Neutral Citation No. [2022] EWHC 3112 (SCCO)

Case No: 201903320 B2

SCCO Reference: SC-2022-CRI-000073

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 29 November 2022

Before:

COSTS JUDGE ROWLEY

R
v
JASON LAWRANCE

Judgment on Appeal under Regulation 29 of the Criminal Legal Aid (Remuneration) Regulations 2013

Appellant: David Emanuel KC

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

The appropriate additional payment, to which should be added the sum of £ 1,750 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by David Emanuel KC against the sums allowed to him by the determining officer in the Criminal Appeal Office under Schedule 3 of the Criminal Legal Aid (Remuneration) Regulations 2013.

2. Counsel was instructed on behalf of Jason Lawrance in the Crown Court at Nottingham. I set out paragraphs 4 and 5 of the determining officer's written reasons which set out the background to the substantive case:

> "4. Lawrance was convicted of five counts of rape, sexual assault, and assault by penetration in the Crown Court at Nottingham on 31 July 2019. His application for leave to appeal against two of the rape convictions, drafted by his trial counsel Mr Emanuel KC, was granted by a Single Judge on 18 February 2020 with legal aid for leading counsel to prepare and present the appeal. On 30 April 2020 the Full Court reserved judgment to 23 July 2020 when the two rape convictions were quashed. Submissions in regard to sentence were invited from counsel and on 15 October 2020 the minimum term in regard to the life sentence was reduced by the Full Court from 10 years to 9 years five months. Counsel was not required to attend the hearing.
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> 5. Lawrance met a woman through a dating website. Her evidence was that, before they had sexual intercourse, she had sought an assurance from Lawrence that he had definitely had a vasectomy as she did not want to risk a pregnancy. Unprotected sexual intercourse took place between the two on two occasions. In exchange of messages the following morning Lawrance admitted he was fertile and apologised. The woman discovered she was pregnant and had a termination. Even if Lawrance genuinely believed she had consented, such a belief was unreasonable. The Grounds of Appeal were that the trial judge's decision that a lie as to fertility was capable of vitiating consent was wrong and the two rape counts should have been withdrawn from the jury. Further that the judge's summing up on this issue was inadequate and his route to verdict flawed and confusing. The Single Judge commented that this was a novel case and raised a point of general importance. Counsel suggested this was the first criminal prosecution of rape on the basis that consent was vitiated by reliance on a lie about fertility."

3. The appeal was heard by Lord Burnett CJ together with two High Court judges. The Lord Chief Justice had previously heard a case involving an undercover police officer which also concerned the question of whether deceit could vitiate the consent given by the complainant. There the court held that, as a matter of law, the officer's deception could not vitiate her consent. Similarly, in the case of Lawrance, the Court accepted Mr Emanuel's submissions that consent to sexual intercourse had been given and that the consequences of that intercourse did not weaken the consent as the trial judge had concluded.

4. Mr Emanuel, who appeared on his appeal hearing before me, clearly felt the weight of this appeal in terms of individuals who had been deceitful in one way or another suddenly finding themselves to have indulged in criminal behaviour if the trial judge's approach was upheld. That weight appears to have been accepted by the determining officer in his written reasons. The novelty referred to by the single Judge and the very fact that the Lord Chief Justice dealt with this appeal all point towards this being an appeal of some significance.

5. Counsel claimed a fee of £14,562.50 for preparation and drafting on the basis of 54.25 hours at £250 per hour. He also claimed £1,000 for the attendance before the full court. The determining officer allowed £8,500 based on 40 hours at £200 per hour together with £500 for the court attendance. Counsel seeks by way of this appeal to receive the full sums claimed.

6. Rather unusually, the determining officer's written reasons encompass three different cases. It is only in this case that the amount of time claimed by counsel has been reduced. But in all three cases, the hourly rate claimed by counsel (which was different in each case) was reduced by the determining officer and that was the consistent challenge on the appeals. Counsel has appealed all three determinations and they have been allocated at random to three different costs judges. Costs Judge Brown has already produced his decision on the case of R v Walker ([2022] EWHC 281 (SCCO)). The remaining case – R v Doak – is, as I understand it due to be heard by Costs Judge Whalan in the New Year.

7. In respect of the time spent, the determining officer said:

> "With regard to the disallowance of 14.25 hours work in Lawrance, this relates to 28.25 hours claimed (reduced to 14 hours allowed) for drafting the Advice and Grounds of Appeal dated 21 August 2019. Not only was this drafted just three weeks after counsel had represented the client in the lower court, so would have been very familiar with the facts and issues arising, but much of the document replicates the written Application to Dismiss which was prepared for the trial Judge on 19 June 2019. Notwithstanding the Advice and Grounds was a longer document than the Application to Dismiss 28.25 hours work was considered unreasonable in the circumstances."

