SENIOR COURTS
COSTS OFFICE

SCCO Ref: 67/19 & 131/19

Dated: 12 June 2019

ON APPEAL FROM REDETERMINATION

REGINA v SALAZAR-DUARTE

CROWN COURT AT BLACKFRIARS

APPEAL PURSUANT TO ARTICLE 30 OF THE CRIMINAL DEFENCE SERVICE (FUNDING) ORDER 2007 / REGULATION 29 OF THE CRIMINAL LEGAL AID (REMUNERATION) REGULATIONS 2013

CASE NO: T20177367

LEGAL AID AGENCY CASE

DATE OF REASONS: 16 January 2019

DATE OF NOTICE OF APPEAL: 6 March 2019

APPELLANTS: EBR Attridge (LGF) & Keith Hadrill (AGF)

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

The appropriate additional payments, to which should be added the Appellants' summarily assessed costs in the sum of £300 inclusive of VAT (LGF) and £500 inclusive of VAT (AGF) and the £100 paid on each appeal, should accordingly be made to the Appellants.

MASTER NAGALINGAM
COSTS JUDGE

REASONS FOR DECISION

Introduction

1. EBR Attridge (Litigators) & Keith Hadrill (Advocate), 'the Appellants', appeal against the decision of the Determining Officer at the Legal Aid Authority ('the Respondent') to reduce the number of pages of prosecution evidence ('PPE') forming part of the Litigators' Graduated Fee ('LGF') claim and part of the Advocate's Graduated Fee ('AGF') claim.

2. The Appellants both submitted a claim for 9,375 PPE, which included electronic evidence. The Determining Officer allowed 1,307 PPE of paper evidence for the AGF claim on the basis that the electronic evidence had not been served. The Determining Officer allowed 1,294 PPE of paper evidence for the LGF claim, again on the basis that the electronic evidence had not been served.

3. The Respondent's written reasons provided on 16 January 2019 in respect of the AGF and LGF claims are nearly identical, with both sets of written reasons submitting that the electronic evidence in question fell under the category of unused material and so both Appellants' claims for additional PPE remained as per the Determining Officer's original decision.

Background

4. The Appellants represented Mr Alexander Salazar-Duarte ('the Defendant') who was indicted on one count of conspiring with his co-defendants and others fraudulently to evade the prohibition on the importation of a controlled drug of Class A, namely a quantity of cocaine, contrary to section 1(1) of the Criminal Law Act 1977, section 3(1) of the Misuse of Drugs Act 1971 and section 170 of the Customs and Excise Management Act 1979.

5. The Defendant pleaded guilty to having a 'significant' role in the conspiracy pre-trial but that plea was not accepted by the Crown who, on or around the same time as the Defendant's guilty plea, served electronic evidence by disc which contained data from 8 mobile telephones (out of a total of 30 mobile

telephones relating to the conspiracy). The Crown accused the Defendant of playing a leading rather than significant role, hence the Defendant's basis of plea was rejected and a Newton hearing was necessary.

6. The Defendant was subsequently sentenced to 10 years imprisonment which reflected that he did not have a leading role, but rather a significant role.

7. Two days before the hearing of this appeal, the Respondent filed and served written submissions in which, for the first time, they accepted that the electronic evidence had been served as used evidence. However, this did not alter the Respondent's stance with respect to remuneration.

The Regulations

8. The Representation Order is dated 18 December 2017 and so the applicable regulations are The Criminal Legal Aid (Remuneration) Regulations 2013 ('the 2013 Regulations').

9. Paragraph 1(2 to 5) of Schedules 1 and 2 to the 2013 Regulations provides (where relevant) as follows:

> "*1. Interpretation*
>
> *…*
>
> *(2) For the purposes of this Schedule, the number of pages of prosecution evidence served on the court must be determined in accordance with sub-paragraphs (3) to (5).*
>
> *(3) The number of pages of prosecution evidence includes all –*
>
> *(a) witness statements;*
>
> *(b) documentary and pictorial exhibits;*
>
> *(c) records of interviews with the assisted person; and*
>
> *(d) records of interviews with other defendants,*
>
> *which form part of the committal or served prosecution documents or which are included in any notice of additional evidence.*
>
> *(4) Subject to sub-paragraph (5), a document served by the prosecution in electronic form is included in the number of pages of prosecution evidence.*

(5) A documentary or pictorial exhibit which –

(a) has been served by the prosecution in electronic form; and

(b) has never existed in paper form,

is not included within the number of pages of prosecution evidence unless the appropriate officer decides that it would be appropriate to include it in the pages of prosecution evidence taking in account the nature of the document and any other relevant circumstances".

