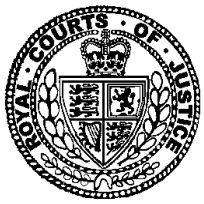

Neutral Citation No. [2022] EWHC 3354 (SCCO)

Case No: T20220081

SCCO Reference: SC-2022-CRI-000065

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 12 December 2022

Before:

COSTS JUDGE ROWLEY

R
v
MANE

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

Appellant: Mark Friend (Counsel)

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

COSTS JUDGE ROWLEY

Costs Judge Rowley:

1. This is an appeal by Mark Friend of counsel against the decision of the determining officer not to make a cracked trial fee payment under the Advocates Graduated Fee Scheme as set out in the Criminal Legal Aid (Remuneration) Regulations 2013.

2. Counsel was instructed on behalf of Braima Salimo Mane in accordance with a representation order granted in September 2021. According to that order, Mane had been charged with stalking involving serious alarm or distress.

3. The indictment ("B1") uploaded by the prosecution to the Digital Case System ("DCS") contained a single count of stalking contrary to sections 4A(1)(a)(b)(ii) and (5) of the Protection from Harassment Act 1997 and was particularised as follows:

> "BRAIMA SALIMOMANE between the 1st day of May 2021 and the 11th day of September 2021 your course of conduct amounted to stalking and which caused Cadija Cande serious alarm or distress which had a substantial adverse effect on her usual day to day activities when you knew or ought to have known that your course of conduct would cause alarm or distress to Candija Cande."

4. Prior to the PTPH, a second indictment ("B2") was uploaded to the DCS which differed from B1 by the separation of the second name so that it read "SALIMO MANE" and not "SALIMOMANE".

5. At the PTPH on 17 January 2022, the Crown uploaded a third indictment ("B3"). The statement of offence did not alter but the particulars were expanded as follows:

> "BRAIMA SALIMO MANE between the 1st day of May 2021 and the 11th day of September 2021 your course of conduct amounted to stalking and which caused Cadija Cande serious alarm or distress which had a substantial adverse effect on her usual day to day activities *in that you*
>
> - *Attended at her home address uninvited*
> - *Approached her in the street to give her a hug*
> - *Asked relatives to give Candija Cande your number and ask that she message you*
>
> when you knew or ought to have known that your course of conduct would cause alarm or distress to Candija Cande."
>
> (italics added)

6. It appears that counsel had some concerns about Mane's fitness to plead at the first PTPH in October 2021. He was therefore not arraigned until 17 January 2022 at which time he pleaded not guilty in response to the B3 indictment. The first two indictments were stayed and the third was preferred and proceeded with to a trial. The advocate at the trial was a different counsel as Mr Friend was unable to appear.

From the written submissions of the Legal Aid Agency, it appears that the trial advocate may not have claimed for all of the fees to which Mr Friend would be entitled in respect of the case represented by B3, but that is not a matter about which I have to make any decision. I note that in the written submissions of the LAA, Mr Rimer concludes that counsel should contact the trial advocate to get a further claim made in respect of any missing fees. No doubt that suggestion would be more than sufficient to ensure that a claim that might otherwise be out of time was looked at favourably by the determining officer.

7. According to Schedule 1 at Paragraph 1(1), the definition of a case under the 2013 Regulations for the purposes of calculating an advocate's graduated fee, is that an assisted person faces "one or more counts of a single indictment…". A graduated fee is payable for each such case. Therefore if, for example, an indictment is severed then there are two indictments and two fees are payable.

8. Where there is more than one indictment, some action is required in respect of each of them. If there has not been a trial in respect of an indictment, then it needs to have been quashed or stayed. Traditionally, that was a relatively infrequent occurrence but where it occurred, it would appear that fees were paid by the LAA since few, if any, appeals reached the Senior Courts Costs Office. When indictments were produced on paper, it would be a straightforward matter to determine whether an indictment had simply been amended on the same piece of paper, or a separate indictment had been created and thereby set out on a different document.

9. However, criminal proceedings have entered the digital age in the last decade and arguably unforeseen consequences have arisen. One such consequence is that the varying, to use a neutral term, of the case against a defendant has led to numerous indictments existing on the DCS at the end of proceedings. I note from the court log in this case that indictment B7 was ultimately before the court.

10. In some cases, orders have been made to stay all versions of the indictment other than the one which has, in the end, been pursued by the prosecution. Where this has occurred, claims have sometimes been made for a fee in respect of those stayed or quashed indictments.

11. Determining officers have regularly refused to pay what appears to be a second fee for the same case and this has led to appeals being made to the SCCO. The initial result of such appeals was success for the appellants (see e.g. R v Ayomanor (SC-2020-CRI-000146)) but that was short lived and more recently decisions of Costs Judges Leonard, Whalan, Brown and myself have taken the view that the recent practice involving the DCS is really one of amendment of a single indictment in most cases.