8. At the appeal hearing, counsel told me that both he and the prosecution had been expecting the application to dismiss the case to be heard on the first day of trial. However, he received an email a couple of weeks before the trial to say that the application was to be made the following day. He described it as being an application where the highlights had to be put before the judge quickly. It was the opposite of the "deep dive" required by the Court of Appeal. Consequently, the nature of the document supporting the application and subsequently the grounds of appeal were very different. Counsel also told me that, as a matter of form, the submission of no case to answer had to be made at half-time in the trial (for the purposes of appeal) even though the judge had already ruled against it. As such, the work done in respect of the application was done rather earlier than three weeks before the grounds had to be drafted.

9. Counsel provided me with a copy of the grounds of appeal as well as the application to dismiss in a bundle produced for the appeal hearing. Having subsequently looked at it, I can see why the determining officer took the view that there was a degree of overlap between the documents. The setting out of the facts and issues does not vary significantly between the two documents. There is obviously more detail and more extensive quotation of authorities and discussion of them but that will only have taken a certain amount of time to marshall them into a logical and cogent order. Having had the chance to look at these documents in detail, however, I think that the amount of time in researching what was accepted to be a novel point, is not given sufficient weight in the determining officer's allowance of 14 hours. The consideration of judgments from courts in this jurisdiction and in similar jurisdictions abroad which are evident from the appeal grounds is a particularly time-consuming task.

10. I note that the determining officer has considered counsel's time spent in relation to other matters in this appeal and similar work on the other appeals to be reasonable. As such, I assume that the determining officer has not generally taken the view that counsel has overworked the cases. In these circumstances, I consider that the amount of time claimed by counsel was in fact reasonable to produce the appeal grounds and that the determining officer's allowance did not provide reasonable remuneration in this respect. I therefore allow his appeal in respect of the time claimed for preparing the Advice and Grounds of Appeal.

11. For the hourly rates, the determining officer contrasted the three cases as follows:

> "I accepted counsel's comments about the complexity and difficulty of the appeal of Walker but allowed a marginally lower hourly rate (£200) than that claimed. I considered that this reasonably reflected the issues and the responsibility upon counsel in preparing and presenting this appeal. I allowed the same hourly rate in Lawrance. Although rightly described by counsel as complex it was far less complex than the appeal of Walker, but was clearly more legally significant in arguing an important legal principle affecting the future prosecution of rape cases in this country. In my view, however, the claim for an hourly rate nearly 15% higher than that claimed in Walker was unjustified. The appeal of Doak was, in my view, considerably less onerous than the other two appeals. Whilst it involved medical evidence it was significantly less involved than the medical evidence in Walker; there were no important legal principles to be argued as there had been in Lawrance ; the volume of work required to prepare the case was significantly less ; and the Crown did not resist the appeal. The claim for an hourly rate in Doak, higher than that claimed in Walker, was again unjustified and unreasonable in my view. The rate I allowed, 75% of the rate I allowed in Walker and Lawrance is, I submit, a reasonable reflection of the lower responsibility upon counsel in Doak."

12. Whilst the determining officer's written reasons do not expressly recite them, I have no doubt that he was fully mindful of the Taxing Officer's Notes for Guidance (2002)

which, at paragraph 1.11 set out the factors relevant in determining the reasonable amount of counsel's fees:

> "(i) the importance of the case, including its importance to each defendant in terms of the consequences to his livelihood, standing or reputation even where his liberty may not be at stake;
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> (ii) the complexity of the matter;
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> (iii) the skill, labour, specialised knowledge and responsibility involved;
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> (iv) the number of documents prepared or perused with due regard to difficulty and length;
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> (v) the time expended; and
>
> (vi) all other relevant circumstances, including hotel and travelling expenses, where appropriate"

13. The excerpt from the determining officer's written reasons seems to me to weigh the first TONG factor i.e. importance in this case more heavily than the complexity factor which was considered greater by counsel himself in the Walker case in coming to the conclusion that the same hourly rate ought to be allowed in both cases. In comparison, the case of Doak was seen by the determining officer to be one which weighed less in the scales of the TONG factors and so the rate of 75% of the other rates was allowed.

14. In the case of R v Day (190/19) the senior costs judge dealt with an appeal from the determining officer where, in the written reasons, the determining officer had made reference to an overwhelming majority of claims by counsel which had not been appealed, notwithstanding that the determining officer had reduced the sums claimed to 60% of the original figure. The determining officer made the point that the hourly rates accepted by counsel were considerably less than those allowed by the costs judges. Having decided that the determining officer had undervalued the case in question, the senior costs judge said the following at paragraph 24 of his judgment:

> "Of the 5,000 payments made by Mr Greenhill's section since 1st January 2017, 40% of the overall total has been disallowed on assessment. The assessment of costs requires the assessor to allow the reasonable rate, not to fix the going rate. It may well be that if only 60% of the costs claimed are being allowed some counsel may be moderating their claims to the rates that they think will be allowed."

