



SENIOR COURTS
COSTS OFFICE

SCCO Ref: 168/13

Dated: 19 February 2014

ON APPEAL FROM REDETERMINATION

REGINA v SHARIF

HARROW CROWN COURT

APPEAL PURSUANT TO PARAGRAPH 21 OF SCHEDULE 1 OF THE CRIMINAL
DEFENCE SERVICE (FUNDING) ORDER 2001 / ARTICLE 30 OF THE CRIMINAL
DEFENCE SERVICE (FUNDING) ORDER 2007

CASE NO:

LEGAL SERVICES COMMISSION CASE

DATE OF REASONS: 30 MAY 2013

DATE OF NOTICE OF APPEAL: 24 JUNE 2013

APPLICANT: COUNSEL
Peter Milnes
Aegis Chambers
39 Mostyn Avenue
Wembley HA9 8AY

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

The appropriate additional payment, to which should be added the sum of £48 (exclusive of VAT) for costs and the £100 paid on appeal, should accordingly be made to the Applicant.

**C. CAMPBELL
COSTS JUDGE
REASONS FOR DECISION**

1. The issue which arises in this appeal brought in accordance with the provisions of the Criminal Defence Service (Funding) Order 2007 (as amended) is whether the Legal Aid Agency was correct in its decision to pay the instructed advocates under the Advocates' Graduated Fee Scheme ("the Scheme") a fee for a single count indictment, without at the same time, paying a cracked trial fee in relation to a different indictment. The sum in issue is £3,537.32.
2. The background is set out in the refreshingly detailed written reasons dated 30 May 2013. The Defendants were husband and wife, Mr M Sharif and Mrs F Sharif. Both had been separately indicted under case numbers T20117564 (Mr Sharif) and T20127078 (Mrs Sharif). At a plea and case management conference on 3 May 2012, the indictments had been joined so that the indictment was as follows:

"Count 1 – conspiracy to defraud – common law – Mr Sharif and Mrs Sharif

Count 2 – fraud by false representation contrary to Sections 1 and 2 of the Fraud Act 2006 – Mrs Sharif alone."
3. Subsequently both Defendants were arraigned when not guilty pleas were taken. Further directions had been given with the case being listed for trial to start on 3 September 2012 with an estimate of five days. Following a further directions hearing on 27 June 2012, the matter was listed for another hearing to take place on 23 July 2013. Thus far is common ground, but as the competing submissions diverge at this point, it is appropriate that I now depart from the written reasons.
4. Mr Smith, who appeared before me on the appeal, informed me that as the original indictment, in the form drafted, had concerned husband and wife, as a matter of law it was ineffective since it had alleged conspiracy between husband and wife. That point having been drawn to the Crown's attention, count 1 was quashed for both Defendants and on count 2, which concerned Mrs Sharif alone, no evidence was offered. However, both Defendants were then arraigned on a new indictment which contained one count of fraud by false representation against both Mr and Mrs Sharif. It is then common ground that directions were given for the trial of the new indictment, including that the trial should still commence on 3 September 2012. In the event, the new single count indictment was eventually heard in January 2013 at the conclusion of which Mr Sharif alone was convicted of fraud and sentenced at a subsequent hearing in February 2013.
5. In accordance with the provisions of the Scheme, Counsel for Mr Sharif submitted a claim for payment in respect of the trial which had concluded in February 2013, which was assessed and paid. However, as I have said at the outset of these reasons, a further claim for a cracked trial in respect of the initial two count indictment was refused on the basis that, in the LAA's view, only one fee was payable as there was only one case.

6. In his submissions, Mr Smith took issue with the LAA's decision. In his submission, the matter fell fairly and squarely within the definition of cracked trial – see paragraph 1 of Schedule 1 of the 2007 Funding Order which provides as follows:

“Interpretation

1 – (1) In this Schedule –

“Case” means proceedings in the Crown Court against any one assisted person –

(a) on one or more counts of a single indictment;

“Cracked trial” means “a case” on indictment which –

(a) a plea and case management hearing takes place; and

(i) the case does not proceed to trial (whether by reason of pleas of not guilty or for other reasons) or the prosecution offers no evidence; and

(ii) either –

(aa) in respect of one or more counts to which the assisted person pleaded guilty, he did not so plead at the plea and case management hearing; or

(bb) in respect of one or more counts which did not proceed the prosecution did not, before or at the plea and case management hearing, declare an intention of not proceeding with them ...”

7. Here, Mr Smith submits, the trial against Mr Sharif in respect of count 1 had cracked because there had been a plea and case management hearing, but the case had not proceeded to trial because the court had been invited to quash the indictment and had done so. For that reason, counsel was entitled to a fee for a cracked trial.

8. As I have said, the claim under the Scheme did not find favour on determination. In her written reasons, the Determining Officer said this:

“The new single count related to the same alleged criminality as the original count. Many courts will, in similar circumstances, allow one indictment to be quashed and replaced by a new one for the same matter, rather than amending the original indictment by adding a new count and then removing the original one. The intention of the court, in adopting either course of action, is the same – to ensure that the Defendant faces an indictment that is correct in law and appropriate to the evidence presented.

It is the Determining Officer's understanding that the prosecution could not in law have referred a totally new indictment for which the evidence had not been served in the original papers, so in the absence of any further sending or voluntary bill of indictment, the advocate has already considered the evidence and prepared a challenge to each allegation, whether or not it was charged as conspiracy or as the substantive offence.

In all the circumstances of the case it would be bizarre to consider that there were two separate indictments and two separate cases. There was only one case in which the later indictment was substituted for the earlier one.

Whilst this is not a case where the indictment was amended before the plea was taken, it is a case in which the indictment was effectively amended by substituting a new one from an old one. The Determining Officer is of the view that the decision of the Costs Judge in [R v Minister] is persuasive in this instance."

9. I disagree with the Determining Officer's reasons. This was not a case of "house-keeping" in the sense that the original indictment was simply being "tidied up". On the contrary, count 1 which concerned Mr Smith was quashed on 23 July 2012 and therefore ceased to exist. It follows this was not a matter in which the indictment was, or could be, "effectively amended by substituting a new one from an old one". In the present case, upon the quashing of count 1 in the original indictment, there was nothing to amend, nor did the indictment continue to exist so that a new one could be substituted in its place.
10. I derive no assistance from R v Minister. In that case, the issue was whether a cracked trial fee should be paid on the grounds that the indictment was amended *before* pleas were taken. The Lord Chancellor's Department, whose submissions prevailed, had submitted to the Master that the essence of a cracked trial was that *after* the conclusion of the plea and directions hearing, there were still counts on which the prosecution and defence were not agreed so that a trial remained a real possibility. Here it is common ground that pleas had already been taken and, indeed, the date had been fixed for the trial before any decision had been made about whether the first indictment should continue or not, those considerations having taken place on 23 July 2012. It follows in my judgment, that R v Minister is simply not on point. It follows, that I am satisfied that in respect of count 1 of the original indictment, counsel became entitled to a fee for a cracked trial and the appeal must succeed.

11. In respect of costs, Mr Smith made no claim, save for his travel expenses of £48, which I allow.

TO: Legal Aid Agency
DX 10035
Nottingham 1

COPIES TO: Peter Milnes
Aegis Chambers
39 Mostyn Avenue
Wembley HA9 8AY

The Senior Courts Costs Office, Royal Courts of Justice, Thomas More Building, London, WC2A 2LL.
DX 44454 Strand, Telephone No: 020 7947 6468, Fax No: 020 7947 6247.
When corresponding with the court, please address letters to the Criminal Clerk
and quote the SCCO number.