Case Search

R v Teret

Year

2016

Citation

[2016] 3 Costs LO 393

Special preparation

Summary

1. This is an appeal by counsel against the decision of the Determining Officer on a claim for 92.25 hours of special preparation made under para 17(1)(a) of Schedule 1 to the Criminal Legal Aid (Remuneration) Regulations 2013.

2. The relevant Representation Certificate was issued on 26 October 2013 and amended to authorise the instruction of leading and junior counsel on 26 March 2014.

3. The question is whether the work for which special preparation is claimed meets the criteria set out in the 2013 Regulations. Paragraph 17(1)(a) reads:

“Fees for special preparation

… This paragraph applies where, in any case on indictment in the Crown Court in respect of which a graduated fee is payable under Part 2 or Part 3 … it has been necessary for an advocate to do work by way of preparation substantially in excess of the amount normally done for cases of the same type because the case involves a very unusual or novel point of law or factual issue …”

The Background

4. The defendant had been an associate of Jimmy Savile in the early 1960s. Following extensive publicity concerning posthumous allegations of sexual impropriety against Savile, a case was brought against the defendant involving 21 separate complainants, 19 of whom made allegations of rape.

5. The defendant, represented by the Appellant Mr Johnson QC and junior counsel Virginia Hayton, initially faced six indictments comprising what counsel describes as a catalogue of serious sexual offences.

6. Of those indictments, only one was tried but by the conclusion of the trial that indictment contained a total of 39 counts: 19 of rape, 2 of buggery, 15 of indecent assault, and 3 of indecency with a child. The defendant was convicted of a sufficient number of serious offences to justify a sentence of 25 years' imprisonment. He was sentenced by Baker J on 11 December 2014.

7. In the case of each complainant, the investigating team took a consistent approach to evidence gathering. Each complainant was interviewed on video and where possible the investigating team went looking for corroboration. This approach generated a substantial volume of served, unused material.

8. The unused material ran to approximately 4,219 pages. This figure, says counsel, excludes material served as unused but which mirrored material served as part of the evidence. Given its volume, it was essential to cross-reference it with the accounts of the complainants. Almost all of it related to unused ABE interviews of the complainants, witnesses traced by the police, contact between the complainants and the enquiry team, or police enquiries relating to premises referred to by the complainants.

9. In every case, the unused material formed the basis of cross-examination at the trial. It was divided into volumes and paginated by the prosecution. This helped counsel for the defendant to cross-reference it in a single document which formed the basis of his notes for cross-examination.

10. Counsel submits that a claim for special preparation is justified because the case raised a very unusual factual issue, involving as it did an alleged campaign of rape against schoolgirls over a 35 year period dating back 52 years. He argues that this was, in comparison to other cases involving charges of rape, buggery or indecent assault, outwith the usual professional experience. The work undertaken in relation to the unused material is, he argues, as a direct result substantially in excess of the amount normally done for cases of the same type.

The Criteria

11. Counsel relies upon R v Ward-Allen [2005] 4 Costs LR 745 and R v Jones [2007] 6 Costs LR 873.

12. In R v Ward-Allen Master Gordon-Saker considered a predecessor of sub-paragraph 17(1)(a) and commented:

"13. … 'Cases of the same type' is not defined in the regulations. The words must therefore be given their usual meaning. 'Type' is an objective classification.

14. The intention of the paragraph, it seems to me, is to reward necessary work which is not normally required in cases of that kind. 'Type' should therefore be employed so as to identify the kind of case within which a sensible comparison can be made. In my judgment it would be difficult to employ it to mean anything more particular than 'type of offence'; i.e. in this case, offences of gross indecency and buggery. To take a narrower definition – such as historical sex abuse in a care home – would be too subjective …

17. The only issue … is whether the extra work was caused by 'a very unusual or novel … factual issue'.

18. This wording is unhelpful and confusing. What did the draftsman anticipate could amount to 'a very unusual or novel

factual issue'? Every fact is unique. An issue as to whether or not something is a fact is also unique and if unique must, by definition, be 'very unusual' …

20. … I think one can draw some assistance from a comparison with the concept of a very unusual or novel point of law. That has an obvious meaning – a point of law which either has never been raised or decided (novel) or which is outwith the usual professional experience (very unusual).

21. If one takes the view, as I do, that 'novel' falls within 'very unusual' – something which is novel must be very unusual – and applies a similar meaning to 'factual issue', one arrives at: 'a factual issue which is outwith the usual professional experience'. What it cannot mean … is an unusual, novel or unique 'fact'.

22. That is the best definition that I can arrive at for a formula of words which defies easy understanding."

13. That is reasoning with which I respectfully agree. Time claimed as special preparation must both (a) be substantially in excess of the amount normally done for cases of the same type and (b) have been incurred because the case involves a very unusual or novel point of law or factual issue. In addressing factor (b) the key question is whether the factual or legal issue that gives rise to the work for which payment is claimed is outwith the usual professional experience.

14. In R v Ward-Allen the claim for special preparation was made with reference to a very substantial volume of unused material in a child abuse case in a community home between 1976 and 1984. The volume of unused material was unspecified but it was described as too big to copy and the schedule of unused material filled a complete lever arch file. Leading counsel claimed a total of 126.5 hours' preparation of which he claimed 61 hours as special preparation relating, in one way or another, to the unused material.

15. For the reasons given at para 14 of his judgment, Master Gordon-Saker did not follow the logic applied by the Determining Officer, who had observed that the extensive examination of social services files and school records was characteristic of a case involving historic sexual abuse. The Master clearly accepted that an exceptional amount of work had been undertaken in comparison to a more appropriate, broader definition of "cases of the same type".