15. It might have been thought that those comments would lead to some alteration in the manner in which costs claims are dealt with in respect of cases which go to the Court of Appeal. Regrettably, that does not seem to be the case. The case of Evans v The Serious Fraud Office [2015] EWHC 1525 (QB) is regularly cited by both counsel and costs judges for its allowance of £480 for leading counsel and £240 for junior counsel in respect of "top end" criminal work. That case is now several years old and as such the rates are likely to be higher. Appeals before the Court of Appeal in cases such as

this one where the Lord Chief Justice has decided to sit on the appeal can only be described as top end work. In those circumstances, it is difficult to see why £250 per hour (which is obviously a long way below £480 per hour) claimed by leading counsel is seen as being an unreasonable rate.

16. I accept of course that Evans involved privately paying defendants and judges have regularly confirmed that a direct comparison between publicly funded and privately funded fees is not appropriate. But there is considerable scope between the £250 claimed here and the £480 in Evans to allow for the difference in regime. Indeed, I note in passing that leading counsel for one of the defendants in Evans charged the much lower rate of £250 per hour because the defendant in question was a fellow barrister. That rate was described as being "less than commercial rates" and might be thought to lend weight to a publicly funded rate than the other counsels' fees.

17. At first blush, there is some sense in the determining officer comparing the various rates claimed by counsel for the different cases. But in fact, it seems to me that to do so is a flawed approach. If counsel only made a claim in respect of one case, then the determining officer would need to consider the TONG factors to decide upon its reasonableness. Even where there are other cases which counsel has appealed, the determining officer's task revolves around the TONG factors.

18. Consequently, whilst on a weighing of the TONG factors, this case may be no heavier than the Walker case, that in itself is not a reason to reduce the rate to the one claimed in Walker if the factors overall justify the rate actually claimed. It is just as possible that counsel has undervalued himself in respect of Walker as he has overvalued himself in this case.

19. As far as I am aware, every recent case where counsel has appealed the hourly rates allowed by the determining officers in Court of Appeal cases has been successful, regardless of which costs judge has heard the appeal. It is disappointing therefore to see in the written reasons that the determining officer has considered it appropriate to seek to rely upon completely irrelevant material to seek to support the hourly rates allowed if an appeal should take place (rather than the TONG factors.) Counsel's hourly rates, unlike solicitors, have never been based upon an expense of time calculation using income and overheads to produce a starting figure. Therefore, even if Sir Christopher Bellamy's report was something which the determining officer could legitimately take into account, it would not assist in contemplating counsel's hourly rate in any event. (The comments of Costs Judge Brown in Walker highlight a number of the problems with attempting to extrapolate any figures.)

20. As first instance judges, costs judges are expected to take on board the outcome of appeals from their decisions and guidance provided by appeal courts. The determining officers must be expected to do the same thing. There is essentially only one source of income for criminal practitioners and determining officers hold the purse strings of that income. They are therefore under a heavy obligation to ensure that they allow reasonable remuneration rather than fix rates which are below those sums. There are numerous examples of solicitors and barristers in various fields deciding to claim the "going rate" rather than to battle for rates they would otherwise expect to receive if a round of appeals was required to obtain such rates. The acquiescence of advocates and litigators is not the test of whether a determining officer is allowing a reasonable rate. Attempts to bring in irrelevant material, rather than to vary the rates allowed, are to be

deprecated. So too is the practice alleged by many appellants of determining officers invariably reducing the rate claimed, whatever starting point has been chosen.

21. As will be apparent from the foregoing paragraphs, I have taken the view that £250 per hour is a reasonable hourly rate and should be allowed for the hours claimed.

22. This leaves the question of the attendance at the hearing before the Court of Appeal. £1,000 has been claimed by counsel for the court attendance and £500 has been allowed. It is obviously an issue which has exercised counsel both in this case and indeed in the other appeals of the determining officer's decisions. I have to confess that I am not entirely sure why this should be the cause of such angst, not least since the determining officer has allowed a separate fee for the hearing. I agree with him that the basic fee, which is clearly intended to mimic a brief fee, is meant to include not only preparation but also the fee for the first day. Separate fees for subsequent days may be allowed as "refreshers." As long as an appropriate level of payment is made, it does not seem to me to matter whether it is a single fee (for a case which lasted no more than one day) or as a fee for preparation and a separate fee for attendance.

23. It is not clear to me on what basis the allowance of £500 has been made. Assuming that it is based on an hourly rate, then it would appear to be for 2.5 hours at the allowed rate of £200 per hour. Given my decision on the hourly rate than that would reduce to 2 hours. It matters not which is the case since does not seem to me that either provides sufficient remuneration for attendance in court. Whilst counsel's recollection was that the case did not go past half a day in court, it was listed for a day and some time for travelling to and from court would also be part of an attendance fee. Taking all these matters into account, it seems to me that the attendance fee of £1,000 claimed is a reasonable figure and should be allowed.

24. Accordingly, counsel has been successful on this appeal is entitled to claim costs of the appeal as a result.