury having been sworn, these would not be matters that they ought to hear) so that their absence from the Court Log is not to be wondered at. In any event as the LAA is well aware, the Court Log is at the best of times a partial record of events and it would certainly (in my view) be possible for the Court Log to omit any reference to the learned Judge confirming that Trial had started on 28 August 2018, even if it was said in open Court.

15. In considering what amounts to 'substantial matters of case management' it seems to me relevant to have regard to what was said in *Henery* at [89] by Spencer J. He described the event which took place (the empanelling of the jury on 10 August) at [10]. He noted the Judge was informed that a prosecution witness (a police officer) was not available but defence counsel confirmed that he was not required ; there was further discussion between counsel and the Judge about the lack of defence statements for the other two Defendants and the Judge enquired if and when bad character applications were to be made. At [89] Spencer J commented that nothing which occurred on this day could be categorised as in any way similar to the extended legal argument or evidence on the *voir dire* such as to justify the conclusion that the Trial had started in a meaningful sense. At [94] he went on to say:

"In this regard it is right to note the growing practice throughout England and Wales of selecting but not swearing jurors on the first day of a long trial. It is a practice encouraged and advocated in the Crown Court Bench Book "Directing the Jury", published by the Judicial Studies Board (as it then was) in March 2010, at page 278-9. It sensibly allows the jurors the opportunity to reflect overnight whether they would have any practical difficulty in serving on a jury for many weeks, before they are finally sworn and the defendant is put in their charge next day. Commonly a great deal of important work by the advocates and the litigators, vital to the smooth running of the trial, will be going on in court on the day on which the jury, in such circumstances, is selected but not sworn. Depending on the circumstances, and consistent with the dicta of Mitting J in R v Dean Smith (supra), that may well mean that the trial has begun in a meaningful sense."

16. I have considered carefully the decisions of other Costs Judges: ***R v Coles* 51/16** and ***R v Sallah* 281/18**. In *Coles* Master Whalan accepted that a Trial had begun where the parties had spent time negotiating the content of a number of 'time line' documents (factual chronologies relevant to the conspiracy alleged). Disagreeing with the decision of Master Simons in *R v Wood* 178/15; Master Whalan concluded that the issue as to whether or not there had been substantial case management, as envisaged by Spencer J, was not dependent per se on the fact of judicial determination of disputed issues. He held that the parties were engaged in discussions of significant evidential importance at the direction (or at least with the permission) of the Trial Judge in a period during which the jury would originally have been sworn and the prosecution case opened. In these circumstances he held that the Trial had begun in a meaningful sense. To conclude otherwise would be to punish constructive and pragmatic advocates and encourage less cooperative advocates content to rely only upon direct judicial intervention as a means of establishing remuneration under the scheme.

17. In *Sallah* prior to a jury having been sworn in, the Court was addressed on a substantial issue relating to admissibility of the evidence. Counsel for the Defendant drafted a skeleton argument; the prosecution took the Court through the skeleton and indicated which matters remained controversial. Time was granted for the Crown to confirm whether the identification witnesses would be relied upon. Further enquiries apparently revealed that there was some suggestion that both witnesses had been inadvertently influenced in their identification, to the extent that prosecution counsel felt unable to rely upon them as giving uncontaminated evidence. The prosecution then indicated that it would not be seeking to rely upon the two witnesses. There was thereafter a discussion as to whether it was appropriate to proceed simply on the basis of other evidence being, as I understand it, CCTV evidence. Prosecution counsel in considering the matter indicated the case could not proceed and no evidence was offered. Agreeing with Master Whalan, Master Rowley did not consider that it was necessary for the Court to make any a formal determination for a Trial to have been commenced and held that it had commenced in a meaningful way on the facts. Those two cases, in my view, resonate with this case much more strongly than *Henery.*

18. Given that he had Written Reasons in December 2018, that stated that evidence in support of his statement (as to the learned Judge confirming that Trial had started on 28 August 2018) was required, the Appellant did not serve his own interests well by indicating this was a "libellous" request and going straight to Appeal.

Regrettably, memories can play tricks upon people; the Appellant himself has asserted that the learned Judge would not remember this case from August 2018 until January 2019, for example. It was perfectly reasonable for the LAA to request evidence.

19. Given the facts as stated by the Appellant, it seems likely that the exchange (about Trial having commenced on 28 August 2018) was one of the last matters raised on that date. Obtaining a non-urgent transcript of the last 30 minutes, or last hour, on that date, would have taken a couple of weeks and cost very little. Needless to say if the transcript vindicated the point that the Appellant wished to make, I would look favourably upon that cost being included in the Appellant's costs of Appeal, subject to it being a reasonable sum (which, given his ability to specify the approximate time at which it was said, and thus order only a fairly short transcript, it certainly should be). In that way, Counsel could have resolved this matter during January 2019, at a cost probably lower than the Court Fee he paid for this Appeal.

20. However, given the above cases whilst the Appellant might have been able to resolve this matter long ago and at little cost by obtaining a transcript of the relevant comment by the learned Judge, on the facts in this case Trial clearly had begun in a meaningful sense. Evidence of the learned Judge saying so in open Court would certainly have helped, but the lack thereof is not fatal to the Appellant's claim; nor is the fact that the Trial, having begun in a meaningful sense, was abortive because of Prosecution/disclosure issues.

21. Master Whalan noted that it was accepted by the appellants in *Coles* that discussion concerning the admissibility of section 10 admissions would not constitute a substantial matter of case management. Nor would more straightforward housekeeping – such as the negotiating and agreeing of schedules – have been enough, in his judgement, as these were inherent in most criminal Trials. However, it is not inherent in most criminal Trials that the Prosecution evidence is in such a poor state that the Trial cannot continue, and yet is not so poor that the Defendant is entitled to acquittal rather than postponement. That was a serious, significant and non-routine turn of events and not on a par with the above hypothetical scenarios from *Coles* in my view.

22. It follows that the Appeal has succeeded and I award the Appellant Appeal costs of £500.00 plus £100.00 Appeal fee. I appreciate that is likely to be only a contribution towards his actual costs, particularly given that he is based at a considerable distance from the SCCO. However, had he obtained a transcript the need for a Hearing could have been avoided.

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