12. Counsel originally intended to appear at the hearing of his appeal but, on the day, found himself required to appear at a trial when this appeal was due to be heard. Having corresponded with Mr Rimer, both sides were content with me dealing with the appeal on the papers since the written submissions contained the points the advocates wished to make in any event.

13. Counsel's written submissions are succinct. Excluding the top and tail, they are as follows:

> "It is suggested by the LAA that "as the charges are identical on the three indictments provided, we would not consider this a separate indictment but an administrative exercise by the court - there is no effective difference between the indictments". I respectfully submit that this reasoning is inaccurate. There were clear and obvious material changes to the charge and those changes are manifestly evident from a comparison of the indictments at B1 and B2 and that at B3.
>
> Whilst the charge itself, or at least the Act under which the alleged behaviour was rendered unlawful, remained the same it is apparent that the prosecution sought to particularise in detail that which was the subject of the allegation and outline those elements of the offence of which the jury would ultimately have to be sure in order to convict the defendant.
>
> I would respectfully submit that far from being an "administrative exercise by the Court" the variety of additional details that appear within the indictment at B3 (having been conspicuously absent from those at B1 and B2) were included directly and necessarily at the behest of the prosecution - indeed, perhaps illustratively, it was the prosecution application that led to the preferment of the B3 indictment and the staying of the B1 and B2 indictments.
>
> I submit that, literally, the charges could not fairly be described as "identical". I respectfully submit that there are clear differences in the nature, and importantly extent, of the charge as outlined with the B1 and B2 indictments and that within the B3 indictment.
>
> I therefore respectfully submit that the stayed indictments are properly to be assessed as separate indictments attracting a separate fee."

14. In the recent spate of cases where fees for stayed indictments have been claimed, numerous variations on the theme of "tidying up" or "housekeeping" have been employed to describe an amendment to an indictment. Such phrases have often met with some derision from appellants about the minimal nature of that work when compared with significant changes in the seriousness of the offence, for example. I consider that attempts to distinguish the phraseology, though entirely understandable, risk ignoring the central point that has emerged from these decisions.

15. Defendants are charged with offences based on the prosecution evidence. As with all drafting, the wording used can often be improved. In this case, the correction of the defendant's name is a small typographical change, but it is obviously important that it is done. One of the later amendments, according to the court log, was to recast the particulars in the third rather than the second person. In days past, ink would be spilt in making manuscript amendments and, nowadays, a new electronic version is uploaded. Whenever the improvement to the drafting was required, it was usually in

the nature of an amendment and not a separate indictment faced by the defendant which required quashing or staying.

16. In one of the earlier cases that is often cited, the prosecution amended a count on the indictment to the offence of GBH rather than ABH. Having taken this step (rather than adding an additional count), it seemed clear to me that the defendant no longer faced a prosecution for ABH but simply for GBH. The first version of the indictment did not amount to a separate case which the defendant might still face and which would found a claim for a separate fee under the 2013 Regulations.

17. In this case, there is no claim for a fee for both B1 and B2, even though, as I understand it, they have both been stayed. I think that is a recognition that the alteration of the defendant's name was simply an amendment. It does however demonstrate that the varying of one version of the indictment to another is a matter of fact and degree. It is not an absolute position that because the prosecution pursed B2, then B1 needs to be stayed or quashed and a fee will result from that action.

18. The difference between B2 and B3 in this case is set out in italics in the quotation at paragraph 5 above. A course of conduct has to be proved in order to establish that the offence of stalking has been committed. Three instances of conduct are set out and the prosecution needed to persuade a jury that at least two of them occurred and caused alarm and distress. The prosecution evidence would have been in the hands of the defence by the time B1 was uploaded. The defendant was not asked to plead because of counsel's concern about his fitness to do so. There is nothing to suggest that the prosecution served further evidence in order to establish the instances alleged in B3. Those instances must have been clear from that evidence and the bullet points seem to me to be there for clarification of the prosecution's case rather than establishing "clear differences in the nature, and importantly extent, of the charge" as counsel submits.

19. During the course of the trial a separate count of stalking was added to the indictment. It was a summary only offence and the trial judge took the view that the defendant did not need to plead formally to it. There is no suggestion in the log that this resulted in the previous iteration of the indictment being stayed or quashed so that the revised version could be proceeded with. It is a good example of the modern approach of the indictment being amended as necessary during the case to reflect the criminality alleged against the defendant.

20. In my judgment this is a clear case of amendment to a single indictment and the determining officer was correct to refuse the claim for a further payment. Accordingly, this appeal fails.