Authorities

10. Authoritative guidance was given in *Lord Chancellor v. SVS Solicitors* [2017] EWHC 1045 (QB) where Mr Justice Holroyde stated (at paragraph 50) these principles:

"*(i) The starting point is that only served evidence and exhibits can be counted as PPE. Material which is only disclosed as unused material cannot be PPE.*

(ii) In this context, references to "served" evidence and exhibits must mean "served as part of the evidence and exhibits in the case". The evidence on which the prosecution rely will of course be served; but evidence may be served even though the prosecution does not specifically rely on every part of it.

(iii) Where evidence and exhibits are formally served as part of the material on the basis of which a defendant is sent for trial, or under a subsequent notice of additional evidence, and are recorded as such in the relevant notices, there is no difficulty in concluding that they are served. But paragraph 1(3) of Schedule 2 to the 2013 Regulations only says that the number of PPE "includes" such material: it does not say that the number of PPE "comprises only" such material.

(iv) "Service" may therefore be informal. Formal service is of course much to be preferred, both because it is required by the Criminal Procedure Rules and because it avoids subsequent arguments about the status of material. But it would be in nobody's interests to penalise informality if, in sensibly and cooperatively progressing a trial, the advocates dispense with the need for service of a notice of additional evidence, before further evidence could be adduced, and all parties subsequently overlooked the need for the prosecution to serve the requisite notice ex post facto.

(v) *The phrase "served on the court" seems to me to do no more than identify a convenient form of evidence as to what has been served by the prosecution on the defendant. I do not think that "service on the court" is a necessary pre-condition of evidence counting as part of the PPE. If 100 pages of further evidence and exhibits were served on a defendant under cover of a notice of additional evidence, it cannot be right that those 100 pages could be excluded from the count of PPE merely because the notice had for some reason not reached the court.*

(vi) *In short, it is important to observe the formalities of service, and compliance with the formalities will provide clear evidence as to the status of particular material; but non-compliance with the formalities of service cannot of itself necessarily exclude material from the count of PPE.*

(vii) *Where the prosecution seek to rely on only part of the data recovered from a particular source, and therefore served an exhibit which contains only some of the data, issues may arise as to whether all of the data should be exhibited. The resolution of such issues would depend on the circumstances of the particular case, and on whether the data which have been exhibited can only fairly be considered in the light of the totality of the data. It should almost always be possible for the parties to resolve such issues between themselves, and it is in the interests of all concerned that a clear decision is reached and any necessary notice of additional evidence served. If, exceptionally, the parties are unable to agree as to what should be served, the trial judge can be asked whether he or she is prepared to make a ruling in the exercise of his case management powers. In such circumstances, the trial judge (if willing to make a ruling) will have to consider all the circumstances of the case before deciding whether the prosecution should be directed either to exhibit the underlying material or to present their case without the extracted material on which they seek to rely.*

(viii) *If – regrettably – the status of particular material has not been clearly resolved between the parties, or (exceptionally) by a ruling of the trial judge, then the Determining Office (or, on appeal, the Costs Judge) will have to determine it in the light of the information which is available. The view initially taken by the prosecution as to the status of the material will be a very important consideration, and will often be decisive, but is not necessarily so: if in reality the material was of central importance to the trial (and not merely helpful to the defence), the Determining Officer (or Costs Judge) will be entitled to conclude that it was in fact served, and that the absence of formal service should not affect its inclusion in the PPE. Again, this will be a case-specific decision. In making that decision, the Determining*

Officer (or Costs Judge) will be entitled to regard the failure of the parties to reach any agreement, or to seek a ruling from the trial judge, as a powerful indication that the prosecution's initial view as to the status of the material was correct. If the Determining Officer (or Costs Judge) is unable to conclude that material was in fact served, then it must be treated as unused material, even if it was important to the defence.