16. Nonetheless, because the history of the victim and other witnesses has to be scrutinised in many sexual offence cases, the Master concluded that the additional work undertaken was caused by a factual issue which was neither "very unusual" nor "novel". The appeal failed.

17. In R v Jones, however, Master Simons allowed a fee for special preparation in a case involving rape and attempted rape by the defendant of his daughter and granddaughter, dating back over nearly 50 years (twice as long as the period investigated in R v Ward-Allen). He took the view that the factual issues, by virtue of their age and the serious sexual abuse within two generations of the same family, were very unusual.

18. Master Simons emphasised that it is important that a court should not set a figure for the number of hours which might be said to constitute "normal preparation" in sexual abuse cases. By definition each case turns on its own facts.

19. Accordingly he invited counsel to identify the increased number of hours which counsel had been obliged to spend on the case as a result of its unusual factual issues. The Master did not receive that information, and what he had before him was evidently inadequate. He was however able to identify the fact that of a total of 102 hours of preparation, 90 had been claimed as special preparation. He was unable to accept that figure on the limited information available, and awarded instead (given the shortage of information) a limited monetary sum.

The Determining Officer's Conclusions

20. Whilst the Determining Officer in this case accepted its serious and difficult nature, she also observed that, regrettably, historic cases involving rape and sexual abuse are becoming more commonplace. Such cases will almost inevitably involve offences against young people committed over a period of years and multiple complainants are not unusual.

21. The Determining Officer observed that the vast majority of criminal cases will of necessity involve the viewing of served unused material in order to identify details which will assist in cross-examination. In historic sexual abuse cases, or any case involving sexual abuse and/or rape, the focus for the defence will inevitably be on identifying material which will undermine the credibility of the complainant or complainants.

22. The additional material itself did not, in the Determining Officer's view, appear to qualify as being very unusual in content, comprising as it did ABE interviews of the complainants, accounts from witnesses, contact between the complainants and the investigating team, and enquiries relating to premises where offences took place. Much such material, she observed, would be expected to feature in the unused material for any case involving rape and/or sexual abuse, regardless of the age of the complainants at the time of the offences or the period over which the offences were committed.

23. Nor was 4,219 pages of unused material considered by the Determining Officer to be an exceptionally high page count for an historic rape/sexual abuse case.

Conclusions

24. R v Ward-Allen [2005] and R v Jones both seem to me to illustrate well the difficulty of identifying "a very unusual or novel" factual issue.

25. In this case, like Master Simons in R v Jones, I find myself in sympathy with the Determining Officer's conclusions but also in disagreement, for these reasons.

26. First, I think it essential not to make the error identified by Master Gordon-Saker, of adopting too narrow a definition of "cases of the same type". The Determining Officer is right to say that historic cases of rape and sexual abuse are becoming relatively commonplace, but the comparison to be made is not with historic cases of rape and sexual abuse, but with cases of rape and sexual abuse generally.

27. The question then is whether, by reference to such cases, this one falls outwith the normal professional experience in any way. If so, and to the extent that the work for which special preparation is claimed was undertaken as a result of that, there is a valid claim for special preparation.

28. Counsel describes the defendant's activities as a "campaign" of rape against schoolgirls. On the evidence before me, that is not an unfair description. Over a 35 year period dating back 52 years, the defendant used his position as a minor celebrity and an associate of celebrities to commit exceptionally high numbers of serious sexual offences against a very substantial number of girls of school age. It seems to me that such a case can be described, properly, as outwith the usual professional experience.

29. I agree with the Determining officer that the nature of the unused material was not in itself remarkable, but it does not have to be. The question is whether preparation substantially in excess of the amount normally done has been undertaken

because the case features a factual issue outwith the usual professional experience.

30. As for the amount of that work, 4,219 pages of material will fill about seven lever arch files. That may not be unusual for cases of historical abuse, but again it seems to me that the comparison must be made with cases of rape and sexual assault generally, not with a narrow category of historical abuse cases.

31. The claim for special preparation in R v Ward-Allen failed not because historical abuse cases typically generate substantial amounts of extra work, but because there was nothing in that particular case outwith the usual professional experience. If such an element exists, then the additional work done in consequence may be claimed as special preparation. If not, an exceptional amount of work may have to be done but there is no claim for additional payment as a result.

32. As Master Gordon-Saker observed, the result can be harsh but the graduated fee scheme is a self-contained scheme and “equity” does not come into it.

33. In this particular case counsel has claimed all of the 92.25 hours spent by him on the unused material as special preparation. Master Simons has pointed out the folly of attempting to set a benchmark for “normal” preparation time in sexual abuse cases, but some unused material will have to be reviewed in any case of rape or sexual abuse and not all of the work undertaken by counsel can have been substantially in excess of the amount normally done for cases of (by the R v Ward-Allen definition) the same type.

34. The appellant has elected to pursue this appeal without a hearing. Like Master Simons in R v Jones I have no clear input from the appellant as to the amount of extra work undertaken by him as a direct result of its unusual factual issues.

35. In the absence of such information I have to take a conservative approach. I take account of the fact that in R v Ward-Allencounsel claimed 61 hours as special preparation in relation to what would appear to have been a much larger volume of material, but it is not possible to ascertain the extent to which much or all of it was relevant, whereas most or all of the unused material in this case will probably have been relevant.

36. In R v Jones Master Simons reduced a claim for 90 hours’ special preparation in relation to a case which involved abuse over a period longer than this one, making an award which by my rough calculation probably constituted about half the amount claimed. In this case however the scale of the defendant’s “campaign” and the number of complainants involved need to be taken into account.

37. Doing the best I can with the material I have, my conclusion is that counsel should be paid for 60 hours of special preparation. The appeal succeeds to that extent.

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