Neutral Citation No. [2024] EWHC 2357 (SCCO)

Case No: T20210504 & T20230059
SCCO Ref: SC-2023-CRI-000091

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 12/09/2024

Before :

COSTS JUDGE NAGALINGAM

Between:

R

-v-

Jenefer Ebosele

IN THE MATTER OF AN APPEAL AGAINST REDETERMINATION

JMW Solicitors LLP **Appellant**

- and –

The Lord Chancellor **Respondent**

Hearing date: 19/04/2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16/09/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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COSTS JUDGE NAGALINGAM

Background

1. The Defendant was arrested and charged with one count of causing death by careless / inconsiderate driving, following a road traffic collision with a pedestrian who later died from their injuries in hospital. The victim was a six year old child.

2. The Defendant pleaded not guilty and the matter was listed for trial, to commence on 20 June 2022, at Manchester Crown Court (Crown Square) under case number T20210504.

3. There is no dispute the trial was started by HHJ Smith on 20 June 2022, that a jury was sworn and took charge of the case, and that the prosecution opened its case.

4. Whilst the prosecution were opening their case, the Defendant became extremely visibly upset to the extent that concern was expressed for her welfare. On 21 June 2022, the
Defendant broke down in front of the jury and a mental health worker was appointed by the Court.

5. HHJ Smith ordered a report from a consultant psychologist, who had previously assessed the Defendant. The report confirmed the Defendant was having suicidal thoughts and was too overwhelmed by the ongoing trial to provide her evidence. It was also confirmed
in the report that special measures by the Court may alleviate the Defendant's stress and ability to engage with the court proceedings.

6. On 22 June 2022 the defence made an application to stay proceedings, submitting that it was an abuse of process for the case to continue and a breach of the Defendant's right to a fair trial, in that there was a in risk of the Defendant's right to life as per Article 2 and 6 of the ECHR. The defence further submitted that should a trial continue, it would further aggravate the Defendant's already diagnosed psychological injury.

7. On 23 June 2022 the parties again attended court, with HHJ Smith having considered submissions from both the prosecution and the defence on the abuse of process argument. HHJ Smith declined to rule on the application to stay the proceedings.

8. HHJ Smith also considered submissions that three jurors could not sit during the trial in following week. As a result, the jury were discharged and the trial was brought to a close.

9. A new trial date was fixed for 30 May 2023, just over 11 months later, at Manchester Minshull Street Crown Court under case number T20230059, before HHJ Savill.

10. On 30 May 2023 a new jury was empanelled and the trial began. However, soon after, HHJ Savill was addressed on the Defendant's mental health and, as a consequence, the trial was adjourned to 31 May 2023 so that medical evidence could be heard and

considered.

11. On 31 May 2023, HHJ Savill determined that the Defendant was not fit to stand trial.

12. HHJ Savill directed that the trial would proceed in the Defendant's absence, and directed the jury that instead of considering whether the Defendant was guilty of the offence on indictment, they would instead be asked to consider if the Defendant 'did the act' relating to the offence with which she had been charged.

13. The Defendant was therefore discharged from attending the remainder of the trial.

14. The Determining Officer concluded that the hearing between 20 and 23 June 2022 amounted to the "first aborted leg of proceedings", and that "the second leg of proceedings commencing on 30 May 2023" were all part of the same "case", but should be paid as a trial and retrial.

15. The Appellant appeals this determination, and maintains a claim for two separate trials.

16. The question, therefore, is whether the claim should be paid as a trial and new trial (as the Appellant would have it), or as a trial and re-trial (as assessed, and maintained, by the Respondent).

Submissions

17. Mr Walker KC is instructed on behalf of the Appellant litigator firm and explains this appeal concerns a stark question as to whether the factual procedural matrix of this claim amounts to a trial and new trial (Appellant's case), or a trial and re-trial (Respondent's case).

18. The Appellant places particular reliance on the recent cases of *R v Howarth* [2024] EWHC 310 (SCCO), which also concerned a litigator's appeal, and *R v George* [2023] SC-2022-CRI-000166 & SC-2022-CRI-000167, which concerned an advocate's appeal.

19. Where the Respondent relies on the decision in *R v Nettleton* [2014] SCCO Ref: 58/13, Mr Walker KC sought to stress this was "not the latest case", and that the Respondent had failed to have regard to the decisions in *Howarth* or *George*, which he says deal with the same issues as those which have arisen in the index appeal.

20. Mr Walker KC wished to stress that 'fitness to plead' was never an issue in the underlying criminal proceedings, and that there was no fitness hearing of any description at the first trial. It was predominantly issues concerning juror availability which led to the first trial being brought to a close because in any event, even if that trial had continued there wouldn't have been sufficient time to complete the trial because some of the jurors would no longer be available.