(ix) If an exhibit is served, but in electronic form and in circumstances which come within paragraph 1(5) of Schedule 2, the Determining Officer (or, on appeal, the Costs Judge) will have a discretion as to whether he or she considers it appropriate to include it in the PPE. As I have indicated above, the LAA's Crown Court Fee Guidance explains the factors which should be considered. This is an important and valuable control mechanism which ensures the public funds are not expended inappropriately.

(x) If an exhibit is served in electronic form but the Determining Officer (or Costs Judge) considers it inappropriate to include it in the count of PPE, a claim for special preparation may be made by the solicitors in the limited circumstances defined by paragraph 20 of Schedule 2.

(xi) If material which has been disclosed as unused material has not in fact been served (even informally) as evidence or exhibits, and the Determining Officer has not concluded that it should have been served (as indicated at (viii) above), then it cannot be included in the number of PPE. In such circumstances, the discretion under paragraph 1(5) does not apply."

11. The Appellants have cited judgments relevant to the status of the service of used evidence. The Respondent has since conceded the evidence in question was served as used.

12. The Respondent has cited *R v Napper* [2014] 5 Costs LR 947, *R v Sana* [2014] 6 Costs LR 1143, *R v Yates* [2017] SCCO 67/17 and *Lord Chancellor v SVS Solicitors* [2017] EWHC 1045 (QB).

The submissions

13. The Respondent's case is set out in the Written Reasons dated 16 January 2019 and in written submissions drafted by Mr Michael Rimer and dated 10 June 2019, with both dates applying to the AGF claim and the LGF claim.

14. The Appellants' submissions are set out in their respective Grounds of Appeal and in further written submissions prepared by Mr Keith Hadrill dated 11 June 2019.

15. The Appellants accept that the burden is on them to show that it is appropriate to include the electronic evidence in the PPE count, taking into account the nature of the documents and the relevant circumstances.

16. The Defendant acknowledged his participation in the conspiracy but did not accept he took a leading role. The Defendant stated that his only source of income was by virtue of his lawful employment as a cleaner and that any income derived from the conspiracy was used to pay off a debt which a third party believed they were owed by the Defendant and/or his family. Further, the Defendant claimed that his involvement in the conspiracy was under duress.

17. The Defendant's basis of plea, that he played a significant but not leading role in the conspiracy, and did so under coercion, was not accepted by the Crown.

18. The Crown alleged that the Defendant was pivotal to the whole operation and on an international basis, including logistics and recruitment.

19. There were 8 mobile phones central to the case (out of around 30), three of which belonged to the Defendant. The mobile phone evidence from co-Defendants including the Defendant's brother, an airport security guard and a passenger courier, also fell to be considered.

20. The Appellants refer to a transcript of the arraignment hearing which took place on 26 January 2019 before His Honour Judge Richardson. In particular they refer to submissions made on behalf of the Crown and by HHJ Richardson:

    Mr Raudnitz for the Crown: "Your Honour, in very short summary, 30 phones were seized in this case, I apologise. That has involved a very substantial degree of work and investigation. A triage process has taken place in which eight key phones to which I have referred, have been selected and they have

been prioritised. It is reasonably assumed that the bulk of the evidence will come from those eight phones and it may not be necessary to pursue to any great extent, the remaining 22 phones."

And on being pressed by HHJ Richardson what precisely would be provided in respect of the 8 key phones, Mr Raudnitz for the Crown stated:

"Your Honour, it is evidential from the download and then the raw data for the whole of the phones as well."

HHJ Richardson, addressing the Defendants, concluded that hearing as follows:

"Your case is fixed for trial for 21 May 2018. Preparations are being made to ensure the case is ready for trial. Each of you must serve a defence statement. It is important that the defence statement should set out your case so that no-one is taken by surprise at the trial. That especially applies to mobile phones. The prosecution think that eight mobile phones are important in this case but they have recovered many other mobile phones."

21. In circumstances where the Defendant's basis of plea was rejected, and where the Crown intended to proceed to trial on a full facts basis because they intended to pursue a case that the Defendant held a leading rather than significant role, and where the Crown had indicated that eight out of thirty mobile phones were "key" or "important", the Appellants say remuneration of consideration of the raw data on those phones is more appropriately remunerated as PPE than as special preparation.

22. The Appellants acknowledged that amongst the data from the eight mobile phones served as used evidence were images. However, because the data was served as raw material it was necessary to go through all of the data including the images. Those images included packets of cocaine and the books in which the packets were hidden as well as lifestyle photographs. The Appellants assert that consideration of the image data was relevant to the question of extent of the Defendant's involvement in the conspiracy, the

extent to which he gained from the conspiracy and with respect to any future Newton Hearing.

23. The Appellants say this was not an 'ordinary case'. The Defendant was being accused of a leading role in an international drug importation case with a network that stretched from Colombia to the UK and continental Europe beyond. Given the Crown's rejection of the Defendant's basis of plea, the raw material on the eight 'key' phones went to the factual matrix of the case because of the need to consider the Defendant's phones, as well as those of the co-defendants including his brother, the airport security guard and a courier.

24. Preparations were undertaken for a Newton hearing in light of the timing of service of the used evidence and the challenge to the basis of plea. In particular, the Defendant needed to demonstrate he had not recruited people to the conspiracy nor been actively involved in planning the logistics of the conspiracy.

25. On behalf of the Respondent Mr Rimer submits that the timing of service by the Crown is one of many factors to be taken into account. He submits that the Crown didn't need to rely on the full raw data contained on the eight mobile phones referenced above. Further, he references the fact that the Defendant had pleaded guilty before the raw phone data had been served. Mr Rimer suggests that in those circumstances, the raw material could only have been considered in the context of its relevance to a Newton Hearing and that, pursuant to the SCCO decision in *R v Yates*, I ought not to attach the same importance to work done in mitigation of a plea as opposed to establishing guilt.

26. Mr Rimer, perhaps rather belatedly as far as the Respondent is concerned, then sought to take me through his analysis of the Legal Aid Agency Report as well as examples of the served used evidence on a laptop computer in order to explain why, in any event, the Respondent considers the served used evidence in the form of raw material from the eight mobile phones is more appropriately remunerated as special preparation rather than as PPE.

27. Mr Rimer submits that the messages on the phones are relevant to “behind the scenes work” and that analysis of the phones in relation to the making of a guilty plea, basis of plea or sentencing does not carry a weight of relevance that would reasonably lead to that evidence being remunerated as PPE.

28. Mr Hadrill represents himself in relation to the AGF. He tells me that the discs are raw material and it was the raw disc material which was ordered to be disclosed. The hard copy discs represent the translated version (in circumstances where messages sent in Spanish had been translated into English). Mr Hadrill submits that the relevant timeline shows that the CPS intended to serve the discs. The Appellants simply pressed for disclosure.

29. Mr Hadrill continued that a Newton hearing is a trial of fact therefore it is still a trial (when considering relevance and nature). Credibility is important in a Newton hearing. The evidence on disc was serious and important. However, because all of the material was in raw data format the evidence was interspersed and therefore difficult to assess in terms of relevance.

30. Mr Chughtai represents his firm in relation to the LGF. He says his firm should not be penalised for the CPS serving material at a late stage where the timing of service created a need to consider the raw material under pressure of time. He says that the Respondent is seeking to apply the benefit of hindsight.

31. Mr Chughtai says that the Defendant had no interest in seeking discs of evidence that were not helpful to the Defendant but in the face of the CPS not accepting the basis of plea, and so a need arising to consider basis and sentencing, it was necessary to review the raw data.

32. There is no dispute that the data extracted from the Defendant’s personal smartphone is included in the served evidence. There is no dispute that the Appellants should not receive some form of remuneration for considering that data. The Appellants submit that remuneration should be in the form of PPE whereas the Respondent submits the proper method of remuneration is special preparation.

My analysis and conclusions

33. The Respondent concedes that the electronic evidence served was served as used evidence.

34. The written reasons are not particularly helpful in circumstances where the Determining Officer's primary focus was to limit the PPE based on a mistaken understanding of the status of the material. It was only two days before the hearing of the appeal that the Respondent accepted the material was served as used, and at the same time filed written submissions that sought to shift the focus of the argument on to the nature and relevance of the materials contained in the raw electronic material.