21. With regard to the time which passed between the first and second trials, Mr Walker KC contrasted *R v George*, which concerned a 2 week hiatus between July and August

2022, and the index case, which concerned a hiatus of some 11 months.

22. Mr Walker KC also sought to highlight the evidential developments which occurred during the period of hiatus in the index appeal, in particular a diagnosis of PTSD in the Defendant leading to the crown electing not to rely on some of the evidence they intended to at the first trial.

23. In between the two hearings, a new assessment of the Defendant was arranged and a report obtained from Dr O'Rourke, psychologist. A report was also obtained from Dr Mahmood, psychiatrist.

24. There was a material change of approach in that the second trial became concerned with whether the act took place, rather than a trial of whether or not the Defendant was guilty of the act.

25. Citing analogy with *R v Howarth*, Mr Walker KC observed that case also involved an 11 month hiatus, a change of judge, a development of the evidence during the hiatus period, and a conclusion (by Costs Judge Whalan) "that the claim be assessed as a trial followed by a new trial".

26. The Appellant also relies on another decision of Costs Judge Whalan, *R v George*, which concerned an advocate's appeal, but on similar terms to *R v Howarth*, i,e. whether there had been a trial and new trial, or one continuous trial. The decision in *George* is consistent with that in *Howarth*.

27. Mr Walker KC submits that in the index appeal, the Defendant's change of diagnosis meant that the crown changed their approach. This meant the second trial necessarily became a trial of issue instead of a trial of fact.

28. The Defendant was not fit to stand trial, and so the trial proceeded in her absence, with the jury directed that they would not be considering whether the Defendant was guilty of the offence on indictment, bur whether she "did the act".

29. Mr Walker KC observes that the Respondent accepts there has been a break in the temporal matrix, and this cannot be a continuous trial. I don't understand that conclusion to be disputed by the Defendant.

30. Mr Walker KC sought to stress this was not a case where the Appellant firm could simply leave the file "parked on a shelf" and pick it up when re-listed. The Defendant had to be advised between the first trial and second trial.

31. Ms Weisman represented the Respondent at this appeal, and relies on her written submissions filed in advance of this hearing.

32. Ms Weisman is clear in her view that "trial and new trial" means two separate cases, i.e. the second trial being based on a different indictment to the first trial. She submits that everything else is a "trial and retrial", *or* a continuous trial.

33. Ms Weisman observes that the Appellant has not argued against the proposition that a new indictment is necessary for there to be a new trial, and has failed to adequately address the fact that at each trial the Defendant was facing the same offence and the same charges.

34. She submits the only differences of any substance were the Defendant's fitness to stand, which was a feature of both trials, and the procedural direction to proceed on the basis of a trial of issue.

35. Ms Weisman considers the Appellant's confusion or conflation of the relevant issues is because of the interchangeable terminology of re-trial and new trial. In *R v George*, she says that the determining officer paid for a single continuous trial (versus a trial and new trial), and that whilst Costs Judge Whalan looked at the provisions for payment of trial and new trial, his decision was based on the provision for a trial and re-trial.

36. As to the areas of dispute identified by Mr Walker KC, Ms Weisman submits these have been mischaracterized. The Respondent accepts there has been a break in the temporal matrix. However, the second trial still proceeded on the basis of the original indictment, and so this remains one case.

37. In so far as the Respondent's written reasons and submissions refer to fitness to stand trial, this is only in so far that it is relevant to calculating the number of days of trial. Ms Weisman concluded by observing that the determining officer could have concluded a single continuous trial, but instead approved payment out on the basis of a trial and re-trial, which was more advantageous to the Appellant in remuneration terms.

38. In response, Mr Walker KC wished to stress that the second hearing was not a fitness trial. Jurors were sworn and this would not have happened had it already been decided that the Defendant was unfit to stand trial. A trial of fact began and only then did the Defendant break down (as she had at the first hearing). It was the hearing itself that again triggered the Defendant's PTSD.

39. It was only then that the Defendant was ruled unfit to stand trial such that the second hearing became a trial of issue, which took place in the Defendant's absence.

40. In the period between the first and second hearings, further preparation had been undertaken by both sides, including account being given for up to date psychiatric evidence concerning the Defendant's health.

41. Mr Walker KC also sought to stress that there was no determination regarding the Defendant's fitness to stand trial at the first hearing because there was no suitable professional available to determine the same, and that the first hearing was stopped in any event due to juror availability.

42. Mr Walker KC closed by submitting there were "literally two trials", that the facts of *R v Howarth* were "absolutely on point" with the index case, that there was never any

order for a re-trial (but rather the re-listing was as per *Howarth*), and that the Respondent's decision seemed manifestly unfair to the Appellant.

Relevant Legislation

43. The applicable regulations are The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations'), as amended in 2018.

44. The Respondent referred me to paragraph 13 of Schedule 2 of the 2013 Regulations, which sets out provisions for circumstances in which the litigator represents the defendant at trial and any retrial:

> 13.—(1) Where following a trial an order is made for a retrial and the same litigator acts for the assisted person at both trials the fee payable to that litigator is—
>
> (a) in respect of the first trial, a fee calculated in accordance with the provisions of this Schedule; and
>
> (b) in respect of the retrial, 25% of the fee, as appropriate to the circumstances of the retrial, in accordance with the provisions of this Schedule.

45. The Respondent also referred me to paragraph 25 of Schedule 2 of the 2013 Regulations, which sets out the provisions for calculation of payment where there is an issue of the defendant's fitness to plead or stand trial:

> 25. Where in any case a hearing is held to determine the question of whether the assisted person is unfit to plead or to stand trial (a "fitness hearing")—
>
> (a) if a trial on indictment is held, or continues, at any time thereafter, the length of the fitness hearing is included in determining the length of the trial for the calculation of the fee in accordance with Part 2;
>
> (b) if a trial on indictment is not held, or does not continue, thereafter by reason of the assisted person being found unfit to plead or to stand trial, the litigator must be paid—
>
> (i) a fee calculated in accordance with paragraph 7 or where appropriate paragraph 9, as appropriate to the combined length of—
>
> (aa) the fitness hearing; and
>
> (bb) any hearing under section 4A of the Criminal Procedure (Insanity) Act 1964 (finding that the accused did the act or made the omission charged against him); or
>
> (ii) a fee calculated in accordance with paragraph 6, or where appropriate paragraph 8, as appropriate, for representing an assisted person in a cracked trial,

whichever the litigator elects; and

(b) if at any time the assisted person pleads guilty to the indictable offence, the litigator must be paid either—

(i) a fee calculated in accordance with paragraph 7 or, where appropriate, paragraph 9, as appropriate to the length of the fitness hearing; or

(ii) a fee calculated in accordance with paragraph 6 or, where appropriate, paragraph 8, as appropriate for representing an assisted person in a guilty plea,

whichever the litigator elects."

Analysis and decision

46. The first trial proceeded at Manchester Crown Court (Crown Square), under case number T20210504. The second trial proceeded at Manchester Minshull Street Crown Court, under case number T20230059. There was an 11 month hiatus between the first trial and the second trial, as well as a change of judge and juries. There were also developments in the available evidence during the period of hiatus.

47. Whilst the Appellant places great importance in the decision of *R v Howarth*, I do not consider that case assists the Appellant. *Howarth* also concerned a stark difference between the parties positions on appeal, but in that case the question was whether there had been one continuous trial (albeit it with a period of hiatus) or a trial and new trial.

48. It strikes me that in the index appeal, it would have been open to the Respondent to make a '*Howarth*' type continuous trial argument, but instead the Defendant has been pragmatic in remunerating the Appellant based on a trial and re-trial.

49. In my view, the real issue is whether the terminology of a 'new trial' and 're-trial' is being confused by the Appellant. Where, in *Howarth*, Costs Judge Whalan directed the claim be assessed as a trial followed by a new trial, that was only after he had drawn the following conclusion:

"The correct conclusion, in my view, is that on the facts of this case there were two trials, and not one continuous trial running effectively from June 2022 to June 2023".

50. I do not consider that decision to be an endorsement that two trial fees be paid as though each trial was an entirely separate trial, but that rather that the appellant (in that case) ought to be remunerated on the basis of two trials, i.e. a trial and re-trial in the same case, as opposed to single continuous trial. The case against the defendant in *Howarth* had not changed, rather some of the evidence had developed and, due to the passage of time, a new jury was empanelled and a different judge presided over the second trial.

51. If I am wrong in my interpretation of that decision, I remind myself that firstly, I am not bound by the same and secondly, I do not consider the factual matrix to be sufficiently analogous (save for the 11 month hiatus and change of judge).

52. As to *R v George*, which is also non-binding, I accept that in that case Costs Judge Whalan specifically addressed the issue of what is meant by a "new trial" where, at paragraph 13, he records "It is important, in my view, to note that the relevant nomenclature is 'trial' and 'new trial', and not 'second trial' or 'retrial'…".

53. Having said that, it is important to recognise that an advocate's appeal is enshrined in schedule 1 of the 2013 regulations and uses the terminology of "new trial", whereas schedule 2, which governs litigators' appeals, use the terminology of "retrial" instead.

54. Further, my reading of paragraph 2 to schedule 1 of the 2013 regulations is that by linking "new trial" fee percentage reductions to proximity with the "first trial", the regulations are drawing a clear link between the two so as to distinguish them from being two entirely separate trials.

55. In *R v Innes*, the issue of whether a second hearing was paid as a separate trial or a re-trial was also considered, in a litigators' appeal heard by Costs Judge Rowley.

56. In that case, the Defendant faced a five count indictment and at the first trial he was convicted on the 5th count, with the jury otherwise unable to reach a verdict in relation to the other (manslaughter) charges.

57. At the second trial, the trial judge (who did not hear the first trial) observed that the basis upon which the Defendant had been convicted on the 5th count was flawed, because the parties had been proceeding on a misapprehension as to whether certain reporting obligations (to reporting groundings of a yacht's keel) applied in the circumstances the defendant had found himself in. As well as the potential impact on the 5th count, the ruling also had a bearing on to what extent other general criticisms of the defendant could be maintained.

58. This all meant the judge in the second trial had to make a number of findings of fact for the purposes of sentencing the defendant in respect of the 5th count. These findings were made in the course of hearing evidence in respect of the manslaughter charges, as opposed to their being a trial of counts 1-4 and then a Newton Hearing in respect of sentencing of the 5th count. Thus in *Innes*, the appellant's cases was that a Newton Hearing had taken place following conviction on count 5, albeit in parallel with the substantive trial concerning counts 1-4.

59. The key feature of *Innes* is that the statutory footing upon which the defendant was convicted on count 5 was not attacked until a change of leading counsel for the second trial. The subsequent ruling by the trial judge at the second trial significantly altered the course of that trial, further witnesses were called and some 3,000 additional pages of evidence were produced.

60. Ultimately, and regardless of whether or not the circumstances of the second trial in *Innes* in fact amounted to a Newton hearing, the appeal was dismissed because it was concluded that:

> "9. It is only if an indictment is severed so that there becomes two indictments or that the original indictment is quashed or stayed and a further indictment is preferred where there can be two trial fees".

61. Cases such as *R v Nettleton* [2014] 2 Costs LR 387 are concerned with the notion of a break in the "temporal or procedural matrix", but that is in the context of considering whether there has been a single continuous trial, or a trial and retrial (for remuneration purposes), the latter being remuneratively more rewarding than the former.

62. The question of whether there has been a trial and a separate "new" trial is a question of fact. It cannot be inferred. In the index matter the indictment on which the Defendant was charged was not quashed before the second hearing, and an application for a stay (made at the first hearing) was never ruled upon. To put it another way, the original indictment was never stayed.

63. I echo the observation of Costs Judge Rowley at paragraph 13 of his decision in *Innes* where he states:

> "It is impossible not to have sympathy with the solicitors in circumstances where a retrial proves to be longer than the original trial and throws up significant new issues during its course. It cannot have been the intention of the regulations to reward such a hearing with a fee of only 25% of the original hearing. Such reduction must assume that there will be rather less for the litigator to do in the second trial since much if not all of the preparation from the first trial can simply be carried over into the second hearing. Where a trial does become significantly more involved than the first one, that assumption is obviously proved false."

64. I also agree that "the regulations are clear in contemplating a trial and retrial but not the situation where two full trials can be remunerated in the absence of severance, quashing or staying of the original indictment taking place" (paragraph 15, *R v Innes*).

65. Changes to the trial venue, trial judge and convening of a new jury are all matter of administration. They are not reliable indicators of a second hearing being an entirely separate "new" trial.

66. Both the first and second hearings began on the basis of the same indictment, and that the Defendant was fit to stand. Based on the submissions I have heard and documents I have read, I am not persuaded in any event that there was a material change to the evidence upon which the Defendant was indicted. The only material change concerned evidence as to the Defendant's mental health as a result of her involvement in a fatal collision and subsequent legal process.

67. The fact the case proceeded on the basis of a trial of issue rather than a trial of fact does not make this a new case. It was the same case, on the same indictment, with the crown electing not to rely on some of the evidence it had otherwise intended to but for the finding that the Defendant was unfit to stand trial.

68. Accordingly, payment under the LGFS is to be calculated on the basis of a trial and retrial, as per the Respondent's original determination. As such, this appeal is dismissed.

COSTS JUDGE NAGALINGAM