35. It is not disputed that PPE can be served after a guilty plea.

36. Whilst brought to my attention by Mr Rimer, I do not consider the decision in *R v Yates* supports the argument he now seeks to make. *R v Yates* concerned a Defendant who entered an early guilty plea. The Defendant had been charged with eight co-defendants with a conspiracy to supply Class A drugs and was accused of playing a leading role in the conspiracy. Two weeks after the Defendant's guilty plea the Crown served a disc containing 13,596 pages of telephone records and data extracted from the Defendant's telephone and their co-defendants' telephones. The Legal Aid Agency in that case accepted that the records from the *Defendant's* phone should form part of the PPE count but that the records from the co-Defendants' phones should be treated differently.

37. In *Yates*, as in this case, the Defendant's legal representatives were concerned with the basis of plea and whether it would be appropriate to arrange a Newton hearing.

38. I agree with Master Leonard's conclusion in *Yates* that there is no distinction to be drawn in principle between consideration of evidence before or after a guilty plea. One must look at the facts and circumstances of the case.

39. In *R v Yates*, Master Leonard concluded that there is "a real distinction, in the context of the case against the Defendant, to be drawn between the importance of (a) telephone evidence directly attributable to the Defendant, offering as it does an indication of his direct contact with his co-conspirators and so his degree of involvement in the conspiracy with others with which he has been charged, and (b) telephone evidence attributable to others, which at most will help put his actions in context. The former was central to establishing the role played by the Defendant in the conspiracy: the latter, in my view, was not. It was part of the background."

40. Thus depending on the facts it may be appropriate to draw a distinction between telephone evidence directly attributable to a Defendant and telephone evidence attributable to others, with the latter being more properly remunerated as special preparation on the facts in *R v Yates*.

41. The appeal before me bears many similarities with *R v Yates* in that the Defendant was accused of playing a leading role in a conspiracy to supply controlled Class A drugs, with a guilty plea being entered before the Crown had served all its evidence. However, the index case is distinguishable on some factors.

42. Firstly, the Defendant entered a guilty plea on the basis of a 'significant' role rather than a 'leading' role, whereas in *Yates* the Defendant accepted a leading role. Secondly, because the Crown did not accept the guilty plea on the basis of a 'significant' role the Appellants had to proceed on the basis that a trial of guilt would follow, as well as preparing for a Newton hearing in the alternative.

43. Despite the existence of some thirty mobile phones the Appellants focused their attention on eight phones, three of which belonged to the Defendant (comprising the majority of the additional PPE sought) as well as phones belonging to the Defendant's brother, the security guard at the airport and the courier (all of whom were co-accused).

44. Taking into account the serious charges with which the Defendant was faced, and the impact on sentencing of an early guilty plea based on a significant

role in the conspiracy as compared with conviction at trial on the basis of a leading role, I consider that it is appropriate to include the raw data on the Defendant's three mobile phones as PPE. I draw that conclusion taking into account the nature of the raw material in terms of showing the extent to which the Defendant had benefited from the conspiracy and the extent to which the Defendant had played a role in the conspiracy. I also take into account the timing and format of disclosure which necessarily required that the evidence be looked at in full and without the benefit of hindsight.

45. The balance of the PPE is more properly remunerated as special preparation and I understand the LAA will consider a late application for payment on that basis.

46. As to duplication this must be evidenced. The LAA's position that there is 'bound to be duplication' with the DCS is unhelpful. Firstly, because this ignores that data is drawn from mobile phone companies and network providers as well as the data contained on the hardware of the phones and memory cards. Secondly, because in this case a large amount of raw material was served as used with less than a month until a trial of guilt which remained listed given the Crown's refusal to accept the Defendant's basis of plea.

Conclusions

47. I find and direct that: (i) the initial page count for both Appellants be increased to reflect the full page count of the raw data relating to the Defendant's phones contained in exhibits CRP/24, CRP/25 and CRP/39; (ii) exhibits CMG/01, CMG/02, GEC/01, GD/01 and GD/02 (the co-defendants' smartphones) be excluded from the PPE count (the Co-Defendants' personal smartphones) but the Appellants may, if they so wish, seek that their claim for remuneration in relation to those exhibits be reviewed by the Determining Officer to consider a claim for a special preparation fee